The Firehouse Lawyer

Volume 20, Number 4

April 2022

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue:

DELEGATION OF AUTHORITY-WHEN IS IT PROPER?

Lately, it seems there have been frequent questions relative to the delegation of authority by a board of fire commissioners to the fire chief, or frankly any governing body delegating authority to a "CEO" of their agency. To assist our readers in thinking about such questions for themselves, and to further your understanding of the law surrounding delegation of authority (and the nondelegation doctrine), we decided to write an article about this subject, based on Washington case law.

We think that the seminal case is still *Barry & Barry, Inc. v. Dept. of Motor Vehicles,* 81 Wn.2d 155, 500 P.2d 540 (1972).[1] This is a Washington Supreme Court decision. In that case, employment agencies and others challenged a regulation of the Director of the Department of Motor Vehicles, in which the department adopted rules or regulations, including one which established maximum fees that employment agencies could charge for their services. The legislature, in RCW 19.31, had established standards for employment agency practices and fees, giving the Director the authority to implement and administer the Employment Agency Act.

The plaintiffs sued, seeking a declaratory judgment and an injunction restraining the

[1] https://case-law.vlex.com/vid/500-p-2d-540-630937539

department from establishing the maximum fee schedule. They claimed the statute contained an unconstitutional delegation of the legislative authority without appropriate legislative standards.

Prior to the *Barry* decision, Washington courts had already held that it is not unconstitutional for the legislature to delegate administrative power to an agency to carry out a statute. However, to be constitutional, the statute must define (1) what is to be done, (2) the instrumentality which is to accomplish it, and (3) the scope of the instrumentality's authority in so doing, by prescribing reasonable administrative standards.

The *Barry* Court then provided an in-depth look into its rationale for deciding that no specific legislative standards are necessary in the statute delegating the authority. Instead, what is required now, according to the Supreme Court of Washington is this: (1) the Legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it, and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of power.

This brief quotation from the decision well illustrates the reasoning of the Court in *Barry:*

> "We are convinced and have no hesitancy in saying that the strict requirement of exact legislative standards for the exercise of administrative authority has ceased to serve any valid purpose. In addition to lacking purpose, the [non-delegation] doctrine in several respects impedes efficient government and conflicts with the public interest in administrative efficiency in a complex modern society."

The *Barry* Court also mentioned that the Washington State Administrative Procedure Act, codified at RCW 34.05, provides necessary procedural safeguards.

For the reasons stated, the Court upheld the regulation establishing the maximum fee schedule applicable to the employment agencies.

Since the *Barry* case is 50 years old this year, one might ask whether this Supreme Court decision is still a valid or important precedent. Well, in August of 2021, another decision (of the Court of Appeals, Division 2) answered that question. Actually, we wrote about the case in *The Firehouse Lawyer.*[2]

In *Associated General Contractors of Washington v. State,* 494 P.3d 443 (2021), Division 2 of the Court of Appeals relied heavily on *Barry* and its explanation of the doctrine, as it ruled that an amendment to a statute was in fact unconstitutional because it violated the holding of the *Barry* Court. The factual distinctions between this case and the facts in *Barry* are very instructive.

In the *Associated General Contractors* case, the legislature tried to amend the prevailing wage statute, which is important to fire districts as it applies to public works projects. The amendment, however, was purporting to allow the state's industrial statistician to rely on collective bargaining agreements that did not yet exist (!) at the time the legislation was adopted. The appellate court was saying essentially that a delegation of authority cannot be based upon facts

---

[2] https://www.firehouselawyer.com/Newsletters/AugustSeptember2021FINAL.pdf

that have not occurred yet or agreements to be made in the future by private parties.

On the matter of "procedural safeguards", the Court of Appeals accepted the AGC's argument that the legislation had no safeguard against the statistician using data from downloaded CBAs, unsigned or expired CBAs and pre-hire CBAs to set the prevailing wages. The court noted that prevailing wage laws in other states did have procedural safeguards to prevent such practices when setting the prevailing wages. In this case, the State of Washington did a 50-state survey on prevailing wage laws and found that 26 states had prevailing wage laws. Only three states, however, had laws similar to the legislation enacted in Washington. For these reasons, the Court of Appeals held that SSB 5493 was an unconstitutional bill attempting to amend the prevailing wage statute.

The above case demonstrates that the delegation doctrine has its limits. The two-prong test of *Barry* is still good law. In any situation where a question arises about the scope of a delegation of power, we will look for some general guidelines provided to the delegee and for some procedural safeguards. A good example would be a credit card resolution adopted by a board of fire commissioners. Ideally, such a resolution would provide general guidelines as to who is allowed to use the credit cards and include some procedures to prevent abuses.

Another typical example would be a resolution delegating to a fire chief the authority to enter into contracts or change orders during a public works project, but limiting the delegated power to contracts below a certain specified dollar amount, and stating that the expenditure must already be included in the budget adopted by the board (a procedural safeguard).

POLICE AND FIRE RESPONSES UNDER THE INVOLUNTARY TREATMENT ACT.

