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Inside This Issue

Are Public Employees' Strikes Legal in Washington?

Recently, a client asked me about some language in a district's current collective bargaining agreement, and particularly about whether I thought it was a good idea to retain or delete it from the next CBA, planned to last three years. The language basically provided that the union agreed during the term of the CBA that there would be no "work stoppage", but that such clause expired with the CBA, implying that they could strike if a contract had expired. I responded with my informal opinion that work stoppages (strikes) were not really lawful for public employees in Washington, so why include such language in the first place. He then said something about statutory language applicable to interest-arbitration eligible employees, to the effect that interest arbitration was granted to them in lieu of the right to strike. He felt perhaps that implied that other public employees (not eligible for interest arb) *did* therefore have such a right. He also pointed out that teachers in Washington have gone on strike within memory of most of us, so how could it be illegal? Why then was an injunction not sought in those cases, and why were the teachers not ordered back to work?

Good questions. And all that prompted me to revisit this interesting issue, which has strains of labor law, jurisprudence, and politics interwoven in it!

Let us take a quick trip down memory lane, or a brief review of some older, but seminal cases in Washington law. In *Roza Irrigation District v. State,* 80 Wn. 2d 633, 497 P.2d 166 (1972), the Supreme Court addressed the question whether an irrigation district was a municipal corporation, and therefore subject to the new public employees bargaining law. The Court concluded that it was, on both counts. While the Court in *Roza Irrigation District* seems to have assumed that public employees, unlike private employees, have no right to strike, the discussion was only a passing comment, and hardly essential to the Court's holding:

> "The service which irrigation district employees render is a vital one in the areas which they serve. It is in the public interest to avoid interruption of irrigation services, just as it is to avoid interruption of services rendered by a city's fire or police department. We

are given no plausible reason why the legislature should have chosen to deny such employees the protection of the act or to regard them as private employees, having the right to strike." (emphasis added) Id. at page 639.

In *Burke & Thomas, Inc. v. Masters,* 92 Wn. 2d 762, 600 P.2d 1282 (1979) the Supreme Court analyzed whether members of the public who are incidentally injured by an "unauthorized" strike of public employees have a private claim for relief against the employees' union to recover damages. The case involved a strike by employees of the Washington State Ferry System. Essentially, the case involved a class action by businesses and individuals located in San Juan County, who claimed the strike shut down ferry service and caused them economic harm. The Court rejected the claim that the labor-management contract could benefit a third party beneficiary such as the plaintiffs. Of interest to us here is only the discussion about the lawfulness of the strike in the first place. As the Court succinctly put it: "Strikes by public employees have traditionally been held to be illegal under the common law, and have not been sanctioned by state legislatures." Id. at page 770. The Court cited numerous labor treatises in support of this proposition, and said Washington State has supported that rule, citing *Roza Irrigation District* and RCW 41.56.120.

(Incidentally, RCW 41.56.120 is only one sentence long; it provides: "Nothing contained in this chapter shall permit or grant any public employee the right to strike or refuse to perform his official duties." Pretty clear and unequivocal, isn't it?)

While the Court noted that some states have responded to pressures by providing limited rights to strike for some or all public employees, the Washington State Legislature has not done so. The courts in two other states that prohibit such strikes have held in judicial decisions that the courts will exercise restraint in issuing injunctions, granting them only when needed to prevent violence, irreparable injury, or breach of the peace (Rhode Island and Michigan). The *Burke* Court spoke in favor of judicial restraint, but mostly in the context of showing reluctance to create new judicial remedies, such as the one sought in that case, or even such as an employer seeking money damages in addition to an injunction. However, it appears to this author that the Court did still recognize that in the appropriate case, and under the usual rules applicable to injunctions, in Washington it would be an appropriate remedy to seek an injunction against a public employees' strike. In our view, especially with employees essential to the provision of fire protection and emergency medical services, a public employee strike is clearly unlawful and subject to an injunction. Washington law has not

changed in that regard. Therefore, there is no place for "work stoppage" language in a Washington public employees' collective bargaining agreement, and I would advise my clients that this is in fact an "illegal subject" of bargaining.

EXCITING NEWS: QUINN NAMED ATTORNEY FOR VALLEY REGIONAL FIRE AUTHORITY

Effective January 1, 2008, the Firehouse Lawyer is under contract to serve as general counsel for the Valley Regional Fire Authority, serving the cities of Auburn, Pacific and Algona. In another development, Quinn has provided some advice to the new regional fire authority in the Centralia area, organized by the City of Centralia and Lewis County Fire Protection District No. 12. Because of these assignments, the Firehouse Lawyer expects to provide a high level of expertise on this new form of government. Certainly, the RFA concept has sparked great interest among cities and fire districts around the state, as the trend of cooperation and combinations (alliances) of local governments continues apace in our state. Many cities and fire districts are actively considering this potential change in government structure to achieve more efficient delivery of fire and EMS service, as well as making special operations and HAZMAT easier to manage.

