FIREHOUSE LAWYER

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Veterans' Preference – Employment in Washington

Again recently we have had the occasion to review and apply the Washington state statute on affording veterans an employment preference in competitive examinations when they are applicants for public employment.

The statute is RCW 41.04.010. This law requires adding ten percent to the passing mark, grade or rating (based upon a possible rating of 100 points as perfect) in entry level applications. The preference is only five percent if the veteran is receiving veteran's retirement payments. The preference does not apply to promotional examinations, and is only applied until they receive their first appointment to a public office. The only circumstance in which the preference is applied to a promotional examination is if the veteran has been recalled to active service after having previously received a public appointment.

There are no other veterans' examination preferences, except for the ones set forth in the statute, and the preference must be claimed by a veteran within eight years of the date of their release or discharge from active service.

It is important to determine first if the person truly is a qualified "veteran" as defined in RCW 41.04.005. To be a veteran qualified for the preference, the person must have received an honorable discharge or a discharge for physical reasons with an honorable record. They must also meet at least one of the following criteria. First, the person must have served between WWI and WWII or during any "period of war" as defined in the statute. This service must have been performed in any branch of the Armed Forces or other variously named equivalent services, such as the Women's Air Force, Merchant Marine, Office of Defense Transportation, etc.

Second, alternatively, the person must have received the Armed Forces Expeditionary Medal, or Marine Corps and Navy Expeditionary Medal, for opposed action on foreign soil, for service in any branch of the Armed Forces or as a member of the Women's Air Forces service pilots.

An important definition contained in this statute is the description of a "period of war". The statute specifically lists the conflicts that fall within the definition of a "period of war". All of the obvious candidates are included such as WWI, WWII, the Korean Conflict, the Vietnam Era, etc.

One of the perplexing periods of war listed in this statute is the Persian Gulf War. RCW

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41.04.005(2)(e) states that the Persian Gulf War was the period beginning August 2, 1990, and "ending on the date prescribed by presidential proclamation or law". Because of some entry level public employment applicants claiming veterans' preference in mid-1997, I had occasion to look at this definition more than two years ago. At that time, I could find no presidential proclamation, Act of Congress or other law prescribing the ending date for the Persian Gulf War. Therefore, I had to conclude at that time in the summer of 1997 that the period of war known as the Persian Gulf War was open-ended and had not yet concluded. Under the definition in our State statute, the alleged veteran would be given the benefit of the doubt as a person who served in the military during a "period of war".

Due to a recurrent need to look at this statute, recently it was discovered that apparently Congress in November 1997 did enact a law declaring an ending date to the Persian Gulf War. By looking on the internet at various federally-sponsored websites, operated by the Federal Department of Labor, the Office of Personnel Management, and other agencies, we have concluded that the Persian Gulf War Period has been declared to be ended on January 2, 1992 by an Act of Congress. Therefore, this open-ended nature of RCW 41.04.005(2)(e) is now laid to rest. It appears that the 105th Congress in the Defense Authorization Act for fiscal year 1998 enacted Public Law 105-85. Section 1102 of Title XI of that Act of Congress, enacted November 18, 1997, establishes that January 2, 1992 ending date.

We have been informed that some jurisdictions, and perhaps even fairly large employers, are still affording veterans' preference to persons who have served after January 2, 1992, as Gulf War veterans. We do not believe this would be correct.

Another question that sometimes arises with respect to application of RCW 41.04.010, is whether the ten percent or five percent veterans' preference is calculated as a percentage of the score previously attained by the applicant, or whether this simply refers to a percentage of the possible rating of 100 points. We believe that the latter interpretation best fulfills the purpose and intent of the statute.

Suppose, for example, that two qualified veterans have scored 79 and 81 points, respectively, out of a possible 100 points, representing a perfect score. We do not believe it would be reasonable to interpret the statute to require adding 7.9 points (10% of the score) to one veteran's passing grade and add 8.1 points to the other veteran's passing grade. We believe the intent of the legislature would be to treat all veterans the same, by providing them a special preference or advantage over non-veteran applicants. We believe the intent of the statute, therefore, calls for adding 10 points so that the first applicant now has a score of 89 and the other applicant a score of 91.

It goes without question that adding ten percent or five percent to an examination definitely provides a significant advantage to veterans, but that is precisely the legislative intent.

Another question that arose a few years ago in our practice related to whether the ten percent or five percent veterans' preference could be added to the overall score of the applicant at the end of the testing process. In other words, this might entail aggregating several test results or examination scores and then applying the veteran's preference to the aggregate score. The employers in question had not been utilizing that system, but had been adding the veteran's preference percentage to each of the individual segments of the overall entry-level testing process. In our opinion in that case, we read the statute in a

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literal fashion, consistent with its purpose. We concluded that each of the separately scored portions of the hiring process constituted a separate "competitive examination" and therefore, under the wording of the statute, the method they had been using continued to be appropriate. Indeed, it probably would have been a violation of the statute to aggregate all of the examination or test scores into one overall score and then at the end apply the veteran's preference. While it may seem that the interpretation unduly favors veterans, again it does meet the intent of the statute and is consistent with the plain and literal meaning of the statute.

