# Firehouse Lawyer

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*Inside This Issue*



## CHARGING NON-RESIDENTS BUT NOT RESIDENTS FOR EMS HELD APPROPRIATE

The Office of Inspector General advises the federal Health and Human Services department on questions arising under the Social Security Act, pertaining to the Medicare and Medicaid rules. Occasionally, they issue advisory opinions that are not binding on any party except for the agency involved, but may be helpful to us in analogous situations.

It is very common for my fire district or RFA clients to charge for emergency medical services and in particular ambulance transports to local emergency rooms. However, it is also not unusual for my clients to charge non-residents of the district for the full amount but to provide some discount to citizens and residents of the district, such as assessing only the insured portion of the claim and "forgiving" the uninsured portion, reasoning that the citizen has paid their fair share already by paying their property taxes, particularly if those relate to an EMS levy authorized by voters pursuant to RCW 84.52.069. Such "membership programs" are established by board resolution and have previously been held by the OIG not to violate the "anti-kickback" regulations.

In the situation presented by OIG Advisory Opinion No. 13-08, the fire protection district collected fees for emergency ambulance services rendered both within and outside the fire district, but pursuant to the tax referendum passed by voters, the district charged nothing to residents or their insurers, charging only non-residents.

The statutory section analyzed in the OIG allows the Secretary of HHS to "exclude" (deny payment to) any individual or entity that submits a bill to Medicare or a State health care program (Medicaid) substantially in excess of their usual charges, absent good cause for doing so. The OIG concluded that, just because the district chose to give credit to those taxpayers of the district for their taxes paid for EMS, that did not mean it had to decide not to charge non-residents. The OIG therefore found that the facts did not provide grounds for "permissive exclusion", i.e. it upheld the non-resident EMS transport charges imposed by the district. While the fire district probably was not located in this state, and the opinion is advisory and cannot be legally relied upon by any other municipal corporation or district, this is helpful and consistent with past legal opinions.

SUPREME COURT INVALIDATES SECTION 3 OF DEFENSE OF MARRIAGE ACT

In June the U.S. Supreme Court invalidated Section 3 of the Defense of Marriage Act, in *United States v. Windsor.* In a decision that many had anticipated, the high court struck down the prohibition on federal agencies' acknowledgment of same-sex marriages. Twelve states, including Washington, recognize same-sex marriages and have passed statutes providing benefits to same-sex couples on the same terms and conditions as provided to opposite-sex couples. But the federal Family and Medical Leave Act did not allow employees to take leave to care for a same-sex spouse with a "serious health condition."

In Washington, insurance companies must sell plans to employers, covering same-sex spouses and registered domestic partners. But what if you have a self-insured plan? If your self-insured plan covers only opposite-sex spouses, you should revise that plan, or risk a federal discrimination law claim.

Heretofore, employees had to pay federal income taxes on "imputed income" for the employer's contribution to a same-sex spouse's coverage for medical, dental or vision coverage. Not any more, after *Windsor.* Similarly, no FICA or FUTA (federal unemployment tax) should be withheld on the employer-provided coverage for same-sex spouses.

Under Washington law, employers are already required to provide family and medical leave to employees with a same-sex spouse with a serious health condition, so *Windsor* simply matches up federal FMLA with that result.

Washington law also recognizes as "registered domestic partners" those opposite-sex partners where one partner is age 62 or over. Since *Windsor* only deals with same-sex partners, that case does not affect these opposite-sex domestic partners one way or the other. The question remains whether *Windsor* will be applied retroactively, so stay tuned for further developments.

REGIONAL FIRE AUTHORITIES - LESSONS LEARNED

Sometimes, the passage of a few years can lead to reflections on the lessons we have learned, from successes, failures, and mistakes made by ourselves and others. The statute enabling fire protection jurisdictions to form, with voter approval, regional fire protection service authorities (or RFA's as most of us call them) has only been in existence for a few years, but we are already learning a lot from experience. The purpose of this article is to reflect on those lessons and share my perspective with the rest of the Washington fire service community. While this may not seem like a "hot button" topic to some people, take it from me--the consideration of RFA formation is very much alive around the State of Washington.

