The Firehouse Lawyer

Volume 23, Number 5

July 2025

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We are often asked to advise clients about the requirements of notice for special meetings of the board of commissioners. The importance of providing detailed notice becomes evident when a board wants to take action or final action at a special meeting.

A case decided recently by Division One of the Court of Appeals illustrates what can happen when an action taken goes beyond a reasonable reading of the notice. In *West v. Walla Walla City Council,* No. 87208-7-1,[1] the plaintiff sued the city council and its members, alleging that they took action during an executive session of a special meeting and that the action taken was not properly identified in the special meeting notice.

The trial court dismissed Mr. West's claim for declaratory judgment and his claim for penalties as barred by the equitable doctrine of laches (unreasonable delay in bringing suit). The appeals court reversed the trial court and remanded to the trial court for entry of partial summary judgment to West and to declare the city council's action violated the Open Public Meetings Act, awarding West his costs. The only real issue for the trial court left for determination was whether the council acted knowingly in violating the OPMA and if so, what is the appropriate penalty.

[1] https://caselaw.findlaw.com/court/wa-court-of-appeals/117189313.html

In *Walla Walla,* the city gave notice of a special meeting to conduct an executive session to evaluate the qualifications of an applicant for public employment, pursuant to RCW 42.30.110(1)(g). That was to be followed by an open session to vote to select 5 finalists for the position of City Manager. However, when the council emerged from executive session the mayor announced that the council had decided to postpone any further interview process and to notify the top candidate of its decision to begin negotiations of an employment contract.

Given that public announcement, a reasonable listener would conclude that the city council made some sort of decision in executive session, and also that their action, if any, would not be the same as the special meeting notice.

I needed to read nothing more of this opinion than the foregoing recitation of facts (on the second page of the 19-page opinion) to discern that the city would be held to have violated the OPMA because we routinely advise our clients as follows: (1) never make any decisions or take final action in an executive session; and (2) when holding a special meeting, never take any action or final action that is inconsistent with the notice that you provided of the special meeting in the first place.

After the council returned to open session, they unanimously approved a motion to move forward with negotiations and an offer of employment. A reasonable citizen who read the notice would not have expected such a motion at all at that meeting. A citizen wrote a letter to the local news media pointing out the obvious: the council had violated the OPMA by changing the announced purpose of the meeting and by making a decision at a secret meeting.

At a subsequent meeting, the council openly discussed their process and one council member expressed his opinion that the council had probably violated the OPMA and suggested what they should have done.

The Court of Appeals disagreed with the city and the trial judge on application of the doctrine of laches, noting that West filed suit only two months after the City Manager was hired. Also, the filing of suit was well within the two-year statute of limitations. Finally, the city could not show damages from the delay in filing suit.

The Court of Appeals held that West's request for injunctive relief was moot, but that his request for a declaratory judgment that the OPMA was violated was not moot. Finding that the dispute was still justiciable, the Court found that they violated the OPMA but it was not clear that they did so knowingly or willfully.

To prevail on a claim for penalties for violating the Act, the plaintiff needs to prove (1) that a member of the governing body (2) attended a meeting of the body (3) where action was taken in violation of OPMA and (4) the member had knowledge that the meeting violated the OPMA. Clearly, the fourth prong of this test is still in question, but the subsequent meeting showed at least one member knew that the act was violated.

In its decision the Court of Appeals made one thing clear: RCW 42.30.080(3) means what it says—that "[F]inal disposition shall not be taken on any other matter [not set forth in the meeting notice] at such meetings by the governing body." In other words, stick within the four corners of your notice of special meeting, or else you have violated this law.

ANOTHER WALLA WALLA COUNTY OPMA CASE

The Washington Court of Appeals decided an OPMA case that raised some of the same issues as the foregoing case. In *McFarland v. Tompkins,* No. 40158-8-III,[2] a citizen sued the Walla Walla County commissioners and the county, alleging violations of the OPMA. The basic allegation was that the county commissioners did not provide proper notice of a special meeting at which they decided to send a letter to the Governor, expressing support for groups protesting the COVID-19 restrictions imposed by Governor Inslee.

The county raised defense issues such as standing, mootness, proper parties, and laches. The plaintiff raised questions of violation of the OPMA section on notice of special meetings (RCW 42.30.080 again), nullification of actions in violation of the act, and personal liability. In our discussion here, we will focus only on the violation issue and the personal liability issue, because we feel that the other issues were basically well settled under prior case law and rather obvious.

The violation of the OPMA here—somewhat like the violation discussed in the above Walla Walla case—was easily identified in that the board of commissioners clearly indicated in one meeting that they would write such a letter and then gave notice later of a meeting that included the potential of considering "miscellaneous business." That formulation was too vague to meet the requirements of RCW 42.30.080(3).

