

The Firehouse Lawyer

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Upcoming Municipal Roundtable on DEI Programs

Please join us on Friday, June 24 from 9-11 AM for our second virtual Municipal Roundtable of 2022! The subject of our roundtable is the creation and administration of Diversity, Equity and Inclusion (DEI) programs. Here is the Zoom link for this *free* virtual learning opportunity: <https://us06web.zoom.us/j/86320585219?pwd=VUFzNkZGOExmbi9BS2hqTXg1ZlhkQT09>

IMPACT FEES AND EXHAUSTION OF REMEDIES

This month Division 2 of the Washington Court of Appeals decided a case concerning impact fees. In *Viking JV, LLC, v. City of Puyallup*, No. 55421-6-II, the Court held that a developer of a warehouse facility failed to exhaust its administrative remedies when it did not appeal to the city's appellate hearing examiner, but proceeded directly to the Superior Court.

As many of our readers know, local governments may establish a system of impact fees pursuant to Chapter 82.02 RCW to help deal with the impacts that new growth and development can cause to the city's (or county's) existing infrastructure, such as streets, parks or other public facilities. Puyallup established an impact fee schedule applicable to commercial uses such as warehouses to defray impact costs on the park system. A warehouse of the size desired was assumed by the city schedule to employ about 450 employees, but the developer

said it only planned to employ between 50 and 60 employees (apparently because of unusual technology). The city imposed an exaction of \$388,725 for the parks and Viking appealed. After the hearing examiner upheld the exaction for various reasons, Viking failed to appeal to the appellate examiner, choosing to file in court instead.

This was a fatal mistake as the Court of Appeals ultimately held that the two-tiered appeal system was consistent with applicable statutes and therefore Viking failed to exhaust administrative remedies before going to court.

This is not an earth-shattering precedent but we write about the case because it sets forth a lot of good law about the nature and purpose of impact fees and how they must be administered. First, it is important to know that rulings on impact fees are land use decisions subject to the Land Use Petition Act (LUPA) because they are part and parcel of the building permit process. This means the exclusive way of challenging impact fee rulings of local governments is to file a LUPA petition, if court review is desired. Second, to have standing to bring a LUPA petition in court, you must first exhaust your administrative remedies at the local government such as appeals to the hearing examiner, or in some jurisdictions, to the governing body or legislative body itself.

The court reviewed the Puyallup two-tiered appeals process in light of all applicable laws and concluded that it was not inconsistent with the land use reform laws. Also, there is no statutory necessity of having the elected officials be the final appellate authority within the city or county as the applicable statute allows “an officer” such as a hearing examiner to be the final arbiter within the local government.

EMPLOYERS – BEWARE OF WAGE RECOVERY CASES

In a case decided on May 17, 2022, Division 3 of the Washington Court of Appeals ruled that an employee was entitled to an award of \$161,415 (plus attorney's fees and costs on appeal) for attorney's fees and costs in a case against Mason County. The case involved a whistleblower who was allegedly retaliated against by the county when she was denied a promotion to the position of “corporal” at the Mason County jail. *See Reeves v. Mason County*, No. 38548-5-III.

Tammy Reeves, a corrections officer, brought a standalone legal action in Superior Court, in an attempt to recover reasonable attorney's fees and costs incurred in numerous Office of Administrative Hearings proceedings and subsequent appeals to Superior Court. The trouble all started when Ms. Reeves filed a complaint with the Mason County HR manager. She alleged the sheriff's office management subjected employees to verbal abuse, denied officers training opportunities, and ignored pervasive problems at the jail. (The court's opinion does not say how that was resolved.) Later the same year, Ms. Reeves applied for a promotion but was not promoted, and felt it was retaliatory. She then filed a complaint with the county prosecutor's office, alleging a violation of the Local Government Whistleblower Protection Act, set out in Chapter 42.41 RCW.

An administrative law judge (ALJ) held an administrative hearing and ruled the county had retaliated against her, and awarded attorney fees and costs of \$32,745.03, pursuant to RCW 42.41.040 (7). Mason County appealed to court and the court remanded to the Office of Administrative Hearings because the ALJ applied the wrong legal test. A new ALJ reheard the

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matter but concluded that it was not shown the sheriff knew of her complaints (and therefore it could not have been retaliatory). On appeal to court a second time, the court ruled that this second ALJ was wrong in that the findings of fact of the first ALJ should have been accepted on remand as verities.

On the second remand, a third ALJ was assigned the case. This ALJ ruled in favor of Reeves, awarded monetary relief of \$7,462.80, plus fees and costs, and reinstated the first ALJ's award of fees and costs in the amount stated above—some \$32,700. This third ALJ felt she had no legal authority to award reasonable fees and costs related to the superior court work or the work related to the hearings before the second ALJ.

If it was not interesting enough already, on March 27, 2020, Reeves' counsel e-mailed a letter to Mason County demanding the county pay Reeves \$136,725.59 in fees and costs by March 31, 2020, and announcing her intention to file suit. However, this claim was based upon RCW 49.48.030 and not upon the whistleblower statute (RCW 42.41.040).

The statute on attorney fees in wage recovery actions is RCW 49.48.030. Case law had previously established that a wage claimant can bring a standalone action for recovery of reasonable attorney fees and costs, subsequent to a successful action for the payment of wages or salary. See *International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29 (2002). In that case, the court held that, having been successful in a previous grievance/arbitration proceeding, the plaintiff could bring a separate action to recover the fees and costs related to the wage case.

Also, in a later case, *Arnold v. City of Seattle*, 185 Wn.2d 510 (2016), the facts were somewhat similar to those in the *Fire Fighters* case. In the *Arnold* case, Seattle demoted Arnold for inadequately supervising an employee who embezzled funds. On appeal to the Seattle Civil Service Commission, however, Arnold was awarded attorney fees under RCW 49.48.030.

It is interesting to note that in *Reeves*, however, it was not clear that the whistleblower proceeding was a wage recovery case. It was unclear whether the claimant established, for example, that she lost wages due to the failure to win the promotion. The Division 3 court said only that the ALJ (ALJ #3) awarded "monetary relief" of approximately \$7,500; in another part of the opinion, the court stated that ALJ #3 "did not address the precise issue of whether RCW 49.48.030 afforded Reeves recovery." In other words, the proceeding was a whistleblower administrative proceeding and not a wage case, such as a wrongful discharge case, or a grievance taken to arbitration, in which back pay was requested, or a civil service appeal. In each of those settings, the action is an employment proceeding designed to determine if an employee is entitled to back wages due to a wrongful discharge, demotion, or failure to promote.

These questions remain: Is a whistleblower administrative proceeding brought under chapter 42.41 a wage proceeding? Did the administrative record in the Reeves case establish what wages she had actually, provably, lost? It is not possible to tell from reading the Division 3 opinion.

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