The first lesson covered here relates to what can be the biggest stumbling block to success in formation of an RFA. I have concluded that unless the financial basis of all participating fire protections is relatively similar, it may be difficult if not impossible to form the RFA. Especially when one or more of the jurisdictions is a city, step one should be to carefully review the revenue streams proposed to be used to finance the RFA. It can be very difficult to forge a viable "partnership" when one department has a historic revenue flow equal to, for example, 83 cents per thousand of assessed valuation, when one of the other departments has revenue equivalent to $1.50 or more. Or, for example, what if one department has had the fire benefit charge for many years and is collecting the equivalent of $1.50 or more, while the other department is collecting less than $1.00? So how can those disparities be addressed prior to the formation vote, so that the revenue streams are more "in synch"? We suggest that sometimes a lid lift election is needed to give the voters a chance to move to a level of taxation more commensurate with their desired service level. Of course a tax increase is never easy, but is that not better than having it as a sort of hidden issue in an RFA ballot proposition?!

Another discrepancy that may be even more difficult is a gross disparity between the capital facilities of the two participants in the planning process. Suppose one department is plagued with aging facilities that urgently need upgrading to stay concurrent with expected population growth but the other "partner" has modern, up to date stations and other facilities and/or apparatus. This can be a real problem and may require the poorer department to request a ballot proposition or bond issue to address their capital facilities needs before RFA formation can move forward. In that fashion, the debt service could be borne more appropriately by the limited population that would derive the primary benefit.

Another problem we have seen recently is the sheer size of the planning effort that needs to take place when there are numerous participating fire protection jurisdictions. How many is too many? The law states that each jurisdiction with a seat at the planning table has three elected representatives. At one planning meeting I attended there were 21 elected officials. Talk about "herding cats". No, did I really say that?! Seriously, however, that presented substantial problems unique to such a planning effort. As a practical matter, I have started to feel that the optimum number of jurisdictions involved in the RFA formation/planning effort might be more like three or four departments at most. Of course, circumstances may differ, especially if some are less major players, such as agencies that are already working in a consolidated fashion.

Past experience leads me to believe that in many cases it may be preferable, for strategic reasons, to form the RFA initially with just two agencies that are quite "compatible" from the standpoint of financing, history, work force culture, etc. and then expand later by annexation. Based on the newly amended statute, this step-by-step procedure (which may take one or two years, done in phases) may be easier to accomplish, partly because only the registered voters of the annexing jurisdiction get to vote on the proposition, as compared to an RFA formation vote, which involves all voters of all jurisdictions participating. In this fashion, the voters of that "latecomer" jurisdiction do not feel like a distinct minority, but rather are solely in control of whether they want to "join" the RFA. This could really help if that annexing jurisdiction is somewhat smaller than the original jurisdictions that formed the RFA in the first place.

A recurring issue for me, with regard to RFA's, is the question of "adjacency". The statutes relative to formation and to annexation of a jurisdiction to an existing RFA both require that the fire protection jurisdictions wishing to join be adjacent to each other. Not contiguous. Adjacent. So what does the word mean in such statutes? The attorneys who have analyzed that issue seem to agree that in this situation "adjacent" does not mean that the jurisdictional boundaries have to touch or be contiguous. But the one appellate case interpreting a similar statute using the word "adjacent" holds that the word means "nearby". The court did not set forth a specific distance in miles, as courts only deal with the actual facts presented.

The actual fact pattern in that case was that the two jurisdictions were only separated by a wide road right of way. The consensus of attorneys we have spoken to on this recurring issue seems to be that (1) jurisdictions are only "nearby" each other if less than 2-3 miles separate them and (2) it is important that there be no intervening fire protection jurisdiction or service area between their boundaries. As a practical matter, those seem to be two good guidelines to follow before considering joining with (in the formation or planning stage) or annexing another jurisdiction into an existing RFA.

One last practical lesson learned might be worth discussing here. We have noticed that, in any kind of consolidation, merger, annexation, or RFA formation process, it is always easier if the union contracts of any bargaining units to be combined in the new organization can be made similar if not identical before proceeding too far. It may well be that the wages and benefits of the two (or more) groups are so different that it is impossible to satisfy all members

of both bargaining units that the combination will not be a personal disaster or at least a career setback. In that situation, you can guess that this group of stakeholders will actively campaign against your combination effort. But that may not occur if you can encourage the union leaders of all units to meet and confer early on about the advantages of the consolidation effort. Compromise may be in order and at times it may seem to the employers that the union locals are "cherrypicking" the contracts to pick the best of both worlds. Nonetheless, somehow it is advantageous or indeed necessary to have the employees of both (or all) organizations supporting the effort or it will just not happen. As a practical matter, you cannot expect the public employees to support the effort if there is any serious risk of losing wages or benefits in the process.

