

Firehouse Lawyer

Volume 9, Number 3

March 2009

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DOL Again Advises – Paid Firefighters Cannot Volunteer

In a Wage and Hour Opinion Letter dated December 18, 2008, the Department of Labor has again advised us that paid firefighters cannot volunteer their services as firefighters during non-duty hours, to the same employer, without being paid. As previously reported in these *Firehouse Lawyer* pages, the DOL regulations allow employees of public agencies to volunteer their services to their employers if such volunteer services are not similar to the services for which they are compensated. But if the services fall within the same occupational classification, then the worker must be paid overtime if they exceed the limit allowed for their work period (40 hours per week for non-shift personnel, and the pertinent limit during the work period for Section 207k employees such as shift firefighters).

This particular fact pattern involved a private, nonprofit “volunteer” fire department, which was not a public agency, so the regulations did not actually apply. (It must not have been an “all volunteer” department, because they did employ some paid firefighters.) By this opinion, the DOL applies the same rule applicable to public agencies to nonprofit, religious, or charitable organizations: paid firefighters can volunteer to work outside normal work hours but *only if* the work is not firefighting or EMS work, such as volunteering to do something that involves entirely different skill sets. We feel it is better to avoid this issue altogether by not expecting or allowing paid personnel to volunteer to do anything at the fire department. For example, teaching or training others with regard to emergency medical services is the same work as actually performing as an EMT, as it involves utilizing the same skill set. Remember that the DOL does not require an element of coercion at all—if it is truly voluntary, that makes no difference! (See Wage and Hour Opinion Letter, Dec. 18, 2008, FLSA 2008-14).

FTC'S RED FLAG RULES ON IDENTITY THEFT ARE COMING

This is just a reminder that it appears the “Red Flag” rules pertaining to identity theft, which go into effect May 1, 2009, do apply to public as well as private ambulance services. These regulations seem to go beyond

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HIPAA and state laws relating to confidentiality or protection of identity. Stay tuned for more on this subject, as the Firehouse Lawyer is working on this issue to develop policy changes needed to assure compliance for my clients.

REGIONAL FIRE AUTHORITY FREQUENTLY ASKED QUESTIONS

A few years ago, the Washington State Legislature enacted new legislation, which is now codified at chapter 52.26 of the Revised Code of Washington, enabling the creation of "Regional Fire Protection Service Authorities" to foster regionalization in the delivery of fire and EMS services in this state. (We use the term RFA for short, as the full statutory name is certainly a mouthfull!) Fire service folks in this state may have noticed that there is a tremendous upswing in interest in this new form of municipal corporation in our state. We know from personal experience that active RFA talks are ongoing by cities and fire districts in Clallam, King, Kitsap, and Thurston counties, as I am actively involved in those efforts. While the Firehouse Lawyer already advises existing RFA's in King (Valley Regional Fire Authority) and Lewis (Riverside Fire Authority in Centralia area) Counties, we also know that new RFA's were "born" recently in both Snohomish and Whatcom Counties. So, this is the beginning of a new and exciting trend in governance in this state.

The purpose of this article is to share a paper discussing frequently asked questions about regional fire authorities. We have "pasted" that paper into this article without substantial changes, but we are constantly changing and adapting the paper as questions are asked.

I am not really sure it is accurate to say these are "frequently asked questions", or FAQs, but I anticipate they will be, since forming regional fire authorities in the State of Washington is much discussed as this is written. In any case, the following are questions that I

have been asked in the past two years about regional fire authorities, and these are my short answers:

POWERS ISSUES:

Q. Does an RFA have the same powers and authority as a fire protection district?

A. Yes and no. According to RCW 52.26.100, if one of the participating fire protection jurisdictions is a fire district, then the board can carry out the RFA's functions and exercise powers in accordance with Title 52 RCW on fire districts. If not, however, then the board has such powers as are set forth in the approved RFA plan. We will see below how important the plan details are in that regard.

Q. Does an RFA or its governing body have any powers not specifically enumerated in RCW 52.26.090? For example, does it have the power of eminent domain, if it needs to acquire land for a fire station?

A. RCW 52.26.090 as amended does not include the power of eminent domain. But RCW 52.26.100 provides that an RFA assumes or receives by transfer all of the powers, duties and functions of the participating jurisdictions "pertaining to fire protection and emergency services". So perhaps that begs the question: is the power of eminent domain that type of power? I concluded that it is, as the power to condemn land is incident to or necessary to implement the functions encompassed within fire protection and emergency services. Thus, the intent of RCW 52.26.100, as to succession to broad powers, is very important. In this instance, since both cities and fire districts have powers of eminent domain, why not conclude that the RFA "succeeded" to those powers, or they were "transferred" upon formation?

GOVERNANCE ISSUES:

- Q. RCW 52.26.080 speaks to the composition of the governing board of an RFA, but only briefly states that: "The governing board shall be determined by the plan and shall consist solely of elected officials." Does this mean that the elected officials must have been elected by the voters of the participating or "charter" fire protection jurisdictions, or could they include, as per plan, officials elected at large by all of the voters of the RFA?
- A. While the statute is not clear, in our opinion the legislature must have assumed that the board members would be elected officials drawn from the ranks of those elected to serve in the participating jurisdictions. Any attempt to appoint elected officials of non-participating jurisdictions would be questionable. However, even though the statute is somewhat ambiguous, we believe the plan can include language to create at large positions, elected by the registered voters of the RFA. To establish one or more RFA board "at large" positions in the plan would require incorporation by reference of RCW 52.14.010 into the powers and/or governance provisions of the RFA plan. Under that statute, a board may consist of three or five elected officials, and the jurisdiction may create "districts" from which each of the elected commissioners is drawn. See also RCW 52.06.085, one of the fire district merger statutes, which discusses "districting" upon merger of fire protection districts.
- Q. The RFA statutes state or imply that you do not have to dissolve a fire district, just because its voters decide to form an RFA. But why would you want to keep the fire district in existence, when you form an RFA?
- A. This is a good question. It appears possible (advisable?) to form a partial service RFA. For example, you could form an RFA for fire only, but leave EMS services out of it, leaving the status quo intact. But for various reasons, it seems

