The Firehouse Lawyer

Volume 13, Number 7

July 2015

Visit us at **firehouselawyer.com,** where you will get a glimpse of our various **PRACTICE AREAS,** which include labor negotiation and arbitration, personnel and risk management, mergers, annexations and consolidations, and federal employment law, among many others**!!!**

This Newsletter is Prepared By:

Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Joseph F. Quinn is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)

Office Telephone: 253-858-3226
Cell Phone: 253-576-3232

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue

EXTRA!!! Make sure to attend our next FREE Municipal Roundtable, in which we will discuss RCW 41.04.500, the Disability Leave Supplement. This MR will be located at West Pierce Fire and Rescue, Station 21, 5000 Steilacoom Blvd SW, Lakewood WA98499, on Friday July 31, from 9-11AM

Washington Supreme Court Decides Very Important Retroactivity Case!!!

On June 11, 2015, the Washington Supreme Court (Court) decided *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, No. 89344-6 (2015). This case is of great import, for many reasons. The case arose from an interest arbitration award that retroactively increased employee health care premiums for a period during which there was no enforceable collective bargaining agreement (CBA). Multiple issues were raised by the sheriff's guild (Guild). First, the Guild claimed that this retroactive increase was a taking in violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution. And second, the Guild claimed that this retroactive increase violated the Wage Rebate Act, RCW 49.48. Our Court upheld the arbitration award. We dedicate much of this issue to the *Kitsap County* case, and begin with a summary of the facts. We then consider our Court's rulings, and the implications of this case for fire departments across Washington State.

To begin, Kitsap County (County) and the Guild had a CBA in effect between 2008 and 2009 (Old CBA). This CBA expired, and remained expired throughout a later arbitration. Under the Old CBA, sheriffs were not required to pay their own health insurance premiums, but were required to pay ten percent of their dependents' premiums. During negotiations for the 2010-2012 CBA, the County proposed that members of the Guild would pay three percent of their

own premiums, and 15 percent of their dependents' premiums ("Proposal"). The parties disagreed, and reached an impasse. A five-day arbitration hearing occurred in October, 2012; the arbitrator issued an award in February, 2013. Between the expiration of the Old CBA and the issuance of the arbitration award, the County maintained the same level of pay and benefits provided under that CBA.

The arbitrator adopted that portion of the Proposal that would increase the health care premiums payable by the employees. The arbitration award applied these increases retroactively to the last six months of the contract period (July 2012-December 2012). The arbitration award required the deputies to return a portion of their previously earned health insurance premiums to the County, effectively rebating wages previously paid to their employees. To offset that increase, the arbitrator awarded a .5 percent wage increase for the same period. The Guild filed suit in superior court, seeking to have the award determined invalid. The superior court reversed the arbitrator. Subsequently, the County appealed directly to the Supreme Court.

The Court reversed the superior court and affirmed the arbitrator. This case presents an issue of great significance: Whether an employer may retroactively increase health care premiums during a period in which no CBA was in effect had never been decided by the Court. This was a case of first impression and therefore required a great deal of analysis. First, the Court underlined that in order for a retroactive decrease in a benefit (a decrease in wages by virtue of an increase in health care premiums) to be deemed a taking under the Fifth Amendment, the party asserting the taking must have a property interest in the benefit. A "mere abstract need or desire" or a "unilateral expectation" in a benefit does not create a property right. *Bd. of Regents of State Calls. v. Roth*, 408 U.S. 564, 577 (1972). Neither party disputed that the Old CBA created a property interest in the compensation (pay and benefits) package in effect during those years. The issue was whether that interest remained after the Old CBA expired. The Court reiterated that it follows decisions made by the federal court of the Ninth Circuit, which has found that expired CBAs are no longer a legally enforceable document. *Office & Prof'l Emps. Ins. Trust Fund v. Laborers Funds Admin. Office of N Cal., Inc.*, 783 F.2d 919, 922 (9th Cir. 1986).

But the Court admitted that "the expired CBA does retain some legal significance." For example, neither the employer nor labor may unilaterally change the conditions of employment pending an arbitration proceeding. *See* RCW 41.56.470. The expired CBA preserves the status quo. But the Guild argued that the Old CBA "rolled over" into the interim period—the time between the expiration of the Old CBA but before the terms of the new CBA were decided. Essentially, the Guild argued that the benefit of non-payment of health care premiums became vested when employees performed services—i.e. deferred compensation for services rendered. The Court rejected this argument.

