Firehouse Lawyer

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INCOMPATIBILITY DOCTRINE - HOLDING TWO POSITIONS AT ONCE

There are some issues that do not arise very often, but when they do, we are looking for an answer right away, without starting the legal research at "square one". One example is the rare occurrence when a public official (usually elected, but not necessarily) is considering occupying two public offices simultaneously. Since I have dealt with that issue about five or six times in the last 25 years, I do have a research file but felt it might be helpful to other municipal attorneys to have a handy quick reference in case this rare issue arises in their jurisdiction.

Here is the typical scenario: Bob is already an elected city council member in the city of Blackacre, which happens to be already annexed into Fire District 99 for fire protection services pursuant to RCW 52.04.061 et seq. As a resident elector (registered voter) of that taxing district, Bob would seem to be eligible for election or appointment to the District 99 Board of Commissioners. But is he really? Would his service on both governing bodies, in that "annexed" situation, violate any statute or common law doctrine in Washington?

Let's start the analysis with the seminal case, *Kennett v. Levine,* 50 Wn. 2d 212, 310 P.2d 244 (1957). (I am using that word "seminal" in the secondary sense, i.e. "highly original and influencing the development of future events", not the primary sense, which you can look up in the dictionary.) In that early case, a public transit commissioner was held to be removable for cause from his position, because he was also an attorney, whose law firm had current claims and a lawsuit against that public agency. The case analyzed and applied the common law doctrine of incompatibility. Most of the more recent inquiries to the Attorney General, which are discussed herein, were more like the scenario above, i.e. presenting the question of occupying two public offices at the same time.

Kennett and later legal authorities stress that it is the nature and function of the offices that must be scrutinized. If the two positions are inherently inconsistent or where antagonism would result in attempting to discharge the duties of both offices (creating a sense or appearance of divided loyalty) there may well be an incompatibility. One example might be where the two agencies are competing for the same tax appropriations, as this situation sets up an obvious opportunity for an adversarial relationship. In AGO 1973, No. 24, the Attorney General

opined that the offices of city or town council and volunteer fireman in the city's volunteer fire department would be incompatible, absent a statute allowing it (which was then proposed by SB 2989 to the 43rd Legislature). It is important to note that in that scenario, the firefighter was serving in a subordinate position **in the same government** he served in the legislative, policy-making post of city councilman, wherein he was partly responsible for budgeting revenues.

By contrast, in AGO 1983, No. 3 the Attorney General opined that there was no violation of the incompatibility doctrine or any statute, if a person simultaneously served as city council member and volunteer or paid firefighter in a district proposing to annex the city under RCW 52.04. The opinion reviewed prior situations, where, for example, it had been found that a person could not serve simultaneously as county commissioner and school board member, because in the former office the person would be deciding financial allocations to school districts, which would create divided loyalty. See AGO 65-66, No. 7. Similarly, in AGO 1978, No. 12, the Attorney General opined that a mayor could not also be a port commissioner, as the port district was subject to city zoning and building codes.

In AGO 61-62, No. 162, the Attorney General concluded that a member of the city fire department may not also serve as a commissioner of a fire district, where the city provided services to the fire district by contract. In so concluding, the AG pointed out that commissioners must decide whether the district should continue to contract for fire protection services from the adjacent city or instead perform their own fire protection function or make still different arrangements. It was felt that the commissioner's decision might be influenced by his other role as a city firefighter. But it is important to note that the legislative, policy-making decisions might affect the officer's interest in the other post. As a fire commissioner, the firefighter could influence his own fire service.

Yet in AGO 1983, No. 3, after having reviewed and compared all of the above situations, the Attorney General opined, as above stated, that there was no problem with the city council member serving also as a paid or volunteer firefighter in the adjacent fire district. This opinion carefully distinguished the situation based on what issues would be presented, if the city council member were not just a firefighter, but more of a decision maker, stating:

> "Were we speaking, instead, of the simultaneous occupancy of the positions of city or town council member and fire protection district commissioner, we would quite probably view the matter differently. Cf., AGO 1978 No. 12, supra. Or if we were not here merely speaking of a member of the fire department but, rather, the fire chief, a similar basis for invoking the doctrine of incompatibility would likewise exist…."

It is a critical difference when one of the posts is that of a governing body or a department head serving in the same functional area as the other agency provides services, it seems to me, because now there is the real question of divided loyalty in critical decision making. When one of the posts is basically a salaried or hourly wage position without critical decisions being made, it is possible that no violation exists.

