FIREHOUSE LAWYER

Vol. 2, No. 12 Joseph F. Quinn, Editor December 31, 1998

Supplemental Pensions - No Duty to Bargain

In 1994, the City of Seattle filed an unfair labor practice complaint against the union that represents approximately 900 firefighters, lieutenants and captains in the Seattle Fire Department. The union had insisted on taking its supplemental pension benefits proposal to interest arbitration. The city maintained that it had no duty to bargain about supplemental pension benefits, which would have greatly changed its pension responsibilities to its uniformed personnel, above and beyond what's provided by LEOFF II. The union proposal would have replaced one paragraph in the existing collective bargaining agreement which simply made reference to the LEOFF pension statute, with a 20 page detailed comprehensive proposal on supplemental pension benefits. Essentially the union wanted service retirement at age 50 with benefits based on 2% of final average salary, a duty disability retirement of 60% of base salary if unable to return to work after 365 days of disability, and a duty death benefit of between 45% and 90% of base salary. In a sense, the union wanted to provide the equivalent of the LEOFF I level of benefits to these LEOFF II employees and also enhance disability benefits.

To the Public Employment Relations Commission (PERC) hearing examiner the city argued that the union proposal would violate Seattle City charter and was pre-empted by state law anyway. In other words, the employer maintained that RCW 41.26 presents a comprehensive statewide scheme on pension benefits for firefighters and that occupies and pre-empts the field of pensions for such employees. Therefore, an employer is bound by state law and cannot provide something different through the process of collective bargaining. The contract also contained a subordination clause, stating that the contract language, to the extent it conflicted with state law, city charter or federal law, would be subordinate.

The hearing examiner mentioned that pensions are certainly encompassed within the terms "wages" and "conditions of employment" as used in the Public Employees Collective Bargaining Act, RCW 41.56. There have been similar holdings under the National Labor Relations Act, which is deemed to be persuasive if not controlling when interpreting the similar state law. The hearing examiner said that the union described its proposal as requiring the employer to create an auxiliary pension system. Certainly the proposal would have dramatically changed certain items specified in the LEOFF statute and the disability laws.

The examiner noted that PERC has recognized the concept of pre-empted subjects of bargaining before. For example, in one earlier case the

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(Continued)

Commission ruled that determination of minimum manning requirements for safe operation of vessels was pre-empted by federal law, having been delegated by Congress to the United States Coast Guard. The PERC Commission therefore could not review or overrule safety standards determined by the Coast Guard. Also, PERC had previously dealt with a situation where two state laws were in conflict and a pre-emption argument was made. In the Hoquiam School District case, Decision 2489 (PECB, 1989), the hearing examiner held that a school statute pre-empted the ability of the school district to use its own employees to accomplish particular work and therefore had to contract such work out, irrespective of RCW 41.56 and therefore there was no duty to bargain the contracting out.

The hearing examiner rejected all of the cases from New York and Rhode Island law submitted by the union, stating that one must keep in mind the statutory context when reading statutory language.

Turning to the specific provisions of the LEOFF Act, Chapter 41.26 RCW, the hearing examiner concluded that a single comprehensive statewide system had been established by the legislature and it was not the legislature's intent to allow local governments like Seattle to have a different pension system. Also, RCW 35A.11.020 specifically states that nothing in the section permitted any city to enact provisions establishing a merit system or civil service for firemen or police or enabled a city to provide different pensions or retirement benefits than are provided by "general law." The concept of general law obviously applies to other state statutes such as the LEOFF statute. The examiner then concluded that the state had occupied the field of retirement and pension benefits for law enforcement officers and firefighters by passing the LEOFF statute. Therefore Seattle had no authority to adopt a supplemental pension benefits program. It had no duty to bargain on the pre-empted subject.

This case was decided by the PERC hearing examiner in June, 1996, and was appealed to Superior Court, but then referred directly to the Court of Appeals of the State of Washington. In October 1997 at the Leavenworth Labor Conference of the Washington Fire Commissioner's Association, I stated my opinion that the hearing examiner was correct in his interpretation of the balance that must be struck between these state statutes. The examiner correctly concluded that municipal corporations with firefighter employees in Washington do not need to bargain for different or better pension benefits with their respective unions.

