# Firehouse Lawyer

*Volume 6, Number 11* *November 13, 2006*

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*Inside This Issue*



# FLSA Issues and Volunteers

We promised in the August issue that we would revisit some FLSA issues soon, namely the "same agency" issue and the "same type of services" issue. In order to facilitate the discussion herein, I will present two scenarios that are certainly based on real events. In Scenario #1, a paid career firefighter is employed by City A, but serves as a volunteer firefighter for Fire District B. The FLSA issue arises, however, because City A has an automatic aid agreement with Fire District B to serve a portion of the city, to which B has a closer station. To make matters worse, quite often while volunteering for B, the engine he usually serves on responds into the adjoining city, City A, on mutual aid calls. What do you think? For FLSA purposes would City A and Fire District B be considered the "same agency", due to the automatic aid agreement? In other words, would it violate the FLSA to call him a volunteer?

Apparently not, according to a federal Department of Labor Wage and Hour Division opinion letter dated April 2006. In this case, the fire district served portions of the city by contract. Since the city and fire district are separate municipal entities, and since the volunteer is entirely under the control of the district chief when volunteering, the city is not then considered his employer. Such arrangements have in fact been recognized for years by the Wage and Hour Division as not presenting FLSA violations, at least when the service was provided pursuant to a mutual aid agreement.

How about Scenario #2, wherein the paid career firefighter serves City A as a volunteer maintenance mechanic by working on vehicle maintenance about 25 hours per week in addition to his regular "modified Detroit" shift schedule? The general rule is that an employee cannot volunteer to do what he/she is otherwise paid for as a regular employee. The aforesaid duties seem different enough as they are not in the same occupational classification, and require different skills. Obviously, a paid firefighter cannot volunteer for any firefighting duties as a part of the volunteer force associated with his employer. What if the bona fide volunteer firefighter is employed as a paid (monthly salary) maintenance mechanic, working a 40-hour job on the day shift? Can he then "clock out" and report to emergency fires wearing his volunteer hat, assuming no docking of pay? If he does that regularly, isn't the

economic reality that he is really working both as a firefighter and mechanic, thus earning his monthly salary? But since he does not meet any test for exemption and is in fact a part-time paid firefighter, is he not really working and volunteering for the same agency doing the same duties, i.e. firefighting? It seems to me these facts could present some serious FLSA problems. As you can see, there can be some difficult fact situations.

## WFCA CONFERENCE IS HUGE SUCCESS

Believe it or not, I have never attended the WFCA Annual Conference before. It seems I am always back East visiting family at that point in October. This year, I decided to go, partly to see if the "buzz" about Gordon Graham was well deserved. Well, for me the conference was definitely worth attending. Gordon certainly did not disappoint. And those Polar Bears presented by one of the insurance companies in the hospitality room were memorable (although maybe they made me forget a few things the next morning!). The presentations by various attorneys and other presenters were educational and informative.

### State Family Medical Leave Act

As a result of the conference, I felt that some discussions of certain topics, and a few clarifications might be in order. In one of the legal seminars, the changes wrought by Chapter 59, Laws of 2006, were discussed. This is the state statute on Family and Medical Leave. It was stated by one attorney on Wednesday evening: "The most significant change is that the Act now applies to all fire protection districts regardless of the number of employees." However, in the other legal seminar by Foster Pepper attorneys, while that law was discussed, such a change was not mentioned. The next day I did some rudimentary research on the legislative history of the bills that became chapter 59, i.e. House Bill 2392 and Substitute Senate Bill 6185. I looked at the bill digest, which did not mention any such change. I looked at the Bill Report and Synopsis of the bill as enacted. Those documents seemed to state (or clearly imply) that the law applies when the employer has 50 or more employees. While the definition section is poorly drafted, as the attorney noted, I could not find any clear intent to change the law so that it applied to smaller public employers.

The attorney also noted, correctly, that the Federal FMLA still does not provide FMLA rights (12 weeks unpaid leave per year for certain health conditions or family health situations) to workers employed by public

employers with less than 50 employees. So it would seem odd that the state and federal statutes would be different on that point. This is especially true when, as stressed in the legislative history alluded to above, one of the main reasons for these 2006 amendments to RCW 49.78 was to make the state law conform *better* to the federal law! In summary, I respectfully disagree that the law was changed and made applicable to small fire districts or similar public employers in Washington. I hope this clarification helps clear up any confusion, or at least stimulates the small employers to look into the problem further, rather than just "caving in" on that issue.



By the way, as I noted in a recent interchange with a new client, the federal FMLA is somewhat confusing because of the manner in which it is written. At one point, the regulations state that the FMLA applies to all public employers regardless of size. However, in the regulations it also states, at 29 C.F.R. Section 825.108 (d), after stating that all public agencies are covered by the Act regardless of size: "However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g. State) employ 50 employees at the worksite or within 75 miles." The upshot of these provisions is that, while small employers are "covered" by the Act, their employees are not eligible to claim the benefits of the FMLA. That makes a lot of sense, doesn't it? I would say, however, that such employers had better be careful if they have voluntarily or gratuitously afforded such benefits as unpaid leave under the FMLA, although they did not have to, as they may thus have waived any employer's right to claim non-eligibility.