One Chief who has been through it all has described the process to me as the negotiation of "what if" agreements. In effect, the two (or more) employers propose to bargain (jointly) with the two (or more) union locals that represent all of the bargaining units that are proposed to be "merged" into one cohesive work force by the formation of the RFA. In other words, they say to the locals, "What if the RFA was formed by vote of the people of the entire area? What would you like your union contract to look like?" The process then entails placing the union contracts side by side, comparing the provisions and then trying to reconcile the language with the full involvement of the employees' representatives. All would have to recognize that the discussions are all tentative, and dependent not only upon the favorable vote of the people but also of course the usual ratification by the rank and file union members and the two (or more) governing bodies. In this fashion, the often difficult issues of seniority, promotions, differing bargaining unit work, premium pay and many other unique issues can be openly discussed, and hopefully compromised or resolved. Imagine the feeling of accomplishment when all parties realize that the formation of the new entity, which was something that all parties wanted, would be possible after all, as long as all stakeholders were willing to cooperate and compromise!

Of course, this could get even more complex when one realizes that there may also be civil service rules (e.g. if one jurisdiction is a city with civil service for firefighters) and/or personnel rules to reconcile as well, between or among the various participating jurisdictions. These situations can present difficult public employee bargaining issues, so clearly any jurisdictions contemplating merger, RFA formation, annexation or consolidation need experienced, competent labor law counsel.

## FIRE COMMISSIONER COMPENSATION ADJUSTED UPWARD TO $114 PER DAY

As many readers know, RCW 52.14.010 heretofore limited compensation for fire commissioners to $104 per day for services to their districts, with an annual limit of $9,984.00. But the statute provides for periodic adjustment every five years by the Office of Financial Management due to inflation. That time has now come and the OFM has announced the daily rate effective July 1, 2013 is $114 per day. The annual cap is increased to $10,944 per year. The statute is by its terms mandatory, so in my opinion a commissioner who performs such services is entitled to that increase, irrespective of local action or inaction.

## INTERESTING QUIRK IN EXCESS LEVY LAWS

An excess levy election that took place in August revealed an interesting quirk in the laws pertaining to excess property tax levies. As you may recall, the Constitution was amended a few years ago to allow fire protection districts, like school districts, to request the voters to approve excess levies for purposes of "maintenance and operations" for up to four years, and for fire facilities for up to six years. See Article VII, Section 2 (a). That subsection of the Constitution is implemented through RCW 84.52.130.

The Constitution also allows, however, excess levies to pay the principal and interest on general obligation bonds issued solely for capital purposes. See Article VII, Section 2 (b). That subsection of the Constitution is implemented through RCW 52.16.080.

Now here is the interesting quirk, caused by certain language in this Article and Section of the Constitution. The quirk pertains to the so-called "validation" requirements. But first, let us point out that all excess levies require a super-majority of 60% rather than the usual 50% plus one vote.

The key number to be aware of is that number of voters equal to 40% of the total number of voters voting in such taxing district at the last preceding general election. Thus, step one is to look at how many voters voted in the last general election...in November of the previous year. If that was a presidential election year, that number tends to be rather large, which can make validation more difficult. But we must look very carefully at the language of Article VII, Section 2(a) to see this quirk. And here it is: if the number of voters voting does not exceed the 40% number you derived in step one, then the number of voters voting "yes" must equal 60% of that magic number. By contrast, if the number of voters voting does exceed 40% of the magic number, then you simply need 60% of those voting to achieve approval. So if you do not get a good turnout, you may find yourself needing much more than 60% yes votes to have any chance of success, but at least it is still possible to achieve approval.

This is not the case at all with excess levies for capital purposes, because Article VII, Section 2 (b) is worded differently than 2 (a). In this instance, a capital bond election, authorized by that subsection and RCW 52.16.080, simply does not validate unless the total number of persons voting equals 40% of the voters in the district who voted at the last preceding general election. So here you need approval by "60% of the 40%" and the results do not support approval regardless of the actual percentage of yes votes, if you do not have 40% of the magic number voting! We are not sure if this was the intent but the language of the Constitution controls and it cannot be interpreted any other way. Thus we have a slight difference in the two types of excess levies, at least potentially.

UPDATE ON ERIC T. QUINN

All of the articles this quarter had to be written by the Editor in Chief, Joseph F. Quinn. That is because my son, Eric Quinn, is working hard in his final term of law school, as an extern in the Civil Division of the Pierce County Prosecutor's Office. (This is great experience. I know because I served in the Civil Division from 1979 to 1983 as a deputy prosecutor.) In December, he will finish law school and then take and pass the Washington State Bar Exam in February. We look forward to welcoming Eric into the Firehouse Lawyer's practice, but for now Dad has to do all of the work himself. :(

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