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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!!!

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Inside this Issue

LEGISLATIVE PROPOSALS FOR 2016

Although it is a short session (60 days) of the State Legislature this year, a surprising number of bills have been dropped already that would affect the fire service. Herein, we summarize and comment upon most of the bills proposed so far, as this is written at the end of January 2016.

WFCA PRIORITIES: The following bills have been identified by the Washington Fire Commissioners Association as priority bills. SB 6250 would allow paid firefighters employed by fire districts or cities, who want to volunteer in another fire district (such as, where they reside) to do so, without fear of retaliation or discrimination from employer or employee groups. Over the years, there have been a few instances where certain union rules or bylaws have prohibited or discouraged such volunteer service. We are unfamiliar with any employers who have prohibited this, but maybe that has occurred somewhere. WFCA supports SB 6250. In reviewing the original bill, we note that it not only protects such volunteering but also applies to part-time or paid on-call employment that such a paid firefighter might want to seek. The bill allows such volunteering or employment if it does not conflict with their performance of the original employment.

It is unclear at this point what the public employee local unions might think of this bill. Over the years, there have been a few instances in which some locals or the IAFF have resisted such volunteering for their own "membership" reasons, or even enacted bylaws prohibiting or discouraging this practice.

HB 2148 would authorize local governments to request a private financial audit in lieu of one performed by the State Auditor. When we have considered this in the past, it seemed that the cost was significantly higher for a private CPA. The bill would also allow appeals of state audits under the Administrative Procedure Act (APA). WFCA also supports this bill. We think the bill as originally written is ambiguous insofar as it states: "The state auditor must approve the request." That appears to state that the SAO has no discretion to deny the request, but we think perhaps they meant to provide: "Any such request shall be submitted to the state auditor and if the request is approved, the agency may contract for a private audit."

SHB 1745 would provide for a state voting rights law that might impact local governments negatively. WFCA is asking the legislature to take fire protection districts out of this law. We are aware of no violations of the federal Voting Rights Act by fire districts so an exemption would seem to make sense.

REVENUE ISSUES

HB 1605 is an important bill and was introduced last year. It would provide for permanent fire benefit charge for RFA's and fire districts, upon a 60% super-majority vote, with a 40% validation requirement like excess levies require now.

However, we note that this bill has recently been replaced by SHB 1605, which is quite different in one respect. Now the bill has a number of exemptions from benefit charges, primarily in favor of nonprofits and housing authority properties. Many readers may not know this but there has been an ongoing "battle" for many years between agencies (fire districts and RFA's) and public housing authorities over fire benefit charges. These tax-exempt entities simply do not believe they should be subject to these charges even though their properties are often multi-family uses no different than apartment houses that generate many, many fire department responses. Perhaps these additions may be the price the agencies have to pay to get this otherwise good legislation approved. However, we just wanted to make sure affected agencies know the details of SHB 1605.

HB 1009/SB 5000 would authorize rural counties providing EMS to locations with "rural amphitheaters" to impose added admissions surcharges so they could reimburse hospital districts and fire districts. "Rural amphitheater" is defined as an outdoor amphitheater with a capacity to accommodate greater than 10,000 people at one time in a county with less than 150,000 population. This appears to be very narrow, special litigation.

GMA/ANNEXATION ISSUES

HB 2732/SB 6451 would allow a city to annex into a fire district by election only of city residents, not the fire district voters (as is now done) with the fire district accepting the annexation without an election, with approval only by the Board of Fire Commissioners, thus saving election costs for fire districts. Simple but good idea. That is essentially how it is done now when territory in a fire district is annexed into a city, i.e. the city voters do not get to vote to accept or reject the territory.

HB 2708/SB 6387 would authorize a city or town to form a fire district within the city or town by election. Historically, fire districts were only allowed to be formed in unincorporated areas. This opens up the option of forming a fire district without annexing to a neighboring fire district or RFA. Why not? The bill would allow the process to start by a 10% voter petition or alternatively, by resolution of the legislative body of the city or town, but also culminating in an election. The process appears to be very similar to RFA formation laws, especially if the financing plan includes fire benefit charges, as in such case a 60% supermajority is needed for approval. One oddity is that the board of commissioners of a district started by resolution and not by petition, entails the board of fire commissioners being made up of the city's elected council. If started by petition, the board of fire commissioners would be the usual independently elected officials of the new taxing district.

OPMA

HB 1425 would require advisory boards, committees and other entities created by a public agency to comply with OPMA. It seems to me that some do this already even though arguably they do not have to, as they are merely advisory. WFCA opposes this as written.