Now, on November 30, 1998, Division I of the Court of Appeals filed an opinion affirming the decision and order of the Public Employment Relations Commission. Citing well-settled precedent, the court noted that great deference is usually given to PERC's interpretation of the law it administers, the Public Employees Collective Bargaining Act - RCW 41.56. As the PERC examiner stated, the Court of Appeals stressed that the purpose of the law enforcement officers and firefighters (LEOFF) statute was to create a single uniform statewide system for all full time firefighters and law enforcement officers. This comprehensive pension system replaced a multitude of separate retirement systems that previously existed. The legislature included an exclusivity provision to make it crystal clear that the LEOFF retirement system was to be the only pension system in the state for such public employees. Thereafter, the court rejected all of the union arguments and concluded that the state statute preempted any other state statute

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or city charter. The court held that the LEOFF II provisions are the exclusive retirement system for full time firefighters. Management therefore has no duty to bargain concerning any supplemental pension benefits requested by the unions.

90-Day Statute of Limitations for Constitutional Writs

Sometimes, there is no statutory appeal and therefore no definite appeal deadline. In International Brotherhood of Electrical Workers, Local 125 v. Clark County Public Utility District No. 1, decided by Division II of the Court of Appeals on December 4, 1998, the court stated that a 90-day period (or "statute of limitations") should be applied with respect to the proposed vacation of an arbitration award in a public employees' dispute.

The IBEW represented certain PUD employees. The PUD is a municipal corporation in Washington and provided public utility service to the residents of Clark County. The PUD and IBEW executed a collective bargaining agreement (CBA). Under that agreement the IBEW submitted a grievance after a layoff of ten employees. Unable to resolve the grievance under the dispute resolution provisions of the CBA, the grievance was submitted to arbitration. Ultimately, in an amended award, the arbitrator held that two of the employees should be placed in non-CBA positions.

More than 90 days later, the PUD filed a petition for constitutional writ of certiorari (writ of review) of the arbitrator's decision in Clark County Superior Court. The trial court ruled in favor of the PUD, rejecting IBEW's arguments regarding timeliness. The IBEW appealed and the Court of Appeals reversed, holding that a 90-day period is the applicable time to apply for such a writ of review.

There is no statutory mechanism for judicial review of public employee labor arbitrations. While the Public Employees Collective Bargaining Act provides for binding arbitration in public employee labor disputes, it does not deal with judicial review of those arbitrations. RCW 41.56.125 provides that RCW 49.08, a statute governing arbitration of general labor disputes, shall not apply to public employment arbitrations. Also, Washington's general arbitration statute, RCW 7.04.010, requires that parties to a collective bargaining agreement specifically provide that the procedures of that act shall be applicable or else it does not apply.

Prior cases have held that where such a statutory and contractual vacuum exists, judicial review must nevertheless be available. The mechanism for that review is the constitutional writ of certiorari. This is because, essentially, under Article 4, Section 6 of the state constitution, the superior courts possess the inherent power to review administrative agency decisions, including arbitration decisions, by issuing such a writ. This inherent power was not always clear.

In the early 1980s, the author participated in Pierce County Sheriff v. Pierce County Civil Service Commission, 98 Wn. 2d. 690, 658 Pac. 2d. 648 (1983). In that case, and in Williams v. Seattle School District 1, 97 Wn. 2d. 215, 221-22, 643 Pac. 2d. 426 (1982), the Supreme Court made it clear once and for all that superior courts have the inherent power and authority to review administrative decisions. Prior decisions had held or implied that it was necessary for the plaintiff to assert some fundamental right requiring protection, but the Williams and Pierce County

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cases made it clear that the right to appeal arbitrary or capricious administrative actions is itself a fundamental right.

What the current case makes clear is that the statute of limitations or the "appeal period" in such constitutional writs, where there is no otherwise applicable time limit, shall be specified by analogy to the time allowed for appeal of a similar decision as prescribed by statute, rule of court or other provision. The court also reiterated a prior ruling that when more than one appeal period applies, the longer period controls. The court analogized to the 90-day statute of limitations applicable in the general arbitration statute, RCW 7.04.180. The Rules on Appeal to the Court of Appeals at RAP 5.2(a), provided an analogous 30-day appeal period. Finally, the Mandatory Arbitration Rules for Superior Court at MAR 7.1 provided a third analogous period, i.e., 20 days. However, in this case, the court favored the 90-day statute over the 20- or the 30-day statute, under the rule applying the longer appeal period. Unfortunately, the PUD had waited more than 90 days and therefore their petition was untimely. For public employers, the ultimate teaching of this case is that, if you want to appeal an arbitration award, while the constitutional writ to superior court may be the appropriate vehicle, you had better file within 90 days after the arbitrator's award.

