The Firehouse Lawyer

Volume 21, Number 7

July 2023

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Joseph F. Quinn, Staff Writer

The law firm of Eric T. Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address: See above
Office Telephone: 253-590-6628
Joe Quinn: 253 576-3232

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue

.

AN IMPORTANT LAWSUIT?

A legal action has been filed in Thurston County Superior Court that may have state-wide implications, insofar as regional fire authorities or fire protection districts have service contracts with Native American Tribes or allegedly have a duty to serve Tribal lands (owned in fee or in trust by the United States).

In AGO 2021, No. 3, the Attorney General opined[1] that a fire district has a duty to provide fire and emergency service to persons and property located within the reservation of a federally recognized Indian tribe if such persons or property are within the fire district's established boundaries. The Attorney General opinion also recognized that, if proper procedures are followed, that any such property could be withdrawn from the boundaries of the fire district. See RCW 52.08.011 et seq. Without explicitly saying so, the Attorney General implied that a district has no legal obligation to provide services to any property that is **outside** of its boundaries.

A similar Attorney General letter opinion (cited in the AGO) was issued in 2015, opining that a fire district had a legal duty to provide all services to commercial structures within its boundaries, whether the property was tax exempt

[1] https://www.atg.wa.gov/ago-opinions/provision-fire-and-emergency-services-persons-and-property-within-reservation-federally

or not. The facts of the 2015 case related to certain Yakama tribal reservation lands. That opinion also stated that absent an agreement, whether the district was compensated or not, it would not be a gift of public funds to provide the service. The opinion stated that there was a general public benefit to such uncompensated service, and that fire service is a fundamental government service, so the usual test as to unconstitutional gifts is satisfied. That letter opinion also included a conclusion that the arrangement did not violate RCW 43.09.210,[2] a statute barring one taxing district or entity from subsidizing another such agency, because a tribe is fundamentally **not** a state department, local government, or Washington municipal corporation or instrumentality.

The legal action, filed by the Confederated Tribes of the Chehalis Reservation, alleges, inter alia, that the West Thurston Regional Fire Authority (the RFA) has a duty to provide services to all persons and property within the tribe's reservation boundaries, which include the Great Wolf Lodge, a casino, and many other commercial and residential properties lying within the RFA boundaries. The suit alleges that this duty is owed whether the Tribe or anyone else pays for, or has a contract with the RFA, as to these properties.

The West Thurston Regional Fire Authority was formed several years ago by two fire protection districts—Thurston County Fire District 1 (Rochester and Grand Mound) and Thurston County Fire District 11 (Littlerock). Although tribes are also allowed to be members of a regional fire protection service authority under RCW 52.26.020 (3), the Chehalis Tribe has never decided to become a party or "fire protection jurisdiction" subject to the RFA.

Since the RFA was formed, for many years the Chehalis Tribe did have a service contract with the RFA. After the Great Wolf Lodge was added to the facilities within the reservation, the parties (the RFA and the Tribe) have had difficulty negotiating a contract that the RFA felt provided fair and reasonable compensation for the increased service, as the Great Wolf Lodge has been generating a significantly greater number of EMS calls by the RFA than ever before.

After it appeared in early 2023 that it might be difficult if not impossible to execute a satisfactory contract with the tribe, the RFA decided to withdraw the reservation (insofar as it is located in the RFA service area, as a small portion of the reservation lands are instead located in a Grays Harbor County fire district) from the RFA boundaries. The RFA accomplished this withdrawal from its boundaries by following the provisions of the applicable statute—RCW 52.26.110.

Under this statute, a withdrawal is effective on the 31st of December in the year in which the resolution is adopted. Although the fire protection district statutes also include provisions for the withdrawal of territory from a fire district (see RCW 52.08.011 et seq.), in this instance the withdrawal was accomplished from the RFA because the RFA is, and has long been the service provider throughout the RFA. Although the two fire districts were never dissolved, the administration and provision of all fire and emergency services has been provided by the RFA since its inception. Moreover, the contract between the tribe and the fire service entity has

[2] https://app.leg.wa.gov/RCW/default.aspx?cite=43.09.210

for many years been with the RFA, not the Rochester-Grand Mound fire district.

In the meantime, the tribe and the RFA reached an agreement for service, although perhaps neither party is really satisfied about its financial terms.

In filing the legal action, the tribe indicated, however, that it believes it was basically coerced into signing that agreement, because of the argument that the RFA had no obligation to provide service to the reservation lands, or persons present there, without reasonable compensation.

At this juncture, it is unclear whether the tribe understands that the reservation has been withdrawn from the RFA's boundaries, or if they contend that was not done properly, or if they contend that it cannot legally be withdrawn, in spite of AGO 2021, No. 3, that it is lawful for property to be withdrawn if proper procedures are followed. They seem to be contending that the RFA has a duty to provide service to them for free, regardless of all of the foregoing actions and opinions. It is unknown at this time precisely what the tribe believes supports that contention.