SECTOR BOSS

For our Letters to the Editor column, long ago we chose, instead of "Q&A", the name "Sector Boss", which is an archaic term in the fire service for a guy who, with his crew's help, always puts out the fire (in other words, the guy with all the answers!).

A question was asked this month by a non-client, but it was one I have been asked before, and no doubt will be asked again, so it must be a question that many fire commissioners have wondered about. Suppose your board votes two to one to approve a contract, such as a services contract with an architect. If you are the dissenting vote, should you or must you actually sign the contract? In my view, the important thing is that the Board of Commissioners took a formal action by motion to approve the contract. Arguably, that alone makes it a binding and enforceable decision. Assuming that a quorum was present and that the majority vote is otherwise legal, such an action is a lawful, binding decision of the entire board (in other words…of the district). The district representatives then execute the contract by signing it, and it does not matter greatly if the dissenting member of the board signs it, or not, in my opinion.

I often recommend that the motion include a concluding clause, authorizing, for example, either the Chairman or the Fire Chief to execute/sign the contract. In summary, I have no problem with the dissenting member signing the actual contract, but do not feel he/she necessarily can be compelled to sign it, since it is binding on the district once executed, irrespective of the absence of that member's signature.

Perhaps a similar question is this: Suppose board member C misses a meeting, but a quorum is present so the meeting is held. Should board member C sign the minutes? I generally think that he/she should not do so, since board member C really has no personal knowledge of what transpired there, and so cannot know that the minutes are accurate.

Aren't you glad you asked that question?

VOLUNTEER RESPONDER INCENTIVE PROTECTION ACT (VRIPA) PASSED

On December 18th, Congress passed a new federal law. In November VRIPA passed the House of Representatives (see the November *Firehouse Lawyer)*, but more recently the Senate inserted the VRIPA language into H.R. 3648, which passed the Senate on December 14th. So this legislation is headed for the President's desk. (He signed it into law on December 20, 2007.) The new law exempts all tax benefits provided by state and local governments to volunteer firefighters from federal income taxes. Otherwise, they are taxable benefits and includible in gross income. For example, in many states it is common to give volunteers rebates on their real property taxes, paid to the state or county. Up to now, that rebate would be taxable income according to the IRS.

Washington fire districts, in my opinion, should propose legislation to exempt an annual amount not to exceed, for example, the first $2,000 refunded by a fire district, city, or regional fire authority to a volunteer firefighter who presents proof of payment of $2,000 or more in annual real property taxes. If a local district could only afford to pay $1,000 per volunteer, then the law could allow local options to be chosen, as long as the $2,000 cap is not exceeded. I do not believe fire districts could adopt this practice without enabling legislation, but I am open to being persuaded otherwise.

The other aspect of the bill would have an impact in more states, and particularly those like Washington that do not currently provide such tax rebates. This section of VRIPA exempts (or excludes) from income taxation the first $360 annually (actually $30 times the number of months served during the year) paid to volunteer firefighters by their departments. It applies whether those payments are considered reimbursement of expenses or compensation for services rendered. While many volunteers undoubtedly get paid a lot more than that annually, the exemption is certainly a good start in the right direction. This attorney has been advising fire district clients for years to consider payment for drills and calls/responses as "gross income" for tax purposes and give W-2's to volunteers. This new law certainly seems consistent with that approach and would affect those W-2's.

EMS ALERT – MEDICARE FINAL RULE CHANGES PATIENT SIGNATURE REQUIREMENTS

Obviously, patients are often unable to sign the Assignment of Benefits form during a medical emergency. Under the final rule published by the Centers for Medicare and Medicaid Services (CMS) in the November 27, 2007 Federal Register, in those instances where a beneficiary is physically or mentally unable to sign the AOB form, ambulance personnel will be required either to obtain the signature of an acceptable surrogate, or, with respect to emergency ambulance services, meet strict new documentation requirements before submitting the claim to Medicare. Clearly, this new rule will affect all emergency medical services providers who charge for services and then often get paid through the auspices of Medicare.

According to the final rule, now it appears that such EMS providers will need:

1. a signed, contemporaneous statement from an employee of the EMS provider, present during the transport, documenting that the

patient was physically or mentally incapable of signing and that no other authorized signers were available or willing to sign; and

2. documentation showing the date and time of transport, and the name and location of the receiving facility; and

3. either a signed, contemporaneous statement from a representative of the receiving facility, documenting the patient's name, and date and time received, or

4. a secondary form of verification, obtained later, but prior to submittal of the claim to Medicare, which may include:

    - Hospital representative's signature on trip report;
    - Hospital registration/admissions sheet;
    - Patient's medical record; or
    - Other internal hospital records.