## Open Public Meetings Act

Another confusing area could arise with respect to the Open Public Meetings Act. There was some discussion by an attorney (at the Wednesday night seminar) of an Attorney General Opinion, i.e. AGO 2006 No. 6. It pertained to the situation arising when a quorum of a governing body attends a meeting called by another body. The AGO expresses the opinion that the mere presence of a quorum at such a meeting not called by the governing body is not *per se* a violation of the OPMA. However, the AGO goes on to state that if the members of that quorum took any "action" as that term is defined in the Act, at the meeting, then the OPMA would apply. In the seminar, the attorney noted that "action" as defined in the Act includes "voting, deliberating together, or using the meeting as a source of public testimony for council action." Unfortunately, that is not a complete definition of "action" as the word is actually defined in the OPMA. The definition of "action" also includes:

> "…the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluation, and final actions…." (emphasis added).

When one tries to interpret the OPMA, one must always keep in mind that the statute is a remedial statute and therefore must be liberally construed to accomplish its purpose, which is openness in government. Let's face it. There are critics out there and advocates of open government who are extremely suspicious of politicians meeting behind

closed doors and making important decisions. Transparency in government is the watchword for today, and probably in the future. Why tempt fate by attending your local fire district Long Range Planning Committee meeting and then having two or more commissioners sitting there sharing their views (and listening to the public's views) on issues as vital as building multi-million dollar fire stations, and then claiming that the meeting was "called" by that committee and not the Board of Commissioners. We submit that it is the topic or subject matter discussed, which must be determinative, not who called the meeting, if in fact a quorum of your board of fire commissioners (or other governing body) is present. And do not try to contend that they only listened and did not otherwise participate, or you might be tripped up on the "took public testimony" part.



In other words, given the very broad definition of "action" and the remedial nature of the OPMA, do not be misled by the apparent supportive nature of this AGO or the presentation prior to the WFCA conference. The best practice, in my opinion, is not to have a quorum present whenever the district's business is being discussed without full compliance with the OPMA. Or if you do plan to have a quorum there, consider advertising the meeting as also a Board of Commissioners Special Meeting, take minutes, and otherwise deal with it just as you do a special meeting. The Board Secretary can be excused; just appoint a board member or someone else to serve as acting secretary by motion at the meeting. Sometimes these issues can be relatively tricky and complex, so I wish that attorneys and elected officials would explain the context and elaborate when discussing such matters, rather than just cryptically mention an attorney general opinion, for example, which might just confuse or mislead people.

### Labor Negotiations – Managing the Process

This presentation by my law school classmate—Steve Dijulio—and his colleagues from Foster Pepper PLLC, was very helpful for commissioners and others trying to sort out the difficult process of labor negotiations. I felt it was especially apt when these attorneys stressed the importance of a "united front", supporting the negotiating team and its expressed positions at the bargaining table. Steve suggested there should be no contact during the negotiating period by elected officials such as fire commissioners, directly with the actual rank and file employees who are represented by the union. This makes good sense and is essential to avoid possible "interference" ULP charges. In my experience, as with most actions of individual commissioners who act without board approval or delegation of authority this type of direct action is fraught with problems.

## PUBLIC RECORDS ACT

As many of you may know, the Public Records Act was moved from RCW 42.17 and re-codified in a new chapter, RCW 42.56. However, you may *not* have noticed that the Attorney General, as directed by the Washington State legislature, has prepared model rules on public records compliance by state and local government agencies in this state. The rules are contained in the regulations at WAC 44-14-00001 et seq.

The rules come with comments that have five-digit numbers, but the model rules themselves have three-digit numbers (e.g. WAC 44-14-010). The purpose of the rules is to provide information to both requestors

and to agencies about "best practices" for complying, so technically the rules are guidelines as opposed to mandates. However, the AG encourages agencies to adopt the model rules, for example, by a fire commissioner resolution. The overall goal is to establish a culture of compliance among agencies and a culture of cooperation among requestors.

In future issues, we will include an article discussing the most frequently asked questions of the Firehouse Lawyer by clients, regarding the inspection and copying of public records.



## RC2 42.17.130 AND USE OF PUBLIC FUNDS

Recently, a client asked me for names of political consultants who might aid a fire district in a future election, assisting with such items as drafting and disseminating an election brochure. Coincidentally, another client retained such a consultant earlier this year to help with their brochure, to be mailed to every postal customer in the district, but I am not sure that the client was satisfied with the work.

How does one choose such a consultant? Is there any "certification" or particular educational background or experience that you are looking for? It struck me that there are very few rules or guidelines for choosing properly in this particular arena. That leaves the door open for some self-proclaimed "experts" who may have been through the process once or twice before.

Boards and Chiefs need to be careful with legal compliance in this area, because RCW 42.17.130 restricts the use of public funds in election campaigns to ensure fairness in such elections. While there are a few exceptions, one of which has been interpreted to allow one carefully worded general mailing, this area is a mine field.

Rather than a political consultant, fire districts and other agencies that want to spend money or staff/employee time on conduct or activities that might violate this statute, would be well advised to consult knowledgeable counsel, familiar with the intricacies of RCW 42.17.130. The Firehouse Lawyer has numerous examples of brochures and fact sheets that have worked well for clients in the recent past.

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