OTHER ISSUES

HB 2321 would provide for RFA's some statutory provisions that fire districts already enjoy, so this bill is long overdue, and is part of a continuing effort to "perfect" the original RFA legislation. This would remove some current disincentives to forming of new RFA's.

HB 2722/SB 6393 would authorize using a small works roster to award public works contracts up to an estimated contract amount of $500,000, increasing the current top threshold. This bill, with 27 separate sections, makes changes to all of the state and local agency statutes pertaining to small works, so it merits further in-depth study. At first glance, the concepts remain the same and the dollar limitation increase is the major change.

HB 2348 would remove the requirement that county and city fireworks ordinance go into effect no sooner than one year after adoption, when those ordinances are more restrictive than the minimum statewide standards. WFCA supports HB 2348.

HB 2709/SB 6416 would create a firefighter memorial license plate program. Proceeds would go to honoring firefighters killed in the

line of duty, with a memorial on the State Capitol campus.

HB 2805 would require the Department of Labor and Industries to begin rule making to require reporting of all hazardous exposures in the course of employment.

HB 2806/SB 6520 would expand the list of cancers rebuttably presumed to be occupationally related. This would include fire investigators and EMTs for occupational diseases.

CASE NOTE: PRIVATE SPEECH, PUBLIC EMPLOYEES, AND RETALIATION

In *Heffernan v. City of Paterson*, (14-1280), the United States Supreme Court (SCOTUS) shall decide a question of paramount importance: To raise a First Amendment retaliation claim, must public employees show they were fired for actually engaging in constitutionally protected activities, or can they simply show that they were *perceived* to be engaged in protected activities?[1] In *Paterson*, the mayor of the city was up for re-election, but a former police chief campaigned against him. A police detective was friends with the police chief. But he did not publicly support either candidate. One day, his mother asked him to pick up a yard sign for her, supporting the former police chief. The detective went to the campaign center for the chief. He spoke with the campaign manager, and obtained a sign. An officer on patrol in the area saw the detective interacting with the campaign manager. The detective obtained the sign, then dropped it off with his mother. He did not put up the yard sign in her yard. The officer who saw him at the campaign center reported this to his supervisor.

The next day, the detective was demoted to patrol officer. He protested this. His supervisor informed him that he was being demoted for engaging in political activity. The detective sued for violation of his First Amendment rights. His claim was dismissed on summary judgment, the lower courts finding that the First Amendment only protects the *actual* exercise of protected activity (political expression and association). Consequently, the lower courts decided that public employers may discipline their employees for their speech or association, based on mistaken information—even if the employer incorrectly perceives that the public employee was engaged in protected activity—without violating the First Amendment. In other words, the employer won. This case boggles the mind.

Before SCOTUS, the detective is arguing that the First Amendment protects public employees from adverse action for engaging in political activities or association, despite the true nature of the employee's activities. The city argues that the First Amendment only protects "the literal exercise of association and speech."

We at the Firehouse Lawyer represent the employer-fire department. But the ruling of the lower courts may fly in the face of the First Amendment. If SCOTUS affirms the lower courts, a public employer may discipline an

[1] See the link to the Supreme Court Preview for this case: https://www.law.cornell.edu/supct/cert/14-1280

employee for engaging in what the employer perceives to be protected First Amendment activity; but if the employer turns out to be wrong, the employer has not violated the First Amendment, under *Paterson*. When a public entity is sued under 42 U.S.C. ¶ 1983, the plaintiff must generally prove that the public entity acted with the intent to violate the plaintiff's constitutional rights. So what difference does it make whether the employee was engaged in protected activity or not, if the employer intentionally disciplined him or her for engaging in private speech on a matter of public concern?[2]

In the end, the employer should not discipline an employee for engaging in private speech on a matter of public concern—i.e. speech that does not relate to one's job but may be of interest to the average citizen. This is true despite whether the perception of the employer is correct. Stay tuned, as *Heffernan* has not yet been decided by SCOTUS, but will be soon.

CASE NOTE: WHEN IT COMES TO UNION DUES, WILL THE UNIONS LOSE?

Another crucial case before SCOTUS is *Friedrichs v. California Teachers Association*, (14-915). The question at issue in this case: Does it violate the First Amendment to require an employee that opts out of union membership to pay a representation fee? The payment of representation fees by non-members is a common practice.[3] Plaintiff teachers, who are not represented employees but must pay representation fees, claim that this practice violates the First Amendment. This case shall be decided very soon, and could deal a tremendous blow to public-employee unions.

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[2] See the 2006 Firehouse Lawyer article on First Amendment retaliation claims, and be wary of the words on your tongue: http://www.firehouselawyer.com/Newsletters/v06n06jun2006.pdf

[3] See the brief of the teachers' union here: http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/79941-California-Brief.pdf