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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to fire departments, which include labor and employment law, public disclosure law, mergers and consolidations, and property taxes and financing methods, among many others!!!

Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Joseph F. Quinn is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)

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

Office Telephone: 253-858-3226
Cell Phone: 253-576-3232

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

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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.

Every Page Counts: Judicial Activism and the Public Records Act

In Public Records Act (PRA) litigation, a public agency that wrongfully withholds public records must pay attorney fees and costs to the prevailing party, but more importantly, "it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public *record*." RCW 42.56.550 (4) (emphasis added). Recently, the Washington Supreme Court ruled that the term " record" actually means *each page* of that record, for purposes of assessing the $100 per-day penalty for wrongfully withholding that record—and now every *page* of that record. This is a landmark case. This case could result in fundamentally limitless penalties to public agencies that violate the Public Records Act, and thus waste taxpayer dollars in a fundamentally limitless way.

The case, *Wade's Eastside Gunshop Inc. v. Dep't of Labor and Industries,* No. 89629-1 (2016) ("*Gunshop"*), arose from a lawsuit by the Seattle Times against L&I for wrongful withholding of records. L&I argued that the records were exempt under RCW 42.56.250 (5), the "investigative records" exemption. The Supreme Court disagreed. But that is not why this case is important here—that exception is rarely invoked in the fire service. A brief discussion of the facts is still in order:

L&I received a report of lead contamination at a gun shop (belonging, presumably, to Wade). L&I commenced an investigation. The Seattle Times asked for records of that investigation, and documents of all lead exposure at the gun shop. L&I did not provide the records. The parties went to court, and the court awarded penalties to the Times for five different violations of the PRA between January 31, 2013 (date of the initial request) and September 20, 2013 (date when the requested records were provided). The penalty totaled $502,827.40, based on the amount of *pages* withheld and the culpability—bad faith—of [1] L&I in withholding the records. This amount did not include attorneys fees and costs.[2]

The Court explicitly held "that the PRA allows trial courts to impose penalties calculated on a per page basis." The Court began by reiterating that a lower court's assessment of PRA penalties will be reviewed for an abuse of discretion, i.e. whether the penalty could not be imposed by any reasonable person, or is based on untenable grounds. L&I argued that RCW 42.56.550 (4) (quoted above) only authorizes lower courts to assess penalties on a per-record basis, not a per-page basis. The Court insisted that a "plain reading of the PRA" demonstrates that a per-page penalty is lawful. Looking to the definition of the word "public record" under the Act, the Court found that a "public record" can be "any writing", and a "writing" is partially defined under the Act as "all papers." This, the Court said, permits a reading that a penalty can be assessed per page.

Without question, when the PRA was enacted in 1972, the meaning assigned to a "record" was different. Records are no longer in hard copy, and can be produced with ease. Records exist in "the cloud." Records exist everywhere we go. For example, the *Gunshop* court noted how text messages are public records, based on the recent holding in *Nissen v. Pierce County*, 183 Wn.2d 863,357 P.3d 45 (2015). The Court ultimately reasoned that "[L]imiting trial courts to imposing penalties based on a set definition of 'record' would deny them the flexibility needed to respond appropriately to PRA violations in this age of rapidly advancing technology." But this same reasoning, that we live in an age of rapidly advancing technology, supports a finding that a liberal construction of statutory PRA penalties will skirt the original intent of the Act.

Washington courts have found for years that the PRA is one of the most strongly worded public disclosure laws in this country. The PRA specifically states that "the people insist on remaining informed," and the PRA must be "liberally construed...to promote this public

[1] See the Firehouse Lawyer Newsletter discussing penalties for violating the PRA:

http://www.firehouselawyer.com/Newsletters/v09n07jul2009.pdf

[2] Take note as well that for some of the wrongfully withheld records, the court imposed a $.02 per page penalty.

policy" of promoting transparency in government. *See* RCW 42.56.030. But if the public policy of the PRA is to promote government transparency, as is so strongly stated in the Act, then what difference does it make whether a penalty is assessed on a per-page or per-record basis? To interpret the PRA with such a broad brush renders the statute meaningless, and instead of "ambulance chasers," *Gunshop* will create a new generation of "record chasers," or perhaps "paper chasers" is a more apt title. The intent of the PRA is to ensure taxpayers are aware of the functions of their government. But a per-page penalty for wrongful withholding of public records punishes taxpayers, because their money is being used to repay these penalties.

