FIREHOUSE LAWYER

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A Burning Constitutional Question

Many fire protection districts in the State of Washington, and probably in other states, are involved in the issuance of burning permits. While generally speaking fire protection districts, operating under Title 57 of the Revised Code of Washington, have no police power and do not enforce the Uniform Fire Code, in the area of burning permits, the fire district acts as a sort of regulatory agency. The statute gives the district the power to issue permits and regulate the conduct of open burning on private property. Occasionally, therefore, the question can arise with respect to entry upon private property by the fire department to ascertain whether illegal open burning is occurring.

For example, a property owner may be burning land-clearing debris without a permit, or even if they have a permit, they may not be staying within permit conditions. Since a property owner certainly has a reasonable expectation of privacy on certain portions of their property, which is private land, a question may arise concerning unreasonable search and seizure, under the Fourth Amendment to the United States Constitution, or parallel provisions in the state constitution. Does a fire district official, in exercising their authority under RCW 52.12 to regulate burning permits, have the authority to enter upon property without a warrant?

In a case currently pending before the Washington State Pollution Control Hearings Board, the Puget Sound Air Pollution Control Agency cited a property owner for unlawful burning under the State Clean Air Act, which is designed to protect against air pollution. Relying upon a warrantless entry by a fire district official and a local health department official, the Air Pollution Control Agency obtained evidence including photographs taken by the fire district official, tending to show that the property owner was burning not only vegetative land-clearing debris, but also construction materials imported onto the property from various construction sites. The materials appeared to include non-native materials such as steel rebar, air filters for automobiles, and similar items, that when burned, could create air pollution. The property owner had previously advised the fire district and other officials that they should keep off his property without prior notice, and had posted "no trespassing" signs. However, it appeared that the fires were located in open areas of the property, not close to any buildings. Obviously, if a property owner desired to burn significant piles of vegetative debris, such as stumps, yard waste, and the like, that would not typically be done within locked buildings or a person's residence, but rather in the open areas of the property.

A Burning Constitutional Question (Continued)

When the matter came before the Pollution Control Hearings Board, the property owner, through his attorney, made a motion to dismiss the penalty or citation against him from the air pollution control agency, arguing that the warrantless entry upon the land constituted an unlawful search and an unreasonable intrusion upon his private property, violating the state and/or federal constitution.

The law surrounding administrative searches of property, like this one, is well developed. However, most of the cases relate to whether a judicial search warrant, or an administrative search warrant of some kind is necessary to enter upon or into buildings. One of the leading cases, for example, arose in the City of Seattle. In See v. City of Seattle, 387 U.S. 541 (1967), the U.S. Supreme Court held that a warrantless fire inspection of a locked commercial warehouse was unconstitutional. The Court stated that a warrant based upon probable cause was needed. The Court also stated that the standard of reasonableness must be flexible in order to ". . . take into account the public need for effective enforcement of the particular regulation involved."

In the case of open burning, it seems reasonable to rely upon the "open fields" doctrine established by United States Supreme Court decisions as old as Hester v. United States, 265 U.S. 57 (1924). Sometimes we question whether these older cases are still good law. However, the answer to that question was provided by the Supreme Court itself in Oliver v. United States, 466 U.S. 170 (1984). In that opinion, the Court dealt with two separate fact situations, but both involved enforcement of drug laws against marijuana operations. In Oliver, in at least one of the cases, the property owner had clearly posted the property with no trespassing signs. In one of the Oliver cases, the trial court judge had suppressed evidence of the discovery of the marijuana field, applying the leading Fourth Amendment case of Katz v. United States, 389 U.S. 347 (1967), which examines whether the defendant had a reasonable expectation of privacy.

In Oliver, the court of appeals reversed the trial court, holding that the Katz case had not impaired the vitality of the open fields doctrine announced in Hester in 1924. The U.S. Supreme Court accepted the case in Oliver v. United States because it wanted to clarify confusion that had arisen as to the continued vitality of the Hester "open fields" doctrine. The Supreme Court in Oliver noted that in one of the two cases before the Court the property owner had done everything possible to exclude others. He posted no trespassing signs and locked the gate. The field itself was highly secluded, *i.e.,* it was bounded on all sides by woods, fences and embankments and could not be seen from any point of public access. (The discovery was done from an airplane.)