On April 18, 2022, Division 1 of the Washington Court of Appeals issued what we think will be seen as a very important and timely opinion in a case involving a person whose behavior suggests that he was suffering from a mental disorder. *Ghodsee v. City of Kent and King County,* 82897-5-1.[3]

In June of 2017 Shahrbanoo Ghodsee contacted King County Crisis and Commitment Services with concerns about her son Sina, who was not taking his medication and seemed "agitated" and "delusional." Designated Mental Health Professionals (DMHPs) scheduled an appointment to interview Sina at the home, but were unsuccessful, because Sina pointed what "appeared to be a table leg at [them] like a gun." They called the police, and the Kent Police responded, but were similarly unable to engage with Sina. They reported that Sina swung a skateboard at them "like a bat" when contact was attempted.

Next, a DMHP petitioned the court for a Non-Emergency Detention Order, which the court granted. The next day a team of DMHPs and police went back to the home but again met no success. But two days later, the police were dispatched to the home after a neighbor called due to concern that Sina was threatening someone and possibly carrying a rifle. The caller could not state with certainty that there was a gun involved; the police never observed criminal conduct. They eventually left without contacting Sina.

[3] https://www.courts.wa.gov/opinions/pdf/828975.pdf

Finally, the next week the police formulated a plan to take Sina into custody while he was out getting groceries or cigarettes. Around midnight a couple of days later, a local grocery store manager called the police, stating that Sina was on site but he was gone when police arrived. The next day, twice neighbors called the police, saying Sina had shot at the neighbor's occupied home.

The Kent police responded and saw Sina in the window of his home with a rifle raised and pointed in the direction of the officers. Two officers simultaneously fired and Sina dropped out of sight. Using a drone, the police saw Sina on the floor. He was taken into custody, with a serious gunshot wound to the head, but he survived with severe long-lasting injuries.

Sina (through a guardian) and his mother filed suit against the City of Kent and the county. In July of 2021 the court granted summary judgment, dismissing the complaint against both defendants.

The Court of Appeals in this opinion performed a thorough analysis of the public duty doctrine and also discussed extensively the immunity provided to government entities under chapter 71.05 RCW.

We have discussed the public duty doctrine many times over the years in these pages so we will not exhaustively discuss it again here. Suffice it to say that a duty owed to the general public is not enough to constitute a duty to a particular person, so as to support a civil action for damages. As it is said, "A duty to all is a duty to no one."

The court focused on the "special relationship" doctrine and distinguished a number of prior cases where the plaintiff had a long-standing relationship with the professional, such as a psychiatrist or a probation officer. Here, the court noted, most of the attempts during this three-week period to contact Sina were completely unsuccessful. The court found no continuing, definite, and established relationship existed.

The court also discussed whether the mental health professional had any "take charge" duty, which is based on limited case law that would be inapplicable to the fire service, so we do not discuss it here.

After the court decided that the public duty doctrine was a complete defense, the court discussed the duty of care (negligence law) owed by police in direct interactions of this kind with members of the public. Essentially, Sina was arguing that if he had been detained sooner he would not have been shot or suffered such serious injuries. He was arguing nonfeasance essentially. The court rejected that argument out of hand in this case, holding that the police had considerable discretion in deciding how to effectuate the Non-Emergency Detention Order issued by the court.

In passing, the court relied upon the holding in the case of *Konicke v. Evergreen Emergency Services, P.S.,* 16 Wn.App. 131, 480 P.3d 424 (2021), which involved a claim against hospital emergency room health care providers. This court noted that these cases present a delicate balancing act between the constitutional rights of the potential detainee and the duty to protect the public and the person with an apparent mental disorder, who may present a danger to himself/herself or others.

Also, this court noted, as the *Konicke* court did, that RCW 71.05 was not enacted particularly

to benefit third parties injured by individuals suffering from "behavioral health disorders." While the *Ghodsee* case was decided under the version of the statute before it was amended a few years ago, we believe the case would be decided the same way under the current statute as well.

The court also found that RCW 71.05 provided statutory immunity to the county and the city because there was no showing of gross negligence by either party. However, the court decided it was not really necessary to reach the issue of the immunity defense under that statute, because the plaintiff had failed in his efforts to show any legal duty to him (or his mother) in the first instance.

The court took the unusual step, near the end of its opinion, of discussing recent state legislation clarifying the use of force in such interactions. We think it is significant enough to quote the court's words verbatim:

> "Our state legislature has made clear that officers must retain discretion as they interact with individuals in our communities so that they may be appropriately responsive to the circumstances presented to them. [citing SHB 1735]. The law recognized that specific de-escalation tactics depend on the circumstances, but also clarifies that physical force may still be used in certain circumstances, including detaining an individual under the ITA…. there are crucial policy reasons, including the very nature of mental health crises and de-escalation, to empower agencies to adapt and respond to each unique situation as it unfolds."

Slip Opinion at p. 19.

In its concluding paragraph, the court expressly approved of the de-escalation tactics utilized by the Kent police as set forth above in our discussion of the facts. As we said, we find this opinion very instructive and helpful for responders in the field. Having reviewed this decision, we strongly feel that fire service personnel have no authority to detain a person suffering from a behavioral health disorder, absent an express delegation by a designated crisis responder, pursuant to RCW 71.05.153.[4]

[4] https://app.leg.wa.gov/RCW/default.aspx?cite=71.05.153