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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, contract negotiation, and property taxes and financing methods, among many others!!!

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Inside this Issue

Three Bills of Interest...
By Joe Quinn

In this article we will discuss three bills in this order: HB 1166, SHB 1467, and ESSB 5875.

The first bill—HB 1166—is important for one thing: fire districts and RFA's will no longer have to employ or contract for a minimum of one full time employee before qualifying for the "third fifty cents" allowed by RCW 52.16.160 for fire districts and by RCW 52.26 for RFA's. This bill is on the Governor's desk.

The second bill is SHB 1467. This bill deals with benefit charges, which is an alternate form (or supplemental really) of financing for fire districts and RFA's, as contrasted to the more common ad valorem property taxes. The main changes wrought by this law are as follows. For fire districts, the benefit charge is not applicable (they are made exempt) to public housing authority properties or other similar tax exempts and nonprofits that provide housing to low income persons, the elderly and the developmentally disabled, generally speaking. There is an exception made for fire districts that are (1) smaller than four square miles; (2) had already established benefit charges prior to this law taking effect; **and** (3) are serving a population of more than 19,000.

As for RFA's, the same kinds of property are exempt, but I do not see that the exception delineated above is applicable to RFA's.

Also worthy of some mention is that there must be—for both fire districts and RFA's—an annual review of how the system is working for these exempt properties. If it is not working correctly it can be changed, but as I see it, this language was inserted as a carrot to the fire departments and probably annual reviews will not lead to much change in our opinion. Only if it could be proven that these properties—or some of them—are getting an inordinate amount of calls/responses could the annual review lead to adjustment. We shall see if that provision is used to that effect, but I doubt it.

One more thing about this bill: when it discusses the "continued imposition" of a benefit charge (sometimes called a renewal by some) it clearly states that only a majority is needed. However, it also seems to quite clearly say that it must be continued for six years, no more and no less. In other words, there will likely no longer be an option to "renew early," as some of my clients have done. I believe this bill also is on Governor Inslee's desk.

The final bill is an offshoot of one we discussed recently in the *Firehouse Lawyer*.[1] In ESSB 5875, the Senate is proposing to tweak the earlier proposal for changing the funding for schools. If you read the earlier article, you know that the earlier bill called for a "local levy effort" that would be counted toward the constitutional 1% limit. As you know from previous study and articles here, in effect the Washington State Constitution prohibits exceeding $10.00 per thousand of assessed valuation. All of our readers should read the *Firehouse Lawyer,* and the bill digest, especially the one on ESSB, as it now stands, to truly understand how this limit works and how it can lead to prorationing. We expressed great concern (and many of our clients did too—to the Legislature) about how the State could levy up to $1.80 per thousand for the local levy effort for schools, when the State can levy up to $3.60 and the senior and junior taxing districts can levy up to $5.90. That only leaves a fifty cent gap, but remember for example that the EMS levy (which *does* count in the $10.00 albeit *not* the $5.90) can be as high as 50 cents. We pointed out how easy it would be to "eat up" the whole $10.00 using this local levy effort for schools, thus leading to widespread prorationing for junior taxing districts.

Maybe the Legislature listened. ESSB 5875 would limit the local effort to $1.55 instead of $1.80. Also, it would address another issue. The prior version basically said the State would try to appropriate a fund to cover any prorationing losses junior taxing districts like fire districts and RFA's might suffer. So it was a "maybe, and we'll try." Now under ESSB 5875 it is a state guarantee that any such losses will be 100% covered. I feel a lot better, don't you? Of course, it seems to me that money will still be subject to a state budget appropriation. Have faith, it will all work out in the end. I hope.

Never Negotiate With a Jar of Muddy Water

A contract is a piece of paper. Negotiation is a state of mind.

Mindfulness practitioners often refer to the mind as a "jar of muddy water," which is filled with needless thoughts and conjecture. These

[1] http://www.firehouselawyer.com/Newsletters/February2017FINAL.pdf

practitioners insist that the more we draw attention to our thoughts, without *clinging* to those thoughts, the more we recognize neutral and objective criteria: the "jar of muddy water" becomes clear and our mind uncluttered.