All EMS providers are urged to check with their billing system or company, as well as their attorney, to see if they are compliant with the new rule.

LATEST SUPREME COURT DECISION ON WORK PRODUCT AND ATTORNEY-CLIENT PRIVILEGE IS NOT A SURPRISE

In late December, the Washington State Supreme Court handed down a decision interpreting the Public Records Act, in a Spokane case involving a school district that asked its attorneys to investigate a situation wherein a student fell ill and died due to a peanut allergy. In *Soter, et al. v. Cowles Publishing Co.,* #78544-1*,* handed down on December 27, 2007, the Court ruled 5-4 in favor of the attorney work product and attorney-client privilege, in opposition to a public records request, after the case had actually been settled and resolved.

The Court's analysis started with discussion of the landmark U.S. Supreme Court decision in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), which established the rule that attorney's notes reflecting witness statements taken in anticipation of litigation were generally not discoverable. Eventually, the rule became codified in the Federal Rules of Civil Procedure at Fed.R.Civ.P. 26(b)(3). The basic standard is that opposing counsel cannot get such materials absent a showing of substantial need and that they cannot get the substantial equivalent of the materials through other means without undue hardship.

We have been advising clients for many years on how to react to any incident that seems to present an opportunity for litigation against the fire district, such as medical malpractice claims against paramedics, enhanced injuries due to alleged tardy responses, motor vehicle accidents, etc. Our recommended procedure is to assume that, as general counsel for the fire district, I want to interview all witnesses immediately after the event to preserve their contemporaneous recollections of the events. Thus, I recommend that each witness be instructed to prepare a short narrative statement of the events they perceived, in their own words, and then you should package up all of the statements and send them to counsel, marked "attorney work product". If there is time, I even indicate to the Fire Chief or staff what questions I have that I always want the witnesses to address in the narratives, such as the timeliness of response, whether any admissions against interest were verbalized, etc. Answers to these questions greatly affect my initial impressions of the case, and thoughts about defensive strategy. (One can see why these types of documents must be privileged!)

I have always felt these statements, clearly prepared in anticipation of litigation, should be considered privileged "attorney work product". Since the PRA is construed consistently with the court rules of discovery, this should mean such work product statements fall within a PRA exemption. This court decision vindicates my advice. I particularly liked the majority's observation that: "The necessity for

protection of attorney work product does not diminish because an attorney represents a government agency". Without this protection, the agency fights with one hand tied behind its back.

The dissenting opinion was disappointing to say the least. In U.S. Supreme Court jurisprudence, it is not unheard of, for a well-reasoned dissent, coupled with a cogent argument, to become the majority opinion of the Court at a later date. Sometimes it is not just a change in the Court's makeup that explains this phenomenon; it is related to the quality of the reasoning and the persuasiveness of the dissent. In this case, I felt the dissenting opinion authored by Justice Charles Johnson (a contemporary of mine at University of Puget Sound Law School) was unpersuasive. Without much citation of pertinent authority at all, the seven-page dissent seemed more like a political diatribe than a scholarly legal opinion. As such, the dissenting opinion did a disservice to the development of the law in this difficult area.

There are strong policy arguments on both sides, but only a dissent that "locks horns" with the precedents cited by the majority and argues strenuously for their reversal has any chance of becoming the law of the future. That is too bad, since the case presented the opportunity for a reasonable compromise, which would not have destroyed the privileges and still could have given proper weight to the Public Records Act. The Court could have considered an exception, applicable only after the litigation is concluded. The majority mentioned that possibility in passing, but rejected it without very much consideration. It seems to me that the dissent could have made some strong arguments that the purpose of the work product privilege and the attorney-client privilege do not necessitate that the records be permanently non-discoverable and therefore exempt from public disclosure. Since the purpose of such privileges is partly to ensure the fairness of the litigation process, and since that purpose has been served, what would be the harm in releasing such documents *after* a settlement has been reached? I am not convinced by the theoretical argument that there could be a chilling effect if a person felt their communications to counsel could ever be revealed. Apparently, some other states have countenanced this particular exception, for resolved cases.

CHANGES TO WEB SITE

You may note that we have made some changes and updates to the web site. Chief among these is the addition of hyperlinks within the topical index, so that now you can research a topic, find the issue it appeared in, and then just go to that edition. Although the law may have evolved somewhat (or changed dramatically) since 1997 or 1998, many of the older articles are still relevant, so we felt that the archives might become a more useful research tool for readers. Along with updating the personal biography, we plan to change photos and otherwise update the web pages this year. We may even be changing the ads, so those vendors who are interested in reaching clients in a different way, feel free to call.

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The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.