

The Firehouse Lawyer

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UPCOMING TRAINING ON THE OPEN GOVERNMENT LAWS!!!

This is just a reminder of our upcoming *free* workshop taking place on Saturday, April 9, (2022) from 9:00 AM to 12:00 noon (not including an extra hour for questions or addressing loose ends). The training pertains to the Open Government Trainings Act and is **required** for records officers and members of governing bodies. We will also include a segment on “The Board and the CEO”, which will explore the differing roles and responsibilities of the members of the governing body, as well as the chief executive of the agency such as the Fire Chief. We use the generic term “CEO” advisedly as the seminar segment is equally applicable to cities and other local government agencies. See the link below for more information on this training.¹

Here is the link to this training opportunity, which shall take place via Zoom:

<https://us06web.zoom.us/j/89785597688?pwd=RlpRdis3cGpOMlVycDBMOEFvTnFYdz09>

Changes in the Police Use-of-Force Laws Do Not Change the Landscape for Fire Departments

¹ See

<https://www.firehouselawyer.com/Newsletters/March2022Extra.pdf>

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In July 2021, we discussed HB 1310, which substantially changed the laws pertaining to the use of force by police, and how those changes must be weighed against the respective powers of the police and fire departments.² The restrictions imposed under HB 1310 have been somewhat relaxed with the passage of SHB 1735, which became a Session Law.³

Back in July 2021, we reminded our readers that fire departments do not possess the power of arrest. But the question remains: What powers do EMTs/paramedics have to restrain or detain people suffering from drug overdoses and/or mental health disorders? Prior to discussing that, we will outline SHB 1735, as follows:

1. Recognizing the shortcomings of HB 1310, the Washington Legislature underlined “the urgent need to provide clarification and guidance for police agencies and the public.”
2. By passing HB 1310, the Legislature did “not intend to prevent or prohibit peace officers from protecting citizens from danger.”
3. SHB 1735 expands the authority of peace officers to use physical force when necessary, subject to the duty to exercise reasonable care.

² See

<https://www.firehouselawyer.com/Newsletters/July2021FINAL.pdf>

³

<https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/House/1735-S.SL.pdf?q=20220328113647>

4. The law better defines “de-escalation tactics” necessary to use prior to using physical force, and provides for alternative, less lethal methods, tools and techniques, instead of physical force. But the law no longer provides for “leaving the area” as a “de-escalation tactic”, as did HB 1310.
5. SHB 1735 tries to clarify that these standards limiting the use of physical force are not meant to prohibit or restrict the peace officer’s ability to engage in community caretaking functions or life-saving measures.
6. The bill still allows the *peace officer* to use physical force to protect against criminal conduct when there is probable cause to effect an arrest, to effect an arrest, to prevent escape, to protect against an imminent threat of bodily harm to the officer or others, including a person against whom force is being used.⁴

In conclusion, we believe that the clarifying legislation will definitely assist the police in knowing where the guardrails are, without adversely impacting the fire service personnel.

Despite the above changes, we are still of the opinion that fire department personnel do *not*, by virtue of the implied consent laws, have the lawful authority to detain a person suffering from a mental health disorder for purposes of involuntary commitment or transport to a hospital at the behest of law enforcement. The laws of implied consent and involuntary detention are as follows (in *italics*):

⁴ Again, firefighters are not “peace officers” as defined under RCW 71.05.020 (40).

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RCW 7.70.050 (4):

*“If a recognized **health care emergency exists** and the patient is **not legally competent** to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to **required treatment** will be implied.” (emphasis added)*

RCW 11.88.010 (1)(e):

*“For purposes of giving informed consent for health care pursuant to RCW 7.70.050 and 7.70.065, an **“incompetent”** person is any person who is (i) incompetent by reason of **mental illness**, developmental disability, senility, habitual drunkenness, **excessive use of drugs**, or **other mental incapacity**, of either managing his or her property or caring for himself or herself, or **both**, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.” (emphasis added)*

We view this law as permitting required treatment at the scene to incapacitated individuals—such as administering Narcan to an overdosing patient—but not granting authority to detain an individual at the request of law enforcement, or necessarily the authority to transport a patient to a facility against their stated will. The laws below provide us further guidance as to involuntary detention.

RCW 71.05.153 (language in italics):

*(1) When a **designated crisis responder** receives information alleging that a*

*person, as the result of a behavioral health disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled, after investigation and evaluation of the specific facts alleged and of the reliability and credibility of the person or persons providing the information if any, the designated crisis responder may take such person, **or cause by oral or written order** such person to be taken into emergency custody in an **evaluation and treatment facility**, secure withdrawal management and stabilization facility if available with adequate space for the person, or approved substance use disorder treatment program if available with adequate space for the person, for not more than one hundred twenty hours as described in RCW 71.05.180.*

(emphasis added). We view the above reference in RCW 71.05.153 to an “oral or written order” as granting first responders the ability to rely on delegation by a “designated crisis responder” to transport a person with a mental health disorder to a medical facility that is defined as an “evaluation and treatment facility” under RCW 71.05.020 (23) under narrow circumstances.⁵ But importantly, law enforcement officers are often not “designated crisis responders.” That is because, first and foremost, designated crisis responders must be *mental health professionals*. See RCW 71.05.020 (16).

Consequently, first responders could not rely on a delegation from a law enforcement officer that is not

⁵ See the applicable definitions here:

<https://app.leg.wa.gov/RCW/default.aspx?cite=71.05.020>

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a mental health professional (and how many of them are?) as granting them authority for involuntarily detaining a person suffering from a mental health disorder. We say this because the broadly worded implied consent law stated above, is superseded by the *specific statute* relating to involuntary detention and treatment of persons with behavioral health disorders.

This conclusion is further bolstered by the law, RCW 71.05.153 (2), which specifically grants peace officers the ability to detain and transport persons suffering from behavioral health disorders to a hospital:

(2)(a) Subject to (b) of this subsection, a peace officer may take or cause such person [suffering from a behavioral health disorder] to be taken into custody and immediately delivered to a triage facility, crisis stabilization unit, evaluation and treatment facility, secure withdrawal management and stabilization facility, approved substance use disorder treatment program, or the emergency department of a local hospital under the following circumstances:

(i) Pursuant to subsection (1) of this section; or

(ii) When he or she has reasonable cause to believe that such person is suffering from a behavioral health disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.

We do not view the “cause to be taken” language above as giving peace officers the ability to

simply delegate their ability to transport such persons to firefighters, because there is no reference to an “oral or written order” as there is under RCW 71.05.153 (1).

Again, we hope to see you at our April 9 training on Open Government!

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