FMLA - DOL Regulation Exceeds Authority

Another federal district court has ruled that a Department of Labor regulation contravenes the clear intent of congress. In Dormeyer v. Comerica Bank - Illinois, N.D. Ill., 96C-4805, October 14, 1998, the court interpreted 29 C.F.R. Section 825.10(d). The statute's plain language provides that an eligible employee is one who has worked for at least 12 months and for 1,250 hours in the 12 months prior to taking leave. The problem in the FMLA regulation of DOL is the provision that "if the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible". Obviously, the effect of such language is that it could provide instant eligibility to employees who sought leave after working for one day or considerably less than 1,250 hours. Therefore, the Dormeyer court rejected that approach as clearly not the intent of Congress in restricting the class of employees eligible for FMLA protection. At least two other federal courts have similarly found the regulations to exceed congressional authority. In Wolke v. Dreadnought, 954 F. Supp. 113 (E.D. Virg. 1997) and in Seaman v. Downtown Partnership of Baltimore, 991 F. Supp. 751 (D. Maryland, 1998), two other district courts made similar decisions in reviewing the same exact DOL regulation. Those courts pointed out that DOL regulations cannot require employers to waive statutory eligibility requirements.

It appears that the message the courts are trying to convey is that the eligibility requirements mean what they say and the employer should not give up if it simply fails to advise an ineligible employee of the eligibility requirements.

FMLA Jurisdictional Question

Sometimes public and private employers adopt the provisions of the Family and Medical Leave Act (FMLA) even if they do not have the requisite number of workers or the act does not otherwise apply.

FMLA Jurisdictional Question (Continued)

Does this adoption of FMLA provisions, or a contract with the employees somehow confer jurisdiction upon the federal court?

In Douglas v. E.G. Baldwin and Associates, Inc., 6th Cir., 150 F. 3d. 604, in August, the Court of Appeals held that it does not. A federal court has no subject matter jurisdiction over an FMLA complaint involving a small employer simply because the employer has voluntarily adopted FMLA provisions or a union contract. Ms. Douglas worked in an office with only 29 people within a 75-mile radius. Therefore, this private employer was not subject to the FMLA. When she returned from maternity leave after the birth of her child, she learned that her position had been eliminated. The company offered her a number of other jobs but she claimed they were not equivalent to her previous position. The District Court for Northern Ohio ruled that because the employer had voluntarily agreed to abide by the FMLA it could be held liable for violations of the law. The court did find one of the other positions was equivalent and therefore ruled against the employee. But the employee then appealed, paving the way for the 6th Circuit decision. The court stated that the plain language of the act excluded application to this employer. Even though the employer willingly adopted the act's provisions into the employment relationship, that did not bring the company under the ambit of the law. It is well settled that a contract cannot create subject matter jurisdiction for a court. The upshot of this decision is that small employers that have voluntarily agreed to FMLS language can breathe a sigh of relief.

Please remember that the FMLA provisions state that public agencies are covered by the FMLA regardless of the number of employees. However, regardless of such applicability, employees of public agencies have no FMLA rights unless the employer, i.e., the federal, state or local agency, employs 50 employees at the work site or within 75 miles of it. See 29 C.F.R. Section 825.108(d). A state, county or city government is considered to be a single public agency for purposes of counting employees. A county fire protection district would not be considered part of the county government as it is a separate municipal corporation and political subdivision of the State of Washington. Of course, if a fire protection district has 50 or more employees at the work site or within 75 miles of it, the FMLA would apply. The term "employee" is given the same definition in the FMLA as it is in the Fair Labor Standards Act. Therefore, if a person is a bona fide volunteer under FLSA, they also are not an employee for purposes of FMLA. To meet the threshold, an employer does not have to have 50 eligible employees, but does have to have 50 employees.

Sector Boss

An arcane and archaic term in the fire service, a sector boss was the guy who was called upon when the chips were down, to put out the fire. In other words, the sector boss has all the answers. (You have to admit, it is much more exciting than "Q&A column".)

Disclaimer

The purpose of this feature is to allow readers to submit short questions which lend themselves to general answers, on various legal issues. More detailed questions would require a formal legal opinion and are beyond the scope of the Q&A column. By giving answers in the Sector Boss column, the Firehouse Lawyer does not purport to give legal advice and disclaims any attorney/client relationship with the reader. Detailed legal opinions require a

Sector Boss (Continued)

greater explanation of the facts, possible legal research and a more thorough discussion of the issue. Readers are therefore urged to contact their legal counsel for legal opinions.