The Court analyzed a series of cases that found certain retroactive decreases in benefits violated due process. But these cases were inapplicable because none of them involved whether there existed a vested property right to a particular level of compensation for work performed **when**

there was no effective CBA.[1] The court reasoned that because RCW 41.56.950 gives employers and employees the right to retroactively increase benefits, so too must the employer or employee concede to these increases, when no CBA is in effect.

Ultimately, the Court found that no members of the Guild had a cognizable property interest in benefits contained within an expired CBA. The Court looked to federal precedent, for the proposition that "the terms of a prior CBA must necessarily lack force after they expire in order to facilitate labor negotiations." *Litton Fin. Printing Div. v. Nat'l Labor Relations Bd*., 501 U.S. 190, 206 (1991). In other words, the terms of an expired CBA may not exist in perpetuity; otherwise, there would be no need, or incentive, for collective bargaining. The Court looked to the *Conard* case, where it held that students at the University of Washington had no property interest in seeing that their athletic scholarships would be renewed. *Conard v. University of Washington*, 119 Wn.2d 519, 530 (1992). Such an interest could only be created by "contract, by mutually explicit understanding, or by substantive procedural restrictions on the part of the decision-maker." In other words, these are the three requirements to establish an otherwise non-existent property right. We will call this the "*Conard* Rule." The students in *Conard* could not demonstrate any of these three requirements. Next, the Court applied the *Conard* Rule to the facts of this case.

[1] Importantly, the Court rejected Kitsap County's argument that RCW 41.56.950, which codified the *Christie* case, and permits retroactive wage increases during the period between the expiration of a CBA and the ratification of a new CBA, permits wage decreases.

First, the Old CBA had expired: a property interest was not created by contract. Second, the parties did not have a "mutually explicit understanding" that the former health care premium benefits would continue. The Court reasoned that "[T]o the contrary, given the nature of the collective bargaining process, both parties knew that any employment terms were subject to change in subsequent CBAs." And finally, there were no procedural safeguards guaranteeing continuation of the premium benefits. After all, the Court reasoned, RCW 41.56.470 only upholds the status quo "during the pendency of arbitration." The Court cited *Roth*, supra: A "mere abstract need or desire" or a "unilateral expectation" in a benefit does not create a property right. The Court cited an opinion of the Massachusetts Supreme Court, which held that "there is no reason why a retroactive award or agreement *detrimental* to union members could not be made." *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 414 Mass. 323, 328 (1993) (emphasis added). Taking all of the above authorities into account, the Court held that the arbitrator's award did not amount to a taking in violation of due process.

Next, the Court turned to whether the retroactive increase violated the Wage Rebate Act (WRA), RCW 49.48. First, the Court held that the County was authorized by law to withhold the wages. The general rule under RCW 49.48 is that an employer may not unlawfully withhold wages, or require a rebate of wages. RCW 49.52.050. But the WRA contains an exception for the withholding or rebating of wages as provided for by state law. RCW 49.52.060. The Court noted that "[O]ur state law authorizes employers to make deductions from an employees' future wage payments if that employee previously received an overpayment

of wages, RCW 49.48.200(1)." As outlined above, the County maintained the status quo (not requiring payment of health care premiums) during the interim period. Because the arbitrator awarded the retroactive increase, with an accompanying wage increase to offset it, the Guild members had received an overpayment of wages. Therefore, the Court held, the County was rebated wages in accordance with state law.

Second, the Court recognized that the legislative intent behind the WRA was "to prevent abuses by employers in a labor management setting." *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 519-200 (2001). The County had not abused, but had comported with, the collective bargaining process: During the interim period there was no effective CBA, the County maintained the status quo from the Old CBA, as required by statute, until the interest arbitration award determined the terms of the 2010-2012 CBA. Although the Guild argued that withholding wages requires written consent of the employee, the Court found that this is not so when the employer is permitted to do so by law.

As a side note, the Guild also argued that the arbitrator's decision was arbitrary and capricious. RCW 41.56.450 provides that an arbitrator's decision is final and binding, subject to court review for whether the decision is arbitrary and capricious. Washington courts have found that a decision is arbitrary and capricious when it amounts to "willful and unreasonable action, without consideration and a disregard of facts or circumstances." *Buell v. City of Bremerton*, 80 Wn.2d 518, 526 (1972). In other words, it takes a lot to reverse an arbitrator. The Court noted that the arbitrator here held a five-day hearing and issued a 33-page opinion, after consideration of all the facts and law. Consequently, the arbitrator's decision was not arbitrary and capricious.[2]