The rationale supporting the open fields doctrine was well expressed by the court of appeals in the Oliver case. That court pointedly stated that the "human relations that create the need for privacy do not ordinarily take place" in open fields. The same rationale could be applied to open burning of materials that are allowed under statutes like the one in the State of Washington. It does not make sense to burn those types of materials in your fireplace in your residence. While in most states, "a man's home is his castle" and the residence and the area immediately around it therefore enjoy a high expectation of privacy, the same may not be said for the open areas outside of your home. Most ordinary people do not engage in the most private acts (use your imagination) in the open fields, even if they are on their own property. Most of us can understand the distinction between a locked barn or warehouse, and the open fields of our own property.

Burning Constitutional Question (Continued)

Therefore, we submit that fire districts and other entities with jurisdiction over open burning laws, whether for the prevention of air pollution, or simply for fire and life safety protection as in the case of fire departments, should continue to use the open fields doctrine. In an area such as open burning, it is far too easy to put the fire out or escape detection, if the regulatory authority must seek a warrant. The evidence of open burning or as to compliance with detailed conditions is unlikely to remain if the extra time is taken to go and procure a warrant. Since the expectation of privacy would not be reasonable, we submit that the governmental interest in enforcing the regulations and gathering the evidence overrides any subjective, unreasonable expectation of privacy that a land owner might have in the conducting of open burning on their property.

In the case before the Pollution Control Hearings Board, it may be unlikely that an administrative agency will even deal with the issue. Typically, such administrative agencies recognize that they are not courts of general jurisdiction and therefore not empowered to interpret the state and federal constitution. Such constitutional law is the exclusive province of the court and therefore the matter probably will not be resolved at this level, but may be resolved on appeal to the superior court or higher courts at some later time.

Actually, both federal and state constitutions must be reviewed in order to obtain a definitive answer to the legal question. In Washington, and probably in some other states, the state constitution frequently provides a measure of additional protection to constitutional rights, above and beyond that mandated by the federal constitution. For example, in the open burning case, we discovered that Washington does not necessarily follow a "protected places" sort of analysis as suggested by the open fields doctrine. Instead, in Washington the court will look to the "reasonable expectation of privacy" analysis in order to ascertain whether the state constitution is satisfied. As implied above, we would argue that since one does not have a reasonable expectation of privacy in burning vegetative or construction debris on real property, then the constitution of the state is not violated by warrantless entry on the property by a fire district official to ascertain if the open burning is permitted or complying with the conditions of an issued permit.

FLSA 7(k) Update

On December 7, 1998, the Supreme Court declined to hear the case of Anne Arundel County v. West, No. 98-266. The Court's refusal to hear the case does not necessarily equate with an affirmance, but it certainly suggests that fire departments had better be extremely careful concerning assignment of work to emergency medical personnel, if they intend to use the Section 207(k) exemption from the FLSA.

Generally, employers must pay employees time and one half for overtime work beyond 40 hours in a work week. However, Section 207(k) allows police and firefighters to work more hours over work periods ranging from 7 to 28 days, without being entitled to overtime pay. In the Fourth Circuit case, in February 1998, the court ruled that because the emergency medical personnel had virtually no participation in firefighting and were restricted to answering emergency medical calls, they did not qualify for the exemption.

The EMTs spent less than 80% of their work time engaging in firefighting, as required under 29 CFR 553.212. The circuit court simply concluded that these were medical personnel and not firefighters.

FLSA 7(k) Update (Continued)

The Supreme Court declining review seems to suggest that the Court agrees with the Fourth Circuit and a few other circuits (see below) that have already so ruled. As previously reported in the Firehouse Lawyer, (see Vol. 2, No. 4 in April, 1998) the Eighth Circuit ruled otherwise and the U.S. Supreme Court denied review in that case as well. We believe that there is enough at stake (and the Circuits do not agree) that the Supreme Court should have resolved this controversy. Now Congress or the Department of Labor should revise the statute and regulations to make it clear.

In the Anne Arundel County case, the EMTs would share a back pay award ranging from 3.5 to 4 million dollars. The case involved the "80/20 rule".