This article does not discuss the veterans' preference applicable in federal employment. There are completely separate federal laws applicable to such veterans' preference. We have looked at the issue of whether there is any federal preemption or supremacy clause issue, in the event that application of the federal statute might be different from application of the state statute. We have concluded that there is no federal preemption or supremacy question. Simply put, the federal veterans' preference laws are applicable to federal jobs and the state veterans' preference law is applicable to the public employment positions referred to in RCW 41.04.010. In other words, the federal veterans' preference statutes were not intended to cover the entire field of veterans' preference in employment in all sectors of possible employment in the United States. Therefore, there can be certain nuances or differences between the workings of the various statutes.

Because veterans' preference issues are very esoteric, employers or veterans are urged to consult legal counsel working exclusively with employment matters.

Court Briefs

The following cases may be of interest to municipal corporations in the State of Washington.

In *Limstrom v. Ladenberg and Pierce County*, Division II of the Court of Appeals interpreted the Public Disclosure Act with respect to the reasonableness of a response to a request for records. See No. 23723-7-II, decided December 22, 1999. In this case an attorney sent a public disclosure request for records to the County Prosecutor. The Prosecutor's Office responded within three business days implying that the records would be produced and estimating that the documents could be provided within 30 days. The attorney said he had no problem with the office taking longer than five days to produce the documents. He did express a concern that the Prosecutor's Office might deny his request at the end of the 30 day period. Ultimately, he received the documents 15 days after he made the request.

The court stated that RCW 42.17.340(2) allows the requestor to move the court to require the agency to show that its estimate is reasonable. The attorney in this case argued that because they produced the documents within 15 days, after indicating in their estimate that it might take 30 days, this necessarily showed that the estimate was unreasonable and therefore he should be entitled to attorneys' fees and other sanctions for violation of the act. The court held otherwise, stating that such a rule would encourage agencies to match the performance date to the estimate date even if that meant unnecessarily delaying delivery of the requested public documents. Such an outcome would be contrary to the legislative mandate requiring agencies to respond promptly to disclosure requests. As the court put it: "Agencies should be congratulated, not condemned for early performance".

Court Cases (Continued)

The lesson to be learned from this case is that the statute provides the agency with five business days to either (1) provide the records; or (2) acknowledge receipt of the request and provide a reasonable estimate of the time needed to respond; or (3) deny the request. If the agency chooses option number 2, the reasonable estimate is reviewable by the court and the court may require the agency to show its estimate to be reasonable. We recommend that the estimate be based upon the amount of time reasonably likely to be involved in finding the records and making them available for inspection or copying. In some instances, the response must of necessity require the requestor to clarify what it is they are requesting. But this case indicates a reluctance on the part of the courts to second guess and penalize the government agencies who reasonably estimate the time it may take to produce the records.

In a recent Division III Court of Appeals case from Eastern Washington, our appellate courts have added another chapter to the growing body of legal authorities regarding civil service commissions and their relationship to collective bargaining. In the case of *City of Spokane and Spokane Police Guild v. Spokane Civil Service Commission*, Case No. 17956-7-III, decided December 21, 1999, the City of Spokane and the police union, the Spokane Guild, entered into a collective bargaining agreement. The new agreement changed the process of promoting a patrolman to the rank of sergeant. The City and the union advised the Spokane Civil Service Commission of the change but the Commission refused to recognize the change. The City and the union jointly sought a declaratory judgment which the trial court entered in favor of the City and the union, ordering the Commission to comply with the change.

As in prior cases, the courts are dealing here with a conflict between two statutory schemes, *i.e.,* the Public Employees Collective Bargaining Act (RCW 41.56) and the Civil Service Commission Statute for City Police (RCW 41.12). The court had to decide whether there was a true conflict between these statutory schemes as applied under the facts of the case and if so which statutory scheme prevails. As in the past, the court held in this case that there was a practical conflict between the statutory schemes and the collective bargaining law, RCW 41.56, prevails over the Civil Service statute.

Ordinarily these cases turn upon an interpretation of whether the Civil Service body is an agency similar in scope, structure and authority to the State Personnel Board, which are the terms set forth for exemption in RCW 41.56.100. The court of appeals found that the Spokane Civil Service Commission is not similar in structure or authority to the State Personnel Board. Ultimately the court found the Commission did not meet the requirements of the exemption.

The court found that the City of Spokane lacked the authority to force the Civil Service Commission to comply with the collective bargaining agreement. Thus, without the Commission's cooperation, the City could not abide by the terms of the agreement which it had agreed to through collective bargaining. In order to fulfill the purpose of the collective bargaining act for public employees, the court could not allow the Civil Service Commission to refuse to abide by the collective bargaining agreement. The court held that the union agreement superceded the Commission's rules.

