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Municipal Roundtable on HIPAA Compliance

On April 29, 2016 the Firehouse Lawyer will be presenting another Municipal Roundtable at the Headquarters of Valley Regional Fire Authority in King County. This roundtable will be from 0900 to 1100, and is free-of-charge. Headquarters are located at 1101 D St NE, Auburn, WA 98002. We will be discussing the mandatory and permissive disclosures of medical records under the Uniform Health Care Information Act and HIPAA. Join us.

Grasping at Straws: Do Probationary Employees Have Property Rights?

The employer makes hard decisions. The employer has entrepreneurial rights. Reflected in the language of collective bargaining agreements across the country, and constitutional principles, probationary employees and volunteers have minimal expectations of continued employment, as compared to career firefighters and paramedics, and administrative staff with bargained-for contractual protections. But should an employer provide a pre-termination hearing to a probationary employee or volunteer, otherwise known as a *Loudermill* conference? Essentially, a *Loudermill* conference is one in which the employee is given an opportunity to explain his

or her side of the story. It does not entitle the employee to present witnesses in his or her defense, or cross-examine witnesses.

There are two stages of discerning whether an employee's procedural due process rights have been violated: (1) Determining whether the employee has a property right; and (2) if so, determining what procedures have been afforded to the employee. We focus here on the first question. Once an employee is found to have a property right in their employment, due process protections must be provided. *See Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 541 (1985). But "property interests are created and defined by existing rules or understandings that stem from independent sources such as state law." *Danielson v. City of Seattle*, 108 Wn.2d 788, 795 (1987).

Therefore, a "property right" must either exist pursuant to state law, derived from procedural protections such as those afforded to teachers under RCW 28A.405.210 or the civil service statutes, or from an "independent source," such as a written agreement or series of agreements, or a course of conduct giving rise to an expectation of continued employment. *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219 (1984); *See Also Schlosser v. Bethel School District*, 183 Wn.App. 280, 287 (2014) (finding a teacher not entitled to a pre-termination hearing for a decision not to renew her contract because a state statute only afforded her a right to a post-termination hearing). **Again: property rights are not defined by federal law; federal law only defines the procedural protections that must be afforded when a property right exists under state law.**

We now turn to the question of whether a probationary employee has a property right in continued employment. Without question, all public employees have a right to engage in collective bargaining with their employers. *See* RCW 41.56.100. Consequently, a public employee, in a probationary status or not, has a right to be covered by a collective bargaining agreementm.[1] Of course, "public employment alone does not create constitutionally protected property interests." *Danielson* at 796.[2] Where the employer has not explicitly promised, or implied through its actions, that an employee shall enjoy employment beyond the probationary period, no property rights exist.

Furthermore, when no contractual provision exists that confers a right to continued employment, no property right exists. For example, pretend that a CBA states that "probationary employees may be terminated at the discretion of the employer, for any reason," but goes on to state that the probationary employee may grieve all other types of discipline "that do not amount to termination." The first provision explicitly indicates that the

[1] We shall use the term "his" or "he" to signify both genders.

[2] *See Also Washington Educ. Ass'n v. State*, 97 Wn.2d 899, 908 (1982) (finding that protected property interests can arise from express or implied contracts for continued employment, or collective bargaining agreements).

probationer may be terminated without cause. The second provision may confer rights to file grievances, but it does not confer a right to continued employment. Consequently, under the language of this contract, a probationer would have no property right to continued employment, despite protections afforded to him by the CBA and RCW 41.56.

But note as well that property rights may be implied by conduct. In *Thompson v. St. Regis,* a case that all employers in Washington must understand, our Supreme Court held that express promises contained in employee handbooks may confer contractual rights that did not exist in employment agreements themselves. *See Thompson* at 228-229. Furthermore, the Court held that contractual rights to for-cause termination may exist "if there is an expressed or implied agreement to that effect." *Id.* at 233. This means the employer should make no promises. This means the employer should not articulate policies that confer for-cause protections to probationary employees. Otherwise, the probationer will have an "independent source" of a property right, and thus be entitled to a *Loudermill* conference prior to being terminated. Review all of your employee contracts and applicable policies.