It seems we need to clarify the purpose of this question and answer column. Like the Q&A column in any newspaper, the purpose of the Sector Boss column, and indeed the purpose of the Firehouse Lawyer newsletter is to educate with respect to the law, but not to give legal advice to any particular client. There is no attorney-client relationship, simply because an agency or person has sent in a question to the newsletter editor. The Sector Boss column is not a free legal clinic for those submitting questions, even if they happen to be clients of Joseph F. Quinn. In other words, the purpose of this column is to answer short legal questions if there is room in the newsletter. The question may or may not be selected for publication. There may simply not be room. Joseph F. Quinn is not practicing law in any state except Washington, and therefore materials in the Firehouse Lawyer are not a substitute for obtaining legal advice for a particular situation. Therefore, readers are advised to consult with a qualified and competent attorney in their state or with respect to the federal questions sometimes discussed here.

Now that we have cleared up any confusion, let's try to educate and answer some interesting questions!

Q: A memorandum of understanding (MOU), from a department and state other than my own, contained an interesting condition in the preamble. Article 1.3 read: "The City is engaged in rendering services to the public, and the City and union recognize their mutual obligation for the continuous rendering and availability of such services. For the purposes of the foregoing, the City will provide pagers to all employees who will keep them in their possession during off-duty hours and while within a reasonable response distance." The MOU, originally agreed to in 1974, is apparently still in effect. What are the FLSA implications or potential problems with this article?

A: This appears to present a question under the Fair Labor Standards Act. Probably there would be no overtime dispute if an employee responded to a page during those "off-duty hours" and returned to work for an emergency. They would clearly be on duty during such response time and if over the applicable limit, they would be entitled to time and a half for the overtime. (That limit could be 40 hours per week unless they are 7K exempt employees which we won't go into here.) The interesting question is whether they are deemed to be "on call" due to the pagers and the language you have cited. Generally speaking, if the employee is free to use the time as he or she pleases then the time spent while "on call" is not considered to be working time. See 29 C.F.R. Section 785.17. There are difficult questions as to whether on-call pay, frequently included in collective bargaining agreements, is to be included in the calculation of "regular rate" for purposes of overtime pay. However, that issue is beyond the scope of this question.

It should also be noted that if on-call time is spent "predominantly for the employer's benefit", under 29 U.S.C. Section 201, the FLSA does require compensation. Previous court cases have said that awarding exempt employees on-call pay is a questionable practice under the FLSA. Thus, your question without more information is difficult to answer. It would be helpful to know: (1) Whether the collective bargaining agreement calls for any on-call pay for exempt or non-exempt workers; (2) What the past practice has been between the employer and the employees with respect to frequency of call-back. Primarily, to answer this question we would need to know

Sector Boss (Continued)

whether the employee is considered free to move about as they see fit, or whether they are constrained by past practice and the CBA language to stay within a reasonable response distance. In other words, if an employer is asserting control over these employees under these restrictions, on-call time could be deemed compensable time. Thus, all that can be said, practically speaking, is that this arrangement is fraught with potential problems under the FLSA, because if the facts show that the predominant benefit of the arrangement is for the employer, and if the employees are frequently called back, they might be able to successfully argue that the on-call time is compensable.

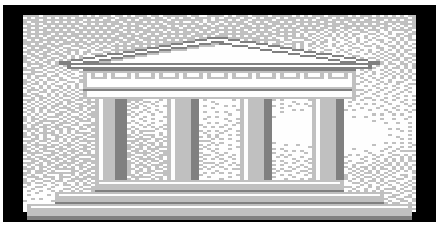
Q. Are we legally required to have a fire chief or acting fire chief for a volunteer fire department?

Pierce County Fire District 25
(Crystal Mountain)

A. In Washington, there is no statute in RCW 52, or elsewhere, that requires a volunteer fire department to have a fire chief or acting fire chief. Probably, however, as a practical necessity, someone needs to be in charge operationally. A volunteer fire department, at any particular emergency scene, should have an incident commander. Previous Firehouse Lawyer articles and discussions have gone into the incident command system concept.

The best guidance available on this question, as usual, is from the National Fire Protection Association. In NFPA 1201, the standard for developing fire protection services for the public, 1994 edition, Chapter 5 deals with the organizational structure of the fire department. In Section 5-2, the standard discusses the fire chief. The 5-2 language provides that the manager of the fire department shall be the fire chief. The fire chief shall be governed in the development of regulations and orders by the provisions of all applicable laws or ordinances and shall maintain a file of such documents. The fire chief is appointed on the basis of merit and ability. The fire chief shall communicate closely with the local government, chief executive and governing body.

In a Washington fire district, that would be the board of commissioners. Finally, the standard states that the governing body shall establish only the primary policies of the fire department and shall not act as an administrative agency nor direct day-to-day management of the department. Thus, the NFPA certainly contemplates that the fire chief shall be the day-to-day manager of the volunteer fire department, under the policy supervision of the governing body. I believe this answers your question, i.e., the answer is that a fire chief is not legally required, but is the only practical option.



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