The interesting question here is whether the county commissioners, individually, knew that they were violating the act by taking action to approve the letter without giving proper notice that they might take that final action. All three commissioners signed identical declarations stating summarily (and in a self-serving way) that they did not know they were violating the OPMA.

The Court of Appeals ruled that the plaintiff had sufficiently raised a genuine issue of material fact on the issue of knowledge of violation, and therefore summary judgment should not have been granted to the commissioners. RCW 42.30.120 (1) provides that a member of a governing body who attends a meeting where action is taken in violation of any provision of the act with *knowledge of the fact that the meeting is in violation thereof* shall be personally liable for a civil penalty in the amount of five hundred dollars for the first violation. What if the meeting is "legal" and the notice was "legal" but the body acted beyond the scope of the notice of the meeting? Well, *Eugster v. City of Spokane,* 118 Wn. App. 383, 424, 76 P.3d 741 (2003) has provided us with a four-part test to help decide such questions. We allude to that test in the foregoing article discussing the *West v. Walla Walla City Council* case. Again, the answer turns on whether the body or any member had knowledge that the meeting (or the action taken) violated the statute.

The Division III judges found there was a question of fact for the trial court to resolve and refused to just accept the (untested by cross-examination) assertions of the county commissioners that they did not know they were violating the act. The Court distinguished another case where the governing body was acting upon

[2] https://www.courts.wa.gov/opinions/pdf/401588_pub.pdf

legal advice, because here there was no evidence of any legal advice before the board acted.

In another case, involving Battle Ground School District, board members discussed issues in emails, despite knowing of concerns expressed by the Attorney General that such email discussions of district business might violate the OPMA by essentially being "meetings." The Court also discussed *Zink v. City of Mesa,* 17 Wn.App. 2d 701 (2021), where it was held the city violated the OPMA when it evicted a person from a meeting after she refused to cease videotaping. The trial court held none of the city council members had knowledge of a violation because none had received training. This Court noted that the Walla-Walla county commissioners had in fact received training under the OPMA. (We note that now a statute requires training of local elected officials on both the OPMA and the Public Records Act.) The Court added that such evidence does not support by itself that a violation has occurred, but it certainly is a factor to consider.

Ultimately, the Court of Appeals ruled that the plaintiff prevailed on his claims of violation of RCW 42.30.060 and .080 and in his request to nullify the commissioners' resolution and their letter to the Governor. However, the court remanded to the trial court to determine the personal liability. Since the issue of knowledge of a violation is essentially a factual question, it certainly appears that the appellate courts would prefer to see the trial court deal with that issue.

MERGING OR ANNEXING- WHAT POWERS CARRY OVER?

We are sometimes asked, when agencies are in the process of merging, or annexing, or even forming a new RFA….what powers and/or funding mechanisms will be carried over or made effective in the "new" organization?

For example, suppose fire district A has a fire benefit charge (FBC) and a property tax levy of $1.00 as its primary funding. But then fire district B, which has never had an FBC, proposes to merge into fire district A. Will the FBC apply automatically throughout the newly merged district? The answer is yes, even though the voters of fire district B never voted in favor of an FBC, by 60% or a simple majority. Of course, we would recommend that the issue be fully advertised in the "campaign" for merger.

The same result would occur if an established regional fire authority (RFA) with a pre-existing FBC annexed by election a fire district that has no FBC.

But conversely: Suppose a city annexed into a fire district pursuant to RCW 52.04.061 et seq. Further suppose that the city had a pre-existing EMS levy pursuant to RCW 84.52.069 of fifty cents per thousand but that levy rate had in recent years eroded to 40 cents, but has three years remaining of the authorized six years. Does the fire district "inherit" that levy in any way? The answer is no. The EMS levy in the city would ordinarily remain as to the properties within the city, but that has no effect on the "county" voters in the fire district, since they never got to vote on that. Moreover, the EMS levy in the city would remain until it expires.

How about debt, including bonded indebtedness? When two fire districts merge, what happens when one of the districts has voter-approved bonds outstanding? RCW 52.06.070 addresses this question, essentially by providing that pre-existing obligations of each of the

districts are to remain in place and are not assumed by the other district.

We are sometimes asked what powers a new regional fire authority (RFA) possesses, as compared to a fire district. My first point would be to stress that such issues are strongly controlled by the RFA plan. Therefore, it follows that the element of the RFA plan that addresses the powers of the new agency and its governing body is a very critical element.

RCW 52.26.090 enumerates the powers of the board of an RFA, and is very similar to RCW 52.12.021 and .031, which set out the general and specific powers of fire protection districts.

However, RCW 52.26.090(g) has some important language that further clarifies the powers an RFA board might possess. That subsection states that such a board may "exercise powers and perform duties as the board determines necessary to carry out the purposes, functions and projects of the authority *in accordance with this title* [in other words, Title 52 on fire districts] if one of the fire protection jurisdictions is a fire district…."