Utilizing this concept of the "jar of muddy water," this month, we discuss a fundamental principle of everyday life: We must negotiate at least one transaction at any given time during the day. We may simply be going to the grocery store, in which case the prices are set, as advertised, and we are left with those prices. Pretend that we purchase one yogurt from the grocer for $.99. This only a "negotiated" transaction in the sense that we have informed the grocer that a yogurt is worth more to us than our $.99, and the grocer has made clear our money is worth more to him than the yogurt. There was no "bargain," per se, but there was mutual assent that this yogurt was fairly priced.

On the other end of the spectrum, there are examples of classic negotiation, in which we may be negotiating a contract to provide fire protection to a city, Indian Tribe,[2] or school.[3] We may be negotiating a collective bargaining agreement, in which case the parties are the employer and the union.[4]

Long ago, the concept of "positional bargaining," in which the parties bargain based on their initial position, gave way to "interest-based bargaining," in which the parties start by identifying the interests of each side and proceeding to negotiate an agreement based on adherence to objective criteria, such as the wages and salaries of comparable jurisdictions,[5] the Kelly Blue Book, and rates for services established by state agencies.

This concept was fully realized in the National Bestseller *Getting to Yes*, in which members of the Harvard Negotiation Project posited that "[N]egotiation is a fact of life." One aspect of the formula for negotiation espoused in *Getting to Yes* is the concept of the "BATNA": the Best Alternative to a Negotiated Agreement. At the core of the BATNA is the idea that one should not negotiate on the basis of a "bottom line," but should consider the alternatives to the bottom line. For example, pretend that a police department is willing to lease office space to your public agency, and is proposing a rent of $1,000 a month. Your agency is seeking to improve relations with this police department, which has hired a new chief. But your agency has determined that $1,000 is a stretch, so the agency establishes a "bottom line" (the most the agency is willing to pay) of $900.

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2 http://www.firehouselawyer.com/Newsletters/v12n03sep2014.pdf

3 Schools are not required under RCW 52.30.020 to contract for fire protection, but this does not mean that negotiation is impossible: The current per-pupil cost for fire protection is $1.213953 per pupil, as established by the Office of the Superintendent of Public Instruction (see page 75): http://www.k12.wa.us/safs/PUB/ORG/15/OrganizationFinancing2015.pdf

4 http://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Collective+Bargaining+

5 http://www.firehouselawyer.com/Newsletters/v07n06jun2007.pdf

Instead of searching for other agencies or parties that may offer a lower monthly rent, your agency immediately commences negotiation with the police department. Your agency is not able to articulate that any other agency or person is offering a lower price for the same amount of office space (to establish objective criteria). The police department insists that $1,000 is the final price. Strictly adhering to your bottom line of $900, the deal collapses. But pretend that your agency does some homework:

First, your agency contacts the local public utility district, which offers a monthly rent of $925. This is above your bottom line, but is less than $1,000. Second, your agency contacts a third-party private landlord (a bank), who is willing to lease out space for $875. This is below your bottom line, and is less than $1,000. But your public agency certainly would not enjoy the good will that may be fostered by sharing office with this police department, and the mentorship that may occur between your agency's chief officer and the new police chief.

After doing this homework (establishing a BATNA), your agency approaches the police department, which insists that $1,000 is the final price. But you inform the police chief that you have found the same office space for $925 at the public utility district, and $875 from the bank. Then you inform the police chief that a rental agreement with the police department would bolster relations between two public-safety agencies, rather than frittering away $925 or $875 on a relationship that may indeed not improve public safety. You illuminate the fact that your chief officer, who has been in public service for 35 years, has institutional knowledge that the police chief may benefit from.

You make an offer of $950. The police department accepts this offer, after hearing more about fostering this public-safety relationship, and learning about the BATNAs (objective criteria) you discovered. Both parties have signified to each other that the $50 each would otherwise not have spent ($50 *above* your agency's bottom line and $50 *below* the police department's bottom line) is worth *less* to them than establishing a relationship of trust between two public safety agencies—much like the cup of yogurt at the grocery store. The parties stopped negotiating with a "jar of muddy water," but instead used objective criteria. The parties made a fair deal.

Another Alternative Revenue Source: The 450 Tax

In the spirit of negotiating without a "jar of muddy water," let us consider a drastically under-utilized funding mechanism, which may be utilized with proper contracts in place.