So, in considering our scenario above, is it a violation of the doctrine of incompatibility to serve as city council member and fire commissioner simultaneously under the circumstances described? One could argue that, once the voters approve annexation under RCW 52.04.061 et seq. that means the city council has little decision making role, if any, in the issues of fire protection and emergency medical services, as those decision making duties pass to the fire district's board of commissioners. However,

there are still some inter-agency issues to be resolved such as code inspections, cause and origin fire investigations, emergency management, property ownership or leasing issues, pre-fire planning, fire service to city buildings, and perhaps a few other minor issues, such as municipal water charges in some places. The end result, I think, is that the positions are incompatible and a person should not serve on both governing bodies simultaneously due to the obvious potential for conflicts of interest.

Now when someone proposes to serve in two public offices at once, you can look like an expert right away by referencing the doctrine of incompatibility, which is somewhat of a special subspecies of the ethical dilemma usually referred to as "conflict of interest". Or at the very least you will have a starting point for your legal research.

ARBITRATION AND PUBLIC POLICY

Since labor agreements and grievance arbitrations are topics that fire officials, especially in Washington, should be knowledgeable about, we decided to include an article regarding a recent case we can use to point out several features of arbitration.

Kitsap County fired a sheriff's deputy for 29 documented incidents of misconduct, including truthfulness. An arbitrator heard the grievance pursuant to a collective bargaining agreement. He determined that the charges were accurate but that termination was not the appropriate penalty. The Court of Appeals overturned the arbitrator's decisions as contrary to public policy, but in this decision of October 29, 2009 the Washington State Supreme Court reversed, holding that the public policy in question was not explicit, well defined, and dominant.

During his 14-year tenure, this sheriff's deputy was disciplined several times. Starting in May 2000, he began to behave unusually. He became obsessive or fixated on his assignment to a child pornography task force. Despite warnings and reprimands, he continued to work outside his regular shift without permission; he maintained too many open cases. It became obvious, in hindsight, that he was disabled and incapable of performing his job. He had developed paranoid delusions. He was suspended for two days after an internal investigation. By February 2001, he was placed on administrative leave pending investigation due to missing files. Ultimately, after investigation, he was terminated for 29 documented instances of misconduct. The Sheriff's Guild filed a grievance and requested arbitration.

As is typical in such arbitrations, the issues were whether the deputy was terminated without just cause and if so, what is the appropriate remedy? The arbitrator held the County met six of the seven elements of just cause, but was unable to show that the degree of discipline administered was reasonably related to the seriousness of the proven offenses.

Incidentally, the other six (proven) elements were:

1. warnings were given;
2. the rules were reasonable;
3. the County made an effort to prove whether the violations had occurred;
4. the investigation was fair;
5. there was substantial evidence he was guilty;
6. and the termination was not discriminatory.

The basic problem, as the arbitrator saw it, was that it should have been apparent he was laboring under a mental disability and the arbitrator said the employer should have referred him for counseling and fitness for duty examinations. He therefore reduced the penalty to three separate final written warnings, but then reinstated the deputy to his position, restoring the status quo prior to termination. He denied back pay, however, finding that the deputy was, and maybe remained, incapacitated. He said the deputy should be returned to full duty, subject to passing psychological and physical fitness for duty exams. Retroactivity was denied for additional reasons.

During the litigation process, which took several years, the deputy also suffered a heart attack.

Moreover, the Guild had requested a lengthy continuance of the hearing.

Next, when the County was not implementing the Arbitration Award to his satisfaction, the deputy filed for breach of contract in Superior Court. The trial court granted summary judgment to the county but refused to vacate the award. Meanwhile, the deputy recovered, passed mental and physical fitness exams, and was reinstated! And this was where it got interesting (to a lawyer like me).

The Court of Appeals held that the arbitrator's decision violated public policy, reasoning that the deputy had violated his duties as a deputy sheriff and could not serve in a position of public trust. The Guild appealed to the Supreme Court, contending that the arbitration decision did not violate an explicit, well defined, and dominant public policy.

The Supreme Court said the main issue boiled down to this: does an arbitration decision reinstating a deputy sheriff who has been found to be untruthful violate an explicit, well defined, and dominant public policy?

Ordinarily, in Washington the courts will review an arbitration decision only in very limited circumstances, such as when an arbitrator has exceeded his or her legal authority. *Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, Local 125,* 150 Wn. 2d 237, 245, 76 P.3d 248 (2003).

But in federal courts, and in some state's courts, an arbitration decision can be vacated if it violates public policy. The U.S. Supreme Court, for example, has held that this public policy exception to the usual rule is limited to decisions that violate an explicit, well defined and dominant public policy, and not just general considerations of supposed public interests. *See, e.g. E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17,* 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed. 2d 354 (2000).