As the dissenting judge in *Gunshop* found, a per-page penalty is contrary to the intent of the PRA. Cogently, the dissent noted that in *Yousoufian,* the landmark case on PRA penalties, the Court found that penalties should be assessed on the basis of the agency's bad faith, not on the size of the request. *See Yousoufian,* 152 Wn.2d 421, 435 (2004). Hilariously, the dissenter reasoned that if a per-page penalty could be assessed, "[B]y this logic, a trial court could impose a separate penalty (of up to $100 per day) for each paragraph, sentence, or even *word* in a public record." We agree with the dissent in *Gunshop.* For the time being, understand that *Gunshop* places an even heavier burden on public agencies to strictly comply with the PRA.

Brief Reminder on Charging for Clerical Time in Searching for Medical Records

Speaking of records, recall that your department may charge for copies of medical records, but unlike the PRA, your department may also charge for the search for those records. Under the current WAC provisions, the department may charge $1.12 per page for the first 30 pages of medical records. Additional pages cost less. The department can also charge an additional $25 shipping and handling fee.

When Are Layoffs a Mandatory Subject of Bargaining? Court of Appeals Answers this Question

Recently, in *Kitsap County v. Kitsap County Correctional Officers Guild, Inc.* No. 73637-0-1 (2016), the Washington Court of Appeals ruled on when the decision to lay off employees should be collectively bargained as though it were a mandatory subject. To establish a foundation for this article, we look to the Public Employees Collective Bargaining Act, RCW 41.56. This law mandates that employers engage in collective bargaining with bargaining representatives with respect to issues impacting their wages, hours and working conditions. *See* RCW 41.56.030. Refusing to bargain is an unfair labor practice. RCW 41.56.140.

Under Washington law, when deciding whether a duty to bargain exists, there are two principal considerations: (1) "the relationship the subject bears to the wages, hours, and working conditions" of employees, and (2) "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *Local 1052 v. PERC* 113 Wn.2d 197, 203 (1989); *See Also Yakima County,* 174 Wn.App. 171 (2013). We will call this the "*Local 1052* Test." Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which the parties may negotiate. *Pasco Police Association*

v. City of Pasco, 132 Wn.2d 450, 460 (1997). Take note as well that it is an unfair labor practice to insist on bargaining a permissive subject to impasse. *Kitsap County v. Kitsap County Corn Officers' Guild, Inc*., 179 Wn. App. 987, 998 (2014).

The Public Employment Relations Commission (PERC) has found that "the size of an employer's workforce is a managerial prerogative, and therefore a permissive subject of bargaining." *City of Centralia*, Decision 5282-A (PECB, 1996). Be that as it may, the *effects* of a decision on a permissive subject (such as, layoffs, under the right circumstances) that has an effect on a mandatory subject (wages, hours and working conditions) must be bargained. But the bottom line from *Kitsap County* is clear: when in doubt, go to the bargaining table, and consult legal counsel first.

In *Kitsap County*, faced with large budget shortfalls, the chief of correctional facilities with the county sheriff informed his employees in an email to all correctional employees that the county would be laying off three employees. The next day, the bargaining representative ("guild") sent a letter to the chief demanding to bargain the *decision* to lay off these correctional officers "plus any associated effects/impacts." The guild insisted that "layoffs are a mandatory subject of bargaining."

The county agreed only to bargain the *effects* of the decision to lay off these two employees, but insisted that it was correct in refusing to bargain the decision to lay off the employees. The two employees were effectively laid off on January 1, 2012. The county sought a declaratory judgment in superior court that the guild committed an unfair labor practice (ULP) by insisting on bargaining the decision to lay off these employees to impasse.[3] In its brief to the superior court, the county argued that "PERC's decisions have created uncertainty about when layoffs are a mandatory subject of bargaining." The superior court found for the county: The guild committed a ULP by insisting to bargain the layoff decision to impasse—because the layoffs in this case were effectively a permissive subject of bargaining. The guild appealed first to the Division Two Court of Appeals, which found that the subject of layoffs, in this case, involved both mandatory and permissive subjects of bargaining. The Division Two court worried that there were not enough facts to establish that the superior court conducted the *Local 1052* Test, and therefore sent the case back down to the superior court. Then the superior court again found for the county. Again, the guild appealed, this time to Division One of the Court of Appeals ("Division One").