Under Washington law, **counties and cities** have general police power, and may tax and spend for the general welfare, subject to any applicable "general laws"—i.e. state and federal statutes. *See* Article XI § 11 of Washington Constitution. This taxing power can sometimes be advantageous to fire departments and law enforcement:

Under Washington law, a county or city may impose an additional sales and use tax[6] of "three-tenths of one percent of the selling price in the case of a sales tax, or value of the article used, in the case of a use tax." RCW 82.14.450 (1). If a county or city chooses to impose the

[6] For purposes of this article, we shall call this sales and use tax the "450 Tax."

450 Tax, such entity must submit the measure at a primary or general election; imposition of the tax requires majority approval.

Importantly, 450 Tax money received *by a county* must be distributed in the following manner: "Sixty percent must be retained *by the county* and forty percent must be distributed on a per capita basis to *cities* in the county." RCW 82.14.450 (6) (emphasis added).

Most importantly, "[O]ne-third of [the 3/10 of one percent] *must* be used solely for criminal justice purposes, fire protection purposes, or both." RCW 82.14.450 (5) (emphasis added).

Using Contractual Negotiation to Establish 450 Tax Revenue for Fire Departments

The Interlocal Cooperation Agreement (ICA) permits two or more public agencies to enter into agreements for joint or cooperative action—to jointly perform or take advantage of the statutory powers that each public agency may exercise on their own. RCW 39.34.030 (2). Ultimately, one taxing district may not subsidize another taxing district. RCW 43.09.210.

Because fire districts and regional fire authorities are public agencies with specific statutory powers, these fire departments may, within limitations, enter into an interlocal agreement (ILA) with a county and/or a city[7] to share in the revenues of the 450 Tax, within the limits provided by law.[8]

Any cities might agree, **by contract**, to remit some or all of their 40 percent to fire departments. Of course, as permitted by statute, the cities could split the 40 percent of 450 Tax revenues (40% of 3/10 of one percent) between police and fire.

Additionally, because a county may retain 60 percent of the 450 Tax revenue—and RCW 82.14.450 (6) does not define the word "retain"—the county may default to its Article XI § 11 general police powers.[9] In other words, a county may utilize this 60 percent in whatever manner the county sees fit. For the sake of discussion, let us pretend that a county seeks to levy the 450 Tax, as a "health and safety tax," to be allocated to police and fire. This is subject to the following *legal* limitations:

First, the county must place the 450 Tax measure on the ballot, which must be accompanied by an explanatory statement that delineates how any 450 Tax revenue would be allocated. *See* RCW 82.14.450 (1). Second, the county must enter into an ILA with at least one fire department, and any other municipal corporations, such as cities, to share in these revenues, to necessitate a "fair exchange"; such an ILA would ensure that the county is not "subsidizing" any other taxing district. *See* RCW 43.09.210. Finally, the county must ensure that at least one third of the 450 Tax is allocated to law enforcement or fire protection, or both. Of course, the Parties—cities, counties and other public agencies—may agree, by

[7] For purposes of this article, we will assume that the ILA is entered into between the fire department(s), cities (with police departments), and a county.

[8] Recall that one third of the 450 Tax revenue *must* be used for "fire protection purposes, criminal justice purposes, or both."

[9] Recall that a county may tax and spend for the general welfare, subject to Washington and federal statutes.

contract, to remit the **entire** 3/10 of one percent to police and fire.[10] A county may agree**, by contract,** to remit its entire 60% share of the 450 Tax (3/10 of one percent) for the purposes of fire protection or law enforcement, or both. Again, cities may do the same.

However, a second question remains: How might a fire department, or a group of fire departments, *convince* a county (1) to enact such a measure to impose the 450 Tax; and (2) that the county—and the cities—must remit at least one third, and could perhaps remit all 3/10 of one percent of 450 Tax revenue to police and fire? The fire department should not arrive at the bargaining table with a "jar of muddy water."

Perhaps multiple fire districts—and cities—might consider establishing a non-profit corporation, via ILA, for the purposes of brainstorming and encouraging alternative revenue sources, which logically could include the 450 Tax. Of course, an association of fire commissioners could exercise similar collective power. Aware of such collective power, a county may be more inclined to listen to this proposal and put the 450 Tax on the ballot.[11] In other words, before proposing the 450 Tax to a county, a TEAM needs to be established.