Thus, assuming one of the agencies forming the RFA is a fire district, an RFA automatically has all the powers that a fire district normally has. But what if the RFA does not have a fire district "member?" Well, in that case, the subsection goes on to state that "if none of the fire protection jurisdictions is a fire district" then the powers are held "in accordance with the statutes identified in the plan." Thus, we can see that if two or more cities are forming an RFA (which has been done or tried in Washington State) it is imperative to list in the plan exactly which statutes provide power to the board of governance.

One device we have recommended in that situation is to reference all of the statutes in Title 52 in the "powers" element of the plan.

Another interesting question that arises in merger and annexation situations is "who gets to vote on this proposition?" Under RCW 52.06.030, only the voters of the merging district get to vote on the merger proposal. The voters of the merger district, which will survive the election, do not get to vote on the proposition.

Compare that procedure with the annexation of a city into a fire district, for purposes of fire protection, accomplished pursuant to RCW 52.04.061 et seq. In that instance, there are essentially two elections. First the voters of the city get to vote on whether they favor the annexation. But also, the voters of the district get to vote on whether they accept the request of the city to annex for service. See RCW 52.04.071. Moreover, the above statute expressly provides that—to be successful—the proposition must obtain a simple majority in *both elections.*

Who gets to vote when a fire protection jurisdiction proposes to annex into an existing RFA? Assuming all required procedures are completed, just like when a merging district proposes to merge into another fire district, only the registered voters of the proposed annexing fire protection district get to vote. The voters of the existing RFA do not get to vote.

It goes without saying that, when an RFA is initially formed, all registered voters of all of the fire protection jurisdictions get to vote and the proposition requires a simple majority of all voters within the proposed boundaries of the RFA, *except* if the RFA plan calls for any financing mechanism that requires a 60% voter approval. If any of those are included in the plan,

then the plan and formation of the RFA is subject to a 60% voter approval requirement, so that is not often proposed.

Thus, if the plan calls for financing with the fire benefit charge, excess levies, or emergency medical services levies, then the plan needs 60% voter approval. RCW 52.26.050. According to the language of that section, there would also be a validation requirement in such an election. This means that, not only do you need 60% voter approval, but also there is a turnout requirement. For success, you need to obtain voter approval by 60% of a number equal to 40% of the total number of voters in the most recent general election. See, e.g. the language in RCW 84.52.069(2) on validation. The lesson to be learned here is that elections to which that language is applicable (where validation is needed) should seldom be held immediately after a general election when the U.S. President was up for a vote, because the turnout in presidential elections is almost always the largest turnout of any election.

WHAT HAPPENED TO HB 2049?

Predictably, the Legislature again failed to move forward with legislation that would have modified the 1% lid on property tax increases, year over year, provided in chapter 84.55 of the Revised Code of Washington. The final version of the statute, which is moving toward the Governor's desk for signature, only addresses adequate funding for K-12 education. It would make sense to change that limitation to 3%, as proposed, to reflect more accurately the typical inflation of the costs charged to municipal governments for goods and services.

LEAVE DEDUCTIONS FOR EXEMPT EMPLOYEES

An issue we were asked about recently may be worthy of discussion here. Suppose you have a FLSA-exempt employee, such as a Fire Chief, who is an executive employee qualified for the salary basis exemption. Does a deduction in leave benefits of less than one day jeopardize that FLSA-exempt status? We do not believe so.

Under 29 CFR 541.602, "[A]n employee will be considered to be paid on a 'salary basis'… if the employee regularly receives each pay period…a predetermined amount…which *amount* is not subject to reduction because of variations in the quality or quantity of the work performed." (emphasis added).

The Department of Labor's Wage and Hour Division (WHD) has explicitly stated that "[A]n employer can require an employee to substitute paid leave for absences of less than a day without losing" their exempt status. *See* WHD Opinion Letter dated July 17, 1987. This opinion letter has been cited in innumerable court cases finding that leave-bank deductions (not necessarily **salary** deductions) for partial-day absences are not inconsistent with the salaried status of an exempt employee. *Kuchinskas,* 840 F.Supp. 1548 (S.D. Fla. 1993), *aff'd,* 86 F.3d 1168 (11th Cir. 1996) ; *IAFF v. City of Alexandria*, 720 F. Supp. 1230 (E.D. Virginia 1989), *aff'd memo*., 912 F.2d 463 (4th Cir. 1990). Numerous court cases and WHD letters make clear that the WHD (and the courts) do not consider deductions from *leave* being a deduction from the "amount" referenced at 29 CFR 541.602 (see italicized language above).