doubtful that this will happen any time soon. So what other reasons exist to leave a fire district intact when the RFA is formed? Riverside Fire Authority in Centralia area left the fire district in existence, because they felt it would help with financing issues in the early years. But we are not sure it is really needed to make sure that the tax money is passed through to the new agency. I recommend dissolving and moving forward with the new entity to provide the services formerly provided by the participating jurisdictions. I cannot identify any legal reason why the fire district needs to continue in order to avoid some legal "jeopardy" caused to the new RFA.

- Q. If the FPD is not dissolved, does the Board still have to meet?
- A. Unfortunately, yes. A statute provides that FPD boards meet at least once monthly (even if there is virtually no business). Of course, you could always adjourn until next month due to lack of a quorum. This would be a bit of a burden, but admittedly not a huge one.
- Q. But if the FPD or districts are dissolved, what happens to the elected officials?
- A. We said above that, in our opinion, the "elected officials" must be serving as such for one of the participating jurisdictions, or they could be serving as at large commissioners. But what if the fire district or districts dissolve? They cannot hold office in a nonexistent jurisdiction! RCW 52.26.120 provides the procedures for such dissolution—the district's governing body passes a resolution and then it goes to the electorate. But the statute does not answer our question explicitly. It does say that all debts remain in place and then the statute concludes that all of the powers, duties and functions succeed to the RFA (pretty much like RCW 52.26.100). Perhaps we can include the elected positions in the words "powers, duties and functions" but that seems a bit odd to me. Again, it seems the best answer is to utilize RCW 52.14.010 and RCW 52.06.085, by

creating commissioner districts prior to dissolution, or indeed as part of the RFA plan in the first place.

FUNDING OR FINANCING ISSUES:

- Q. Is it lawful to form an RFA, but not fund it right away?
- A. RCW 52.26.040 provides that the plan for an RFA “shall” include certain elements including financing. This would seem to make inclusion of a funding element mandatory, but RCW 52.26.050 seems much more ambiguous, and uses the word “may”, with an implication that the financing may be imposed after formation of the RFA. As a practical matter, it is not really feasible in my view to start an RFA without providing a long term funding source. We all recognize that first year funding may have to come from the participating jurisdictions that form the RFA, but thereafter the new “taxing district” needs to impose its own taxes or have other revenue sources.
- Q. Is it lawful to place on the ballot a measure to form an RFA, and on the same ballot ask for a “lid lift” under RCW 84.55, such as a multi-year lid lift with a 6% limit factor, to try to keep the tax rate at optimal levels?
- A. This has been questioned by the Department of Revenue. Recently, in Benton County a fire district tried to couple an EMS levy with a lid lift, on the same ballot. DOR said it could not do that as RCW 84.55.050 states that a lid lift must occur within 12 months of the election. DOR said you have to establish the property tax rate first and then you can ask for a lid lift. In the first year of an EMS levy the lid lift law does not apply. See RCW 84.52.069(9).

EXPANSION ISSUES:

- Q. Once an RFA is established, how would it go about combining fully and legally with, for example, an adjacent fire district?
- A. In my opinion, if the RFA includes a fire district, then we conclude that RCW 52.06 powers are available. Therefore the RFA could merge with that adjacent fire district being the “merging district” as in RCW 52.06, to be dissolved pursuant to that statute once added to the RFA. However, if no fire district was included in the original RFA (e.g. just cities as in Valley Regional Fire Authority) such authority or power to use RCW 52.06 would exist only if set forth explicitly in the RFA plan approved by the voters. But we see no reason that could not be so specified in an “expansion” section in the original RFA plan.
- Q. Similar question: how would such an RFA combine, consolidate or absorb a city fire department, into the RFA governing structure?
- A. Similar answer: In my opinion, if the RFA includes a fire district, then we conclude that RCW 52.04.061 and .071 powers (to annex city into fire district) are available and therefore the RFA could “annex” the city for service as in those sections of RCW 52.04. However, if no fire district was included in the original RFA (e.g. just cities as in Valley Regional Fire Authority) such authority or power to use RCW 52.04.061 and .071 would exist only if set forth explicitly in the RFA plan approved by the voters.

The foregoing illustrates the importance of the Plan language!

- Q. Let us assume you participate in an RFA with multiple fire districts and cities, and that the districts do not dissolve upon formation. Now, another city outside the RFA wants to annex land under the city annexation laws, but that land is located in your RFA, outside “your” cities but in one of your FPDs. It appears there is no way to

stop that annexation, but do the asset transfer provisions of RCW 35.02.190 et seq. and of RCW 35A.14 apply at all?

- A. I think they do apply by their terms. This may be one reason to dissolve the fire district(s) when forming the RFA! You certainly do not want neighboring cities to be making claims upon your assets. Take a look at those asset transfer laws if you are not familiar with them. (While this is a complex question, and this article can provide only a shorthand answer, we believe this answer comports with existing law. As with many of the questions discussed herein, we have a formal legal opinion to support this answer.)

DISCLAIMER

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.