While the legal action is only in the early stages, with the pleadings having been filed and discovery just beginning, it is clear that the case presents some issues that might be interesting to all RFAs and fire districts that have federally recognized tribes within or even near their boundaries. Stay tuned for further developments as the litigation proceeds.

COUNTY FIRE COMMISSIONERS' ASSOCIATIONS

In addition to the WFCA, the State Fire Commissioners Association, there are many county associations of fire commissioners around the State of Washington. Recently, we had occasion to advise a nascent association as to the pros and cons of the different forms of organization that such associations may take. As some readers probably know, some local fire commissioners' associations have not only incorporated as nonprofit organizations with the Secretary of State, but also have been recognized by the Internal Revenue Service as tax-exempt entities. Some probably have qualified as 501(c)(3) charitable organizations and some have been recognized as social organizations under 501(c)(4), as we have done in Pierce County.

We would suggest that any group in the State of Washington contemplating such formation of an association consider all of the advantages and disadvantages of each form of organization. Maybe the best way to approach the issues is to ask yourselves a series of questions or in essence create a checklist. Here are some examples of questions we considered:

Q1: What are some advantages of incorporating with the state as a nonprofit?

A: Incorporating creates a liability shield for each individual member of the organization. Their personal assets are not at risk.

Q2: Are there any distinct disadvantages to incorporating?

A. Annually, you have to report to the Secretary of State, and list current directors of the corporation. Also, it costs money initially and annually to incorporate and report.

Q3: Why would we want to seek recognition from the IRS as a 501(c)(3) entity?

A. The main reason to seek that status is if you plan to accept tax-deductible donations.

Q4: What are the disadvantages?

A. Again, there are financial concerns, as this costs a bit more than the aforementioned incorporation expenses. But a significant disadvantage might be the limitations the law places on 501(c)(3) organizations, banning activities such as lobbying or political activity.

Q5: How about recognition under 501(c)(4) as a social welfare organization?

A. These nonprofits are organized primarily for promoting social welfare, i.e. the common good and welfare of the community.

Q6: Are there any disadvantages to forming as a 501(c)(4)?

A. See answer above to Q4, but the limitations on lobbying are not as stringent as for the 501(c)(3) organizations. As with all of the above organization types, no profit or financial benefit should inure to any member.

Regardless of the form of organization that a commissioners' association might choose, if the organization plans to have any employees, then you must obtain an EIN (Employer's Identification Number) from the IRS. You also have to establish relationships with the state departments of Employment Security and Labor & Industries. As far as employer concerns exist, there does not seem to be any obvious "best" form of organization. Even an unincorporated association may have employees, and this simple form of organization will undoubtedly cost less than any of the others. The group that I advised ultimately chose the unincorporated association option to keep it simple administratively.

UNDUE HARDSHIP RULE MODIFIED BY SCOTUS

Since the late 1970's the standard for determining if an accommodation constituted "undue hardship" for an employer in a religious discrimination case was "more than de minimis." In other words, the standard did not require much proof of inconvenience for a court to affirm the refusal of an accommodation request due to undue hardship upon the employer. On June 29, 2023 that all changed—drastically, some might say.

In the case of *Groff v. DeJoy,*[3] the Supreme Court of the United States ruled that to prove the affirmative defense of undue hardship in such a case, the employer needs to show "substantial increased costs in relation to the conduct of its particular business." The Court said all relevant factors must be taken into account. Those factors would normally include the particular accommodation in question and practical impact of allowing the accommodation when considering the nature, size and operating costs of the employ, given the accommodation granted.

Ever since the 1977 case of *Trans World Airlines, Inc. v. Hardison,*[4] the test established by the High Court has been one of "more than a *de*

[3] https://www.supremecourt.gov/opinions/22pdf/22-174_k536.pdf

[4] https://supreme.justia.com/cases/federal/us/432/63/

minimis cost." Actually, the *Hardison* case itself mentioned "substantial additional costs" and "substantial expenditures." However, lower courts since 1977 have fastened upon the *de minimis* language to render the meaning of "undue hardship" almost a trivial level of costs.

In the *Groff* case, Mr. Groff was a postal worker who said he could not work on Sundays because it was against his religious beliefs. The Postal Service assigned the Sunday work to his co-workers but that caused morale problems. Groff received discipline for his refusal. Eventually, he resigned to avoid termination. He sued under Title VII of the Civil Rights of 1964, alleging that his employer failed or refused to accommodate him by letting him take Sundays off, but of course the employer claimed undue hardship. Both the federal district court and the Third Circuit applied the "more than *de minimis"* standard, to rule for the employer. The Supreme Court reversed and remanded to the trial court to apply the newer, stricter standard that requires more proof of hardship than the old standard.

Groff and his supporters wanted the Court to go farther than it did. They suggested the Court should apply the standard used in discrimination cases brought under the Americans with Disabilities Act (ADA) which defines undue hardship as "significant difficulty or expense." The Court declined to apply ADA case law, so apparently the new standard for finding undue hardship only applies in Title VII cases (for now).