Until this Kitsap County case, the Washington Supreme Court had not had the opportunity to decide whether to adopt this public policy exception to the usual rule of showing deference to arbitrators' decisions. While the Court of Appeals in Washington had alluded to public policy in decisions vacating or not following arbitrators' decisions a couple of times before, in this decision the Supreme Court of our state explicitly adopted this narrow public policy exception.

However, ultimately the Court did not set aside this arbitrator's decision, as it found that it was not shown that the award (decision) of the arbitrator contravened any such policy. The county argued that state criminal statutes prohibiting false statements to public officers established such a policy. Or perhaps the statute prohibiting public officers from making false statements in official reports might support the policy. Suffice it to say that the Court did not agree that any of those suggested statutes provided the explicit, well defined and "dominant" public policies that the U.S. Supreme Court had in mind. This Court said examples might include a state statute prohibiting felons from serving as police officers, as a Massachusetts court had held. Actually, in that Boston case the court vacated an arbitration award reinstating a police officer who had falsely arrested two people and then lied under oath about it, which the court classified as "felonious" (in other words, he was not actually a convicted felon--yet).

Another example this Court suggested was a policy against sexual harassment by police officers. A Minnesota appeals court vacated an arbitration award reinstating a police officer with a long history of stalking and sexual harassment (while on duty). This Court pointed out that Washington has no law prohibiting persons found to be untruthful form serving as officers (perhaps it should) or a statute requiring counties to prevent such officers from ever being untruthful.

In support of its decision, the Washington Supreme Court pointed to cases in Illinois in Oregon, where courts refused to vacate arbitration awards. The first arbitrator, in Illinois, reinstated a police officer found guilty of misdemeanor trespass to a vehicle in an off-duty incident, finding there was no strong policy to

terminate any officer found guilty of violating any law. The second arbitrator, in Oregon, reinstated a police officer who tested positive for marijuana and lied about his drug use, noting that the relevant statute only required termination if the officer was convicted of unlawful use of a controlled substance.

In summary, it takes a very strong policy statement to satisfy this narrow exception, so courts will defer to the judgment of the arbitrator in most cases.

Also, the Court interpreted the arbitration award as not requiring retroactive wages, rejecting the union's argument on that issue. The union actually argued that the arbitrator's jurisdiction did not include the time period after termination, and he was only charged with determining the just cause for discharge issue. This argument seems anomalous to me, since arbitrators routinely deal with back pay issues as part of consideration of the remedy, if just cause is shown not to have been proven by the employer. In short, the Court ruled the arbitrator was well within his scope of authority in ruling against back pay but that the grievant could retain his unemployment pay.

To read this interesting decision, *See Kitsap County Sheriff's Guild v Kitsap County,* Washington State Supreme Court Cause No. 80720-5 (October 29, 2009). You can find it on the internet at www.courts.wa.gov. The lower court--the Court of Appeals--issued their decision in 2007. It may be found at *Kitsap County Deputy Sheriff's Guild v. Kitsap County,* 140 Wn. App. 516, 165 P.3d 1266 (2007).

So what did we learn from this interesting case? First, we learned that just cause (or cause) has several elements that the employer must prove in a discipline case. Other decisions, by courts and arbitrators, have provided even a longer list of the elements of good cause, but this Court's formulation is pretty good. Second, we learned that courts are extremely reluctant to vacate arbitrators' awards, and this case provides only a very narrow exception indeed. So, be advised, that as a practical matter, the arbitration hearing on a "just cause" discipline case is rather final and binding. Not only will the court not hear the evidence all over again, but also the court will not "bail you out" if you fail to prove good cause.

Third, we learned there is no universal rule that state courts must follow federal court precedents, as a matter of binding precedent, and that includes Supreme Court decisions. You noticed that the State Supreme Court did not just follow the *Associated Coal* rule of the U.S. Supreme Court on the issue of the public policy exception to the rule of deference to arbitrators. Instead, our Court consciously decided to adopt that rule as the rule in this state. That is because the issue was not one arising under the federal constitution or a federal statute. It was an issue arising effectively under a state statute or statutes, and/or state constitutional provisions about the power of the judiciary. So, for you non-lawyers out there, you learned that decisions of the Supreme Court are not necessarily binding on state courts...it depends on the precise issue presented.

Fourth, we learned that it may be difficult to sustain a discharge when the misconduct is related to an obvious disability, because there may be other ways of dealing with the underlying problem that is causing the behavior. We often advise clients to be careful about disciplining individuals who are disabled or may be perceived as disabled. There may be other avenues to consider, as this arbitrator suggested, such as fitness for duty evaluations, referral to an employee assistance program, or leave of absence, prior to considering discharge as the only option.

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