What may be drawn from *Kitsap County*? Well, for years, Washington courts have liberally construed RCW 41.56 in favor of the worker. They still do. However, *Kitsap County* was about an expired CBA. This case arose out of a dispute over whether an expired CBA confers property rights. And the Court held, explicitly, that an expired CBA does not confer a property right, but only preserves the status quo during arbitration proceedings, pursuant to RCW 41.56.470. Consequently, outside of the arbitration context, an expired CBA does not confer a property right, but perhaps only a mere expectation of a continued benefit. Using the *Conard* Rule, the Court found that (1) the expired CBA guaranteed no property rights; (2) there was no mutual understanding between the parties that the non-payment of health care premiums would continue; and (3) there were no procedural safeguards conferred by law or contract that would give rise to a property right. This rule is used by Washington courts to discern the existence of a property right, and therefore the right to challenge its deprivation in court. Consequently, fire departments should consider the *Conard* Rule when deciding whether their employees have certain rights after a CBA has expired, and during the interim period between when that CBA expired and the new CBA is enacted. What does the contract say? Have you made any express or implied promises that a benefit would continue after the CBA expires? Or are there some procedural protections afforded to employees that may preserve previously existing rights? Be careful.

[2] Additionally, the Court held that an arbitration award "is not arbitrary and capricious merely because its implementation is inconsistent with past practices from an expired CBA."

Do not make promises you do not intend to keep. In fact, be wary of making promises in the first place. You do not want an expired CBA to become the "floor" from which an arbitrator may calculate present or future benefits.

Additionally, as to the WRA claim, be careful. The WRA is liberally construed in favor of the worker. The employer would be remiss to rely on *Kitsap County* for the premise that it may seek a rebate of wages based on an arbitrator's decision. If an arbitrator's award would necessitate a rebate, as it did in *Kitsap County*, then the employer should proceed accordingly. But if the employer cannot realize an actual out-of-pocket expense, we caution you not to seek rebates, or withhold wages. Remember that an arbitrator's decision is very hard to overturn.

The Fire Engine, *West Main*, and the Lorax: Why SEPA Mitigation is a Tricky Issue

Today we consider whether a fire department may seek financial or material recourse in the event of new construction and development. A fire department might ask: When a developer seeks to build 400 homes within the span of a year, what are the immediate impacts of the proposed development to the fire department, and what financial or material recourse may the department seek in those circumstances? Local governments, thus far, are reluctant to grant fire districts the authority to seek impact fees, even though those are now allowed under state statute. And we all know that property taxes are not collected immediately when a new home is built. But another avenue lies within RCW 43.21C, the Washington State Environmental Policy Act, aka SEPA. Pursuant to SEPA, a local government, when considering the specific probable adverse environmental impacts of a proposed action, may impose mitigation measures as a condition of approval of that action. *See* RCW 43.21C.240 (2) (a)-(b). But most importantly, a county, city, or other municipal corporation must have substantive SEPA authority to impose such mitigation measures. *See* RCW 43.21C.060. For purposes of this article, we intend "substantive SEPA authority" to mean the authority of a local government to impose SEPA mitigation measures upon a developer. To impose conditions upon or deny a proposed development, the appropriate governmental authority—usually a county or city —must have "formally designated" a policy, rule, regulation or code to support the exercise of substantive SEPA authority. *See* RCW 43.21C.060; *See Also* WAC 197-11-660 (1)(a). This begs two questions: (1) What does it mean to "formally designate" a policy, and (2) how specific must this policy be, prior to the exercise of substantive SEPA authority?

As to the first question, take four separate county and city codes for example. The Tacoma Municipal Code (TMC) states that SEPA "[M]itigation measures or denials shall be based on the policies, plans, rules, or regulations **formally designated** by the City as a basis for the exercise of substantive authority." *See* TMC 13.12.810 (1). The TMC designates a single policy that may be utilized to exercise substantive authority: The Tacoma Comprehensive Plan, which incorporates by reference the policies of SEPA. *See* TMC 13.12.810 (C). The Pierce County Code (PCC)

references much more than its comprehensive plan, but provides nearly the same lack of guidance. Title 18D.40.060 (B) of the PCC requires that mitigation measures be "based on one or more policies" in another section of the Code, 18D.40.060 (D), prior to the exercise of substantive SEPA authority. Within that section, numerous specific policies or code provisions are specified that provide for substantive SEPA authority. *See* 18D.40.060 (D) (2). But the policy of preserving fire and EMS services is not included in the PCC. Interestingly, another broad policy set forth in the PCC is to "[E]ndeavor to achieve for the people of Pierce County safe, healthful, and aesthetically pleasing surroundings." 18D.40.060 (D) (1)(a). The Gig Harbor Municipal Code (GHMC), 18.04.210 (B)(5) states that mitigation measures must be "based on one or more policies in subsection (D)" of GHMC 18.04.210. However, in addition to specifying various general policies, GHMC 18.04.210 (D)(4) specifically provides that schools and police—not fire and EMS—may pursue SEPA mitigation fees. The King County Code (KCC) adopts "[T]he policies of the state Environmental Policy Act, RCW 43.21C.020" as granting substantive SEPA authority. *See* KCC 20.44.080 (B)(1).