Initially, some courts ruled that EMS personnel who are regularly dispatched to fires do qualify for section 207(k) exemption. See, e.g., Bond v. City of Jackson, Mississippi, 951 F.2d 347 (5th Cir. 1991) and Littlefield v. Town of Old Orchard Beach, 780 F.Supp. 64 (D.Me. 1992). Later however, several circuit courts, in a series of decisions, established a test for determining whether employees could be considered exempt under Section 207(k). The Sixth, Seventh, and Eleventh Circuits all issued decisions establishing the "80/20 Rule", which has more recently been applied in the Fourth Circuit case. See Spires v. Ben Hill County, 980 F.2d 683 (11th Circuit 1993); O'Neal v. Barrow County Board of Commissioners, 980 F.2d 674 (11th Circuit 1993); Justice v. Metropolitan Government of Nashville, 1 Wage and Hour Cases 2nd (BNA) 1025 (6th Circuit 1993); Wouters v. Martin County Florida, 1 Wage and Hour Cases 2nd (BNA) 1335 (11th Circuit 1993); Nalley v. Mayor and City Council of Baltimore, 1 Wage and Hour Cases 2nd (BNA) 1033 (D.Md. 1993); and Alex v. City of Chicago, 29 F.3d 1235 (7th Circuit 1994).

Basically under the "80/20 rule" an EMS employee can only remain exempt under Section 207(k) so long as the employee does not spend more than 20 percent of his or her time performing non-exempt duties. The question becomes, therefore, what are non-exempt duties.

Obviously, a firefighter serving on an engine company does not spend 80 percent of their time actually fighting fires. However, it has long been well settled that incidental duties performed by firefighters, included but not limited to housekeeping, station maintenance, vehicle maintenance, drill, classroom education, and the like are all considered incidental duties. All of that time constitutes exempt work.

Non-exempt work is something different. The example given in the regulations at Section 553.212 (where the 20 percent limitation on non-exempt work is discussed) is somewhat instructive. The regulations state that employees engaged in fire protection activities as described in the primary subsections, may also engage in some non-exempt work not performed as an incident to or in conjunction with their fire protection activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to firefighting duties. The performance of that non-exempt work does not defeat their 7(k) exemption unless it exceeds 20 percent of the total hours worked.

We submit that the courts, the Department of Labor, and all of the agencies should not focus only on the "80/20 Rule" developed by the cases. That "80/20 Rule" is contained in Section 553.212, but first the analysis should begin with Section 553.210 "Fire Protection Activities".

In that section, there is a four-part test to see if a person

FLSA 7(k) Update (Continued)

qualifies as an employee engaged in fire protection activities. The test has four questions: (1) Is the employee employed by an organized fire department or fire protection district? (2) Have they been trained to the extent required by state statute or local ordinance? (3) Do they have the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type? and (4) Do they perform activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including incidental non-firefighting functions as discussed above?

Just looking at that four-part test, if a paramedic or EMT does not meet all four parts of that test they do not qualify. Therefore, if we suppose that they have no job description requiring them to engage in the prevention, control or extinguishment of any fires, they do not meet all of the criteria. If they do not perform activities relating to fires, then they do not qualify. The last sentence of 553.210(a) does state: "The term (any employee . . . in fire protection activities) would also include rescue and ambulance service personnel if such personnel form an integral part of the agencies fire protection activities".

Now, we focus on that question. How could a paramedic or an EMT who only works on medical calls and does emergency medicine only qualify as an integral part of the public agency's fire protection activities? Would it be enough if their job duties included responding to fire calls to look out for the physical well being of the firefighters, and provide them with emergency medical care?

Using this analytical approach, we would conclude that EMT personnel such as paramedics and EMTs whether employed by a fire protection district or another organized fire department such as a city or municipal department cannot qualify for the 7(k) exemption if their job duties do not include prevention, control or extinguishment of fires. It seems to me that it comes down to the way a fire department is organized, and how they deal with their call volume. Since, in many departments there is a sufficiently large call volume (and over 70 percent of the total call volume is EMS related and not fire related) it makes sense to have personnel devoted almost exclusively to delivering emergency medical care. These paramedics and EMTs are in effect placed in an EMS division and do not as a significant part of their duties fight fires or anything incidental to that. Therefore, they should simply be considered medical personnel and non-7(k) exempt.

If the call volume is not sufficient, or if a fire department is organized differently, there may well be employees engaged in fire protection activities who have ancillary duties in the field of delivering emergency medical care. Those employees would qualify for the 7(k) exemption. That is because their job descriptions show that they meet the four part test of 553.210. Now, it is these employees who must be careful about the "80/20 Rule". These employees clearly meet the four part test for employees engaged in fire protection, but they still should not spend more than 20 percent of their time performing emergency medical care, such as the aforementioned ambulance and rescue personnel. It seems that it could get very difficult to determine what time counts as non-exempt activities.