Local Improvement Districts and CARES Programs: How Do We Value a Moving Target?

In last month's issue, we discussed the reasons for which a local improvement district may be created as another funding mechanism for fire departments.[3] But there are three potential roadblocks that may prevent the formation of an LID for the purpose of funding a CARES Program, pursuant to RCW 35.21.930.

First, under Chapter 52 RCW, an LID may be formed "for fire protection or *emergency* medical purposes." RCW 52.20.010 (emphasis added). As we have already discussed, by passage of RCW 35.21.930, the Washington State Legislature minimized any scope-of-practice issues which may arise when providing non-emergent community paramedicine, so long as paramedics and EMT's only perform procedures they are certified and trained to perform.[4] However, "emergency medical service" still means "medical treatment and care which may be rendered at the scene of any medical emergency or while transporting any patient in an ambulance to an appropriate medical facility, including ambulance transportation between medical facilities." RCW 18.73.030 (10). Consequently, an auditor, or a concerned citizen, may still raise the argument that an LID may only be formed for fire protection or emergency medical purposes, and a CARES Program would provide neither. But we may respond that the practical definition of

[3] http://www.firehouselawyer.com/Newsletters/February2016FINAL.pdf

[4] http://www.firehouselawyer.com/Newsletters/September2015_ThidDraft.pdf

"emergency medical services" has evolved, and this has been recognized by the Legislature, through RCW 35.21.930.

A second roadblock exists: The fire department would most likely not be able to defray labor costs imposed by the CARES Program. This is because a fire district may form an LID for "acquisition, maintenance, and operation of real property, buildings, apparatus, and *instrumentalities* needed to provide" fire protection and EMS. RCW 52.20.010 (emphasis added). Consequently, a fire district may use special assessments to recover the costs of real property (land), buildings (fire stations), apparatus (fire engines, ambulances, fire boats etc…), and "instrumentalities." The question becomes: What is an "instrumentality?" A paramedic? An EMT? Equipment, such as catheters, blood pressure monitors?

Generally, LID's have been formed for the expansion or construction of tangible property. *See State ex rel. Frese v. City of Normandy Park*, 64 Wn.2d 411, 423 (1964) (relating to the construction of a sewer system); *See Also Carlisle v. Columbia Irrigation Dist*., 229 P.3d 761, 168 Wn.2d 555 (2010) (relating to expansion of the boundaries of an irrigation district); *Carter v. Palzer*, 18 Wn.App. 694 (1977) (not challenging the legitimacy of a petitioned-for LID for the increased construction of water mains and fire hydrants in a fire district); *Appeal of State*, 60 Wn.2d 380 (1962) (affirming that the installment of 12-inch cast-iron water-mains and three fire hydrants was valid action of LID).

None of the above authorities ruled on what may constitute an "instrumentality" under the LID statutes. But we may deduce that the aforementioned supplies—blood pressure monitors etc.—are necessary predicates to the provision of community paramedicine, and would therefore be "instrumentalities" under RCW 52.20.010.

Additionally, the term "instrumentalities" has also been found to apply to human beings themselves, albeit in a different context. *See United States v. Ballinger*, 395 F.3d 1218, 1227 (11th Cir. 2005) (man found to be an "instrumentality" of interstate commerce because he crossed four state lines to burn churches). The federal courts have held, explicitly, that "[I]nstrumentalities of interstate commerce…are the people and things themselves moving in commerce, including automobiles, airplanes, boats, and shipments of goods. *Ballinger* at 1226. Consequently, the argument may be made that a paramedic or EMT performing community paramedicine is an "instrumentality", and therefore the costs incurred in obtaining the labor of that "instrumentality" may be defrayed by an LID.