A MAJOR SCOTUS DECISION ON "REVERSE DISCRIMINATION"

The United States Supreme Court, on June 5, 2025, unanimously ruled that a white person was

not categorically barred from asserting a claim of race-based (or other protected characteristic-based) discrimination under Title VII, the preeminent federal law against discrimination.[3] The SCOTUS overruled a lower court opinion that a member of a majority group (a white person) must, in addition to making the initial (prima facie) case for discrimination, must also demonstrate that "background circumstances" support the suspicion that "the defendant is that unusual employer who discriminates against the majority."

Instead, the provisions of Title VII, and the case law interpreting Title VII, must be applied equally to any plaintiff, whether they are in a majority group or not, the SCOTUS ruled.

The case involved petitioner Marlean Ames, a heterosexual woman, who worked for the Ohio Department of Youth Services since 2004 and had been promoted to the role of program administrator. In 2019, she applied for a new management position but was not selected; instead, the agency hired a lesbian woman. Shortly thereafter, Ames was removed from her administrator role and demoted to her previous position as executive secretary, with a significant pay cut. A gay man was later hired to fill the program administrator position Ames had vacated.

This case, which we will likely be discussing again in future articles, solidifies that if an employer opts to choose a person in an otherwise-understood "protected class"—such as a person of a different sexual orientation, or a person other than a white person—over a white person, that white person may raise a Title VII claim in the same manner as any other person in an otherwise-understood "protected class."

A note: As we have discussed before in these pages,[4] "preferential treatment" of a person in a protected class is illegal in Washington, but the consideration of socioeconomic factors in the hiring/promotional process is not affirmative action nor would such consideration rise to the level of Title VII discrimination—if the employer's decision is actually motivated by socioeconomic factors and not upon animus toward a particular race, sex or other protected status.

MISCELLANEOUS CHANGES

Effective July 27, 2025,[5] employers cannot require a valid driver's license as a condition of employment—unless it is one of the employee's essential job functions or the employer has a legitimate business purpose.

At least annually, an employer shall, at least annually and upon the request of an employee, permit the employee to review a full copy of their personnel file. *See* RCW 49.12.250. Effective July 27, 2025,[6] the contents of said "personnel file" under RCW 49.12.240 have been clarified to include the following:

[3] https://www.supremecourt.gov/opinions/24pdf/23-1039_c0n2.pdf

[4] https://www.firehouselawyer.com/Newsletters/August2020FINAL.pdf

[5] https://lawfilesext.leg.wa.gov/biennium/2025-26/Pdf/Bills/Session%20Laws/Senate/5501-S.SL.pdf#page=1/

[6] https://lawfilesext.leg.wa.gov/biennium/2025-26/Pdf/Bills/Session%20Laws/House/1308-S.SL.pdf

(a) All job application records;

(b) All performance evaluations;

(c) All nonactive or closed disciplinary records;

(d) All leave and reasonable accommodation records;

(e) All payroll records.

(f) All employment agreements.

Furthermore, instead of the employer having to disclose the personnel file within a "reasonable time," the employer will now be required to provide the personnel file within 21 calendar days.

FIRE DISTRICTS/RFAs ARE SUBJECT TO APPRENTICE-UTILIZATION REQUIREMENTS

This is a reminder that fire districts and RFAs are considered "municipalities" under RCW 39.04, and "municipalities" (see RCW 39.04.010 (4) must ensure that in public-works contracts valued at $2,000,000 or more, that the bid documents (specifications) must indicate that at least 15% of the labor hours in connection with the project be performed by state-registered apprentices, pursuant to RCW 39.04.320.[7] The fire district/RFA may adjust these requirements under narrow circumstances. Consult your legal counsel regarding that.

REGULATION OF ARTIFICIAL INTELLIGENCE

Sometimes we do not pay sufficient attention to legislation that is *not* adopted or signed into law. An example of that phenomenon may have occurred recently. In the One Big Beautiful Bill that passed the House, there was a 10-year moratorium proposed on states imposing regulations on artificial intelligence. But after the Senate was intensely lobbied when they considered the bill, the moratorium was gone!

Thus, at this point, states are free to begin regulating artificial intelligence, even as the federal government seems to be taking a "hands off" attitude toward AI. California has already started to address this issue. In the Fair Employment and Housing Act approved on June 25, 2025, the state prohibited employers from using AI to discriminate in hiring. Moreover, California is considering SB 7, which would require human oversight on any machine decision-making, such as algorithms.

Texas has enacted legislation to prevent use of AI systems that discriminate against protected classes. Oversight and transparency are important under the Texas law. So, our Washington public employer clients might well ask: "What is Washington going to do about AI in employment practices?" So far, all we have is a Task Force but expect some legislative proposals after their final report is published in July 2026.

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[7] https://app.leg.wa.gov/RCW/default.aspx?cite=39.04.320