In lieu of forming a non-profit corporation to campaign for the 450 Tax, various fire departments might simply reach out to counties, cities (which provide law enforcement), and any other fire departments (collectively the "Parties"), with the following proposal:

First, the department(s) would inform all about the 450 Tax, and what that tax entails;

Second, the department(s) should prepare to present the math behind the 450 Tax. For example, a fire department might present the following hypothetical: Assume that the voters approve the 450 Tax. Under this assumption, pretend that a person purchases lumber for $10,000.[12] The 450 Tax would permit 3/10 of one percent of that sale be allocated toward the counties and cities (60/40). That would mean that $30.00[13] would be remitted to the county to distribute, and at least one third of that ($10.00) must be allocated to fire protection and/or law enforcement;

Third, the department should explain why the Parties should be interested in entering into an ILA to share 450 Tax revenues. Speaking to the above hypothetical, the department might explain that as little as $10.00 per $10,000 *must* be, and as much as $30.00 per $10,000 *could* be allocated toward fire protection and/or law enforcement. In either scenario (law and fire receive "one third" of 3/10 of one percent, or the full 3/10 of one percent), a "fair exchange" must

[10] It should be noted that because the 450 Tax is not a property tax levied by fire districts or RFAs, that the statutory limitations imposed on fire districts and RFAs (up to a $1.50 per thousand dollars of AV) are not applicable to revenues derived by a county from the 450 Tax.

[11] The use of collective power could also be used to lobby for the collection of impact fees and SEPA mitigation measures, which require that the county adopt such fees as part of the capital facilities element of a comprehensive plan, or adopt such fees in a local land use code.. *See* RCW 43.21C.060 and RCW 82.02.060.

[12] It is important to note that the of sale automobiles, or the lease of automobiles, for up to 36 months into the lease, are NOT subject to the 450 Tax. *See* RCW 82.14.450 (4).

[13] We arrive at this number with the following calculation: 10,000 x .01 (one percent) x .3 (three tenths)

be negotiated between the Parties, as required by RCW 43.09.210.

Of course, law enforcement should be at the table to stake its claim to the "one third"—and as much as three tenths of one percent—of 450 Tax revenues. Finalization of the 450 Tax revenues allocated will depend on the Parties that enter into a Master ILA.

Perhaps we might play with some numbers:

Pretend that there are $50,000,000 of sales in a county. That equates to $150,000 of 450 Tax revenue (three tenths of one percent of $50,000,000). (In one typical county we considered, .3 of 1% of their typical eligible sales actually appeared to at least $4 million!) Although this would have to be allocated among the Parties to a particular ILA, the 450 Tax revenue could be substantial. Furthermore, because this 450 Tax is not a property tax, but a sales and use tax, this would simply arrive every year, without further vote of the people, unless of course, the voters sought a referendum or the legislature repealed the law. And the original imposition of the 450 Tax would only require a simple majority. In other words, the 450 Tax is a revenue source which should be considered by fire departments and law enforcement agencies.

SAFETY BILL

Speaking of bills…we cannot forget the Safety Bill Column this month. However, due to a space shortage, I will keep it brief. We would just like to remind all readers that the vertical safety standards *require* you to create and maintain some OSHA Forms. For example, WAC 296-305-01501 *requires* all fire departments to create annually their OSHA Form 300A, the summary of all injuries and illnesses reported in the previous year. You have to post that summary form by February 1 of the following year, and keep it posted (on a bulletin board, for example) until at least April 30th. We recommend just keeping it up there until 2/1, then take it down and put up the new one. You also have to create and retain the reports as to each on-the-job injury.

Another little tip: We noticed that when the safety standards were amended a couple of years ago, there is now a tendency to require departments to observe or follow the "manufacturer's recommendations." See, e.g. WAC 296-305-02004 (d), where the WAC now *requires* you to observe or follow the manufacturer's recommendations as to the care, use and maintenance of any eye protection. This is subtle, but important that now "recommendations" have been converted into mandatory rules! And that WAC is only one of many such rules we found in WAC 296-305.