But a third and final roadblock remains: Unlike the construction of a building, where the location is fixed and the benefit may be more easily determined, based on the "zone and

termini" method,[5] a CARES Program is something of a "moving target." Under Washington law, "property not benefited by a particular improvement cannot be assessed at all." *State ex rel. Frese* at 423.

When called to testify in superior court, an appraiser may testify competently as to whether a particular property's value increases by virtue of its proximity to buildings or real property, such as a fire station or school, or park. A CARES Program is less tangible. Its dollar value is hard to prove or establish, so we call it a "moving target". This is an undeniable challenge. This is perhaps the strongest of the three roadblocks. We at the Firehouse Lawyer view the formation of an LID as a sleeping giant: a greatly untapped resource for fire districts. We will continue to focus on the propriety of forming an LID for various purposes. Thus, if you have any questions about whether an LID may be formed for a particular purpose, do not hesitate to ask.

When Do the Medical Records of Employees Become Protected Health Information?

Under the Washington Uniform Health Care Information Act (UHCIA), only a "patient" of the health care provider has a right of privacy in the medical records held by that provider. *See* RCW 70.02.010; *See Also Hines v. Todd Shipyards Corp.*, 127 Wn.App. 356, 370 (2005) (finding that the results of an employee's drug-screening test were not "health care information", but instead were the results of a "condition of employment"). Consequently, Washington does not protect the health care information of employees through this law.

However, nothing within the UHCIA shall prevent a health care provider from complying with federal law, i.e. HIPAA. RCW 70.02.900. What this means is that if HIPAA provides more protection of privacy rights in medical records than the UHCIA, then HIPAA shall apply, and vice versa. *Id*; *See Also* 45 C.F.R. § 160.203 (b). Thus, we must consider whether some regulation within HIPAA would protect the medical records of employees from disclosure.

Under HIPAA, a health care provider—a covered entity—generally may not disclose protected health information (PHI) without a written authorization from the protected person. *See* 45 C.F.R. § 164.508 (a)(1).[6]

But a covered entity *may* obtain consent from an individual[7] to disclose PHI used to conduct "health care operations." 45 C.F.R. § 164.506 (b). The negative corollary to this exception to the Privacy Rule is that the covered entity may

[5] See Link Contained in Footnote 1.

[6] Recall as well that "[H]ealth information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information." 45 C.F.R. § 164.514 (a).

[7] Importantly, HIPAA uses the word "individual" rather than "patient."

also *refuse* to disclose such information. Furthermore, the employee may *insist* that such information—obtained during the course of an employer-provided health plan—not be disclosed:

> In the case that an individual requests under paragraph (a)(1)(i)(A) of section 164.522 of title 45, Code of Federal Regulations, that a covered entity restrict the disclosure of the protected health information of the individual, notwithstanding paragraph (a)(1)(ii) of such section, the covered entity must comply with the requested restriction if-
>
> (1) except as otherwise required by law, the disclosure is to a health plan for purposes of carrying out payment or health care operations (and is not for purposes of carrying out treatment); and (2) the protected health information pertains solely to a health care item or service for which the health care provider involved has been paid out of pocket in full.

42 U.S.C. § 17935. Of course, the employer must have such a health care plan for this "employee exception" to apply, and the employee must request that the subject information not be disclosed.

In the alternative, if the employer has no such health care plan, then the information of the employee is not PHI. Thus, we treat the request for medical records as a public records request. But recall that the PRA contains an exemption for the "personal information" of public employees, to the extent that disclosure would violate their privacy. RCW 42.56.230 (3). For disclosure of a record to violate privacy, this must be "highly offensive to a reasonable person" and "of no legitimate concern to the public." RCW 42.56.050. Certainly, disclosure of employee medical records, in most instances, would meet this privacy test, and would therefore be exempt from disclosure under the "personal information" exemption, even if the information at issue was technically not PHI.

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