The above are examples of the policies "formally designated" in order to exercise substantive SEPA authority, in accordance with RCW 43.21C.060. Adopting and codifying such language should suffice to constitute "formal designation." But as you can see, some policies are more specific than others. That brings us to the second question.

How specific must these "formally designated" policies be? This has been answered—implicitly—by Washington courts. A case of seminal importance is *West Main Associates v. City of Bellevue*, 49 Wn.App. 513 (1987). We concede that *West Main* involved the denial of a proposal for development, not the imposition of SEPA mitigation measures. In *West Main*, the city council of Bellevue denied a proposal for development of a 22-story mixed-use retail, office, and residential structure proposed for construction on a 1.1-acre tract. *Id.* at 515. First, the city council found that the proposal failed to meet certain criteria under the city's land use code. *Id.* at 516. Second, the city council relied on its locally adopted SEPA policies. *Id.* The city adopted RCW 43.21.C.020 as a basis for exercising substantive SEPA authority—as did King County, demonstrated above. *Id.* at 526. This statute underlines that one policy of SEPA is to "[a]ssure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings"—much like the language of the PCC. The developer petitioned the trial court for relief; the trial court found that the city council relied on its land use code in error; but the council correctly relied on its adopted SEPA policies as grounds for denial. *Id.* at 517.

The *West Main* court found that the city's land use policy could be used as a SEPA policy, and noted analysis by prior courts that "general Comprehensive Plan policies" may serve as a basis to deny a project. *Id.* at 526. Additionally, the court quoted another important Washington decision involving SEPA, *Polygon*, 90 Wn.2d 59 (1978), for the proposition that "SEPA does confer upon the City the authority to apply the standards expressed in SEPA to the building permit application of a particular property owner." *West Main* at 527. This implies that SEPA confers broad power to cities and counties to "formally designate" SEPA as a basis for exercising substantive SEPA authority.

Considering the *West Main* decision, let us turn to the four codes above that address substantive SEPA authority. On one end of the spectrum we have broad policies of achieving "safe, healthful, and aesthetically pleasing surroundings," (PCC), explicitly adopting SEPA (KCC)—as was the case in *West Main*—or merely referencing a comprehensive plan as granting substantive authority (TMC). On the other end, we have a specific enumeration of an entity for which mitigation measures may be imposed: schools and police (GHMC). We cannot say definitively where a "formally designated" policy must fall on this spectrum. We can only assume that, to be on the safe side, due to the varying policy formulations under the above codes, that a legislative fix—on the local level—may be necessary prior to a fire department seeking mitigation measures. After all, being denied SEPA mitigation—based on a county or city council finding it does not have substantive SEPA authority to impose mitigation—then appealing that decision, is costly. Or paying the fees to have a particular municipal or county code interpreted may be costly. For example, Pierce County charges a fee of $1,450 for the director of Pierce County Planning and Land Services (PALS) to issue an interpretation of the PCC. *See* PCC 2.05.040, Table 15. Thus, it would cost $1,450 for the director of PALS to tell us that the county does not have substantive authority to impose mitigation for fire and EMS! For that reason, we recommend sitting down for coffee with your local legislators to fix this ambiguity, and give them the opportunity to provide fire and EMS with the option of seeking SEPA mitigation—within their very code—in the event of new construction and development.

One might ask how to persuade these local legislators. The conversation might begin with reference to SEPA itself: One of the purposes of SEPA is to "stimulate the health and welfare of human beings." RCW 43.21C.010 (3). Fire departments, without question, promote the health and welfare of human beings through efficient fire and EMS services—for those counties or cities with broad policies granting substantive SEPA authority. Fire departments, without question, are akin to police, whose number one priority is protecting the safety, health and welfare of all citizens—for those counties or cities that require more specific policies granting substantive SEPA authority. Perhaps reference may be made to the KCC, which adopts SEPA itself as granting substantive authority—the GHMC does the same. Undoubtedly, the construction of new residential, commercial or industrial units creates an impact on fire departments that cannot be immediately recompensed by property taxes and other revenue sources currently in effect. But in the end, these arguments should be made to local legislators first, prior to making them before a hearing examiner, or the courts. Your department may cite the *West Main* decision, the KCC, PCC and TMC as authority to persuade these legislators.

DISCLAIMER