For example, suppose a firefighter/paramedic spends 15 percent of total work time in a typical work period on emergency medical care delivery. Suppose, however, that training and drill for these cross-trained personnel involves 10 percent of their work time, but the training and drill is approximately equally divided between training on their firefighter duties and training on their EMS duties. Can that

FLSA 7(k) Update (Continued)

training all be considered exempt work? Or is the training related to the emergency medical care non-exempt work like the actual delivery of emergency medical services?

After the Anne Arundel case, a strong argument can be made this is incidental to non-exempt work and could disqualify the person. This kind of example points up the obvious need for Congress and the Department of Labor to review these court decisions and see if they relate to what is actually happening in fire departments across the United States. To this observer, it is obvious that the state of the law is ridiculously out of touch with the needs of the modern fire department. If there are good, solid public policy reasons for the 7(k) exemption to apply it to firefighters, then it seems to me that there are just as strong policy reasons to apply it to their cohorts on the EMS side of the fire department. While a United States Supreme Court decision might resolve the conflict between the federal circuit courts of appeal, the only real way to resolve the differences in interpretation is for congressional clarification and/or administrative clean-up of the regulations.

Sector Boss

An arcane and archaic term in the fire service, a sector boss was the guy who was called upon when the chips were down, to put out the fire. In other words, the sector boss has all the answers. (You have to admit, it is much more exciting than "Q&A column".)

Disclaimer

We need to clarify the purpose of this question and answer column. Like the Q&A column in any newspaper, the purpose of the Sector Boss column, and indeed the purpose of the Firehouse Lawyer newsletter, is to educate with respect to the law, but not to give legal advice to any particular client. There is no attorney-client relationship, simply because an agency or person has sent in a question to the newsletter editor. The Sector Boss column is not a free legal clinic for those submitting questions, even if they happen to be clients of Joseph F. Quinn. In other words, the purpose of this column is to answer short legal questions if there is room in the newsletter. A question may or may not be selected for publication. There may simply not be room. Joseph F. Quinn is not practicing law in any state except Washington, and therefore materials in the Firehouse Lawyer are not a substitute for obtaining legal advice for a particular situation. Therefore, readers are advised to consult with a qualified and competent attorney in their state or with respect to the federal questions sometimes discussed here.

Now that we have cleared up any confusion, let's try to educate and answer some interesting questions!

Q: My question pertains to report writing. Specifically, I was trained on the importance of writing clear and concise EMS reports. Specifically, I was taught that only one person's handwriting should appear on such a report. I was led to believe that there were legal reasons for this rule. Please advise as to the issues related to multiple handwriting versus single handwriting appearing on an EMS report.

M. from Arizona

A: I suppose this is a question that could vary from state to state, and I can only express my opinion as to the law in the State of Washington. There do not appear to be any federal requirements that would be applicable.

There are no legal requirements in Washington based on state law or regulation

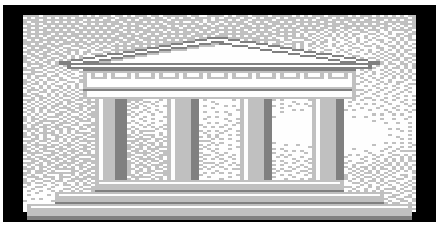
Sector Boss (continued)

that would require only one person's handwriting to appear on an EMS report.

I suspect that your training may have related to the practical problems that could arise in a legal setting, with an EMS report "written by committee". As with any other type of report, in a courtroom, the witness is testifying about the report, which is an exhibit. It may be more difficult to testify concerning that report if it is written by committee, as the competence and personal knowledge of the witness could be challenged. However, it is not uncommon for an expert witness to testify concerning a complicated report that has been prepared under his or her supervision with the assistance of other personnel employed by the same company. So long as the expert witness familiarized himself or herself with the details of the report noted by the other persons, the witness would still be competent.

There may be other reasons for your training, but they are more practical than legal. As a practical matter, to avoid inconsistencies of style, or even content, it might be preferable to have just one report writer. That report writer could collect input from any person at the scene and include it in the EMS report. This could tend to lead to more uniform and high quality reports.

In summary, I doubt that the reasons for a single hand on the reports were truly legal reasons, but were probably practical ones.



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