The issue before Division One was whether the decision to lay off these two employees was a mandatory or permissive subject. Division One began by noting that there are essentially two United States Supreme Court ("SCOTUS") cases that form the basis for analyzing whether a subject is mandatory or permissive: *Fibreboard* and *First National*. In *Fibreboard*, the employer laid off employees because it decided to contract work out that had previously been performed by the union. In *Fibreboard*, SCOTUS found that the layoff decision was mandatory because the employer made these layoffs for budgetary reasons. In *First National*, the employer shut down a part of its business, and laid off the employees that worked in that part of the employer's business. The SCOTUS found that layoffs were a permissive subject

[3] Yes, when a party alleges that a ULP has taken place, under certain circumstances, that party can bypass taking their claim to PERC first.

under the facts, because the employer's right to manage its business "purely for economic reasons," in that case, outweighed the employees' interest in participating in the decision.

Washington courts follow both *Fibreboard* and *First National*; the county argued that the situation at bar was more like the "partial shutdown" in *First National* than the "contract-out" that occurred in *Fibreboard*. The "duty to maintain a balanced budget," the county said, was indeed a "core managerial prerogative," and therefore the scale tilted towards the layoffs in this case being a permissive subject, under the *Local 1052* Test. The county stated that the guild, truly, was not demanding to bargain the layoffs themselves, but sought to bargain the county's "decision to reduce the budget." Division One found that if that were true, "the county's position would likely prevail." But that was not the case, said Division One: The guild specifically demanded to bargain the decision to lay off these employees.

Importantly, Division One noted that the county commissioners "did not specifically require or itemize layoffs of employees" in order to reduce the budget. Of course, Division One reiterated "*general staffing* levels are fundamental prerogatives of management," and are therefore permissive subjects. *See Local 1052*, 113 Wn.2d at 205 (emphasis added). But this principle of law, related to "general staffing levels," only applies to "programmatic decisions," such as whether a community "will have a large police force, a small one, or none at all," said Division One. *See Local 1052* at 205. In this case, said Division One, the chief of correctional officers did not make a "programmatic decision." He did not "decide as a matter of policy that the jail staff had become too large."

Instead, Division One reasoned, the chief made a unilateral decision that these two layoffs were the only way to comply with the budget set forth by the county commissioners. Thus, the chief's actions were unlike the "partial shutdown" in *First National*, because the decision did not fundamentally alter the employer's business model. The chief's decision was based on a desire "to reduce labor costs in order to meet the budget cut." Consequently, the layoffs in this case were a mandatory subject, and therefore the decision—not merely the *effects* of that decision—must have been bargained.

Division One underlined seven PERC decisions in which staffing cuts were found to be permissive subjects, because in those cases, the staffing cuts related to "closing operations, reorganizing, or changing the scope of services": a change in the employee's business model. But in those cases in which the employee laid off employees to "reduce labor costs," the layoffs were a mandatory subject. Ultimately, Division One found that a layoff decision motivated by reducing costs is mandatory; a decision to lay off employees based on a fundamental reorganization or a change in the scope of the service provided is permissive.

What is the ultimate lesson to be drawn from *Kitsap County*? There are truly two, one which we have already iterated: When in doubt about whether a subject is mandatory or permissive, go to the bargaining table prior to making a decision on that subject, but consult legal counsel first. Second, the ultimate holding of the *Kitsap County* court is that a decision to lay off employees, in order to effect a change in the services being offered by an employer, is probably permissive; a decision to change *who* does or does not provide the same services that were already provided by the employer—

motivated by budgetary concerns—is probably mandatory.

Case Note: The DRS Plays a Game of Cause and Effect, and Loses this Time

Recently, Division Two of the Washington Court of Appeals, in In *Shaw v. DRS*, No. 47166-3-II (2016), reversed the findings of the Department of Retirement Services (DRS), which found that duty-related injuries must be the "sole cause" of a potential retiree's ("retiree") disability, in order for that retiree to be entitled to duty-related disability. When interpreting any ruling by any Washington court, we must begin with the facts.

Frank Shaw was abused as a child. Because of this, he experienced "depression and anger management issues." In 1989, he became a firefighter/paramedic, and a member of LEOFF. He contributed to his LEOFF II pension until 2007, when he retired from active duty with Kittitas Valley Fire and Rescue. Shaw applied for a disability retirement based on his depression and stress; this application was initially denied, but upon further review, was granted in 2008. But DRS only granted Shaw a *non-duty* disability retirement.

He petitioned for review, and argued that he was entitled to a *duty-related* disability retirement under RCW 41.26.470. DRS denied the petition because Shaw's injury was not "work related." Shaw sought further review, on the grounds that he had PTSD, diagnosed by his psychiatrist in 2010. He claimed that his PTSD was aggravated by various specific duty-related incidents, including, but not limited to, an accusation of nonphysical contact with a teenage girl. In 2011, DRS again denied his petition, and Shaw filed a notice of appeal with the DRS. The issue before DRS, which became the issue before Division Two, was whether Shaw's disability was "incurred in the line of duty" under RCW 41.26.470 and WAC 415-104-480 (we will call this the "480 regulation"). The DRS appeals board again denied Shaw a duty-related disability retirement, but made no findings with respect to the causal connection between Shaw's employment and his disability. The superior court affirmed the appeals officer. Shaw appealed to Division Two.

Shaw presented an issue of first impression: What does "line of duty" mean under LEOFF II? Under the 480 regulation, "[L]ine of duty means any action or activity occurring *in conjunction with* your employment or your status as a law enforcement officer or firefighter and required or authorized by law, rule, regulations, or condition of employment or services." WAC 415-104-480 (emphasis added). Interestingly, DRS agreed with Shaw that the appeals board applied an inappropriate standard of review to whether Shaw was entitled to duty-related disability retirement. The appeals board found that LEOFF II-related duties must be the "sole cause" of the disability.

Because no Washington court had discerned the meaning of "line of duty" as applied in LEOFF II, Division Two borrowed definitions of "line of duty" from previous court decisions relating to LEOFF I benefits. Washington courts interpreting the definition of "line of duty" under LEOFF I have found that the disability must be "naturally and proximately" caused by the LEOFF member's work to be construed as a "line of duty" injury. *Dillon v. Seattle Police Pension Bd.*, 82 Wn. App. 168, 916 P.2d 956 (1996). In *Dillon*, a police officer injured his hand in an off-duty related incident. He retired on a non duty-related disability. Three years

later, the Seattle Pension Board ordered him back to work for the state patrol. The officer insisted that his hand injury precluded him from doing his duties. He suffered anxiety and depression because of this. He applied for duty-related disability retirement, and this was denied by DRS. The court of appeals reversed the DRS, on the grounds that the officer's anxiety and depression were "naturally and proximately" caused by his return to his former duties.

Looking to *Dillon,* the *Shaw* court found that the "sole cause" standard applied by the DRS appeals board was the incorrect standard. The *Shaw* court reiterated that to establish that the disability "naturally" resulted from one's duties as a LEOFF employee, one must show that his "particular work conditions more probably caused his disease or disease-based disability than conditions in everyday life or all employments in general." *Dillon* at 172-73. To show that a disability was "proximately" caused by one's duties, the person must demonstrate that they would not have contracted the disability were it not for the "aggravating condition of his job." *Id.*

Instead of engaging in whether Shaw was actually entitled to duty-related disability retirement, the court merely accepted the DRS's concession that the appeals board applied the wrong standard ("sole cause"), and remanded the case for further fact-finding—to establish whether the work-related incidents that Shaw suffered were the "natural and proximate" cause of his PTSD. The court remanded the case back to the DRS in order for the appeals board to apply the appropriate "natural and proximate cause" standard.

What *Shaw* stands for is that Washington courts—and because of *Shaw,* the DRS—will apply the same principle of proximate cause that is used in the context of worker's compensation, to interpret whether an injured firefighter is entitled to a duty-related disability retirement under LEOFF II.

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