In this case as well as in prior cases presenting conflicts between civil service statutes and RCW 41.56, the courts uphold the primacy of collective bargaining laws. We are doubtful that any municipal Civil

Court Cases (Continued)

Service Commission in the State of Washington would be held by the courts to be similar in scope, structure and authority to the State Personnel Board. This is true partly because the State Personnel Board has a very broad jurisdiction over many issues not ordinarily within the purview of a Civil Service Commission.

EDITORIAL

NFPA 1710 and 1720 – Dangerous Industry Standards

Certainly, the National Fire Protection Association has contributed a great deal to the fire service in the United States. Recent proposed standards NFPA 1710 and 1720, however, could cause a marked disservice because they may foment litigation. As lawyers know, negligence cases require proof of a standard of care, breach of that standard, proximate cause and damages. The standard of care may be supplied by statute, prior case law, or in many instances, an industry standard such as an NFPA standard.

If, however, an industry standard is set by a recognized, authoritative institution, and if the majority of entities in that industry cannot attain the standard, we wonder whether such a standard really fulfills its ultimate purpose. If industry standards were just goals or guidelines that participants should strive to achieve, that would be one thing. However, when industry standards become the norms used by lawyers to successfully attack either private or public corporations for failing to meet the standard, we then must question whether the standards are in the best interest of the service providers or the public.

Specifically, NFPA 1710 has some standards that are unrealistic for most fire service providers in many areas in the United States. For example, 3-2.1 requires a minimum of four and probably five or six on-duty personnel to staff pumpers (engines). Given the taxing limitations and other inflation controls in place in many states, this requirement may be unrealistic for the vast majority of fire departments in many states. Another example would be 3-2.2.2. If a fire company's primary function is ladder truck or aerial operations, four and most likely five or six minimum staff on-duty personnel are required. The same objections can be registered to this standard. Or how about 3-2.3.1.1, which requires a fire department to arrive with an engine on location within four minutes 90% of the time. At least in the large western states, frequently departments cover huge geographic areas with a limited number of fire stations. They simply cannot attain this particular response time that often. Similarly 3-3.4.3.3 requires that on EMS alarms, an ALS unit be on location 90% of the time within eight minutes. While certainly many urbanized areas with several ALS ambulances could meet this requirement, it is simply not attainable in many rural areas. We suggest that NFPA needs to make a distinction based upon population density, or characteristics of the community in question, whether it be urban or rural.

We could summarize and critique several of the other standards, but the point is that departments need to make their concerns known to NFPA, probably through their state fire commissioners' associations or fire chiefs' association. We have seen documents suggesting that both the Oregon and Washington associations are very concerned and are taking concerted action.

Speaking as a lawyer, who spends 90% of his time trying to protect municipal corporations like fire districts and water

NFPA 1710 and 1720 – Dangerous Industry Standards (Continued)

districts from preventable liability events, I can say with some assurance that establishing unrealistic levels of service or standards of care is a sure path to increasing, rather than decreasing liability exposure. Instead, the standards makers should establish reasonable, attainable standards. On the other hand, if they wish to set goals or guidelines desirable for urban or rural departments to attain, such goals or guidelines should be clearly stated as something other than minimum standards. That's my opinion.

FLSA – Legislation Clarifies §207(k) Exemption

Regular Firehouse Lawyer readers know that we have closely followed the up and down saga of Section 207(k) cases involving paramedics and EMTs, especially those cross-trained as firefighters. The cases have been inconsistent, but it is fair to say that the 1998 Fourth Circuit Court of Appeals decision in *West v. Anne Arundel County*, 137 F.3d 752, created heightened concern across the country about the potential loss of this exemption for such medical personnel. Indeed, many fire departments consider the abolition of the very common shift schedules for such personnel.

H.R. 1693 will clarify the scope of this FLSA partial overtime exemption for police and firefighters. The legislation was approved by the House on November 4th and the Senate on November 19th. It becomes law immediately upon signing by President Clinton.

Essentially the bill adds a definition at 29 U.S.C. §203(y) of the FLSA. The definition clarifies that firefighters, paramedics, EMTs, rescue workers, ambulance personnel and hazardous materials workers do qualify for the partial exemption if they are trained in fire suppression and have the legal authority and responsibility to engage in fire suppression, and if they are employed by a fire department of a municipality, county, fire district or state, and if they are engaged in the prevention, control and extinguishment of fires **or** response to emergency situations where life, property or the environment is at risk. Thus, it can be seen that the definition would still exclude paramedics or emergency personnel who are neither trained nor have the ability and responsibility to engage in fire suppression. It would also exclude non-municipal personnel, such as those that work for private volunteer non-profit associations around the United States. The bill would clarify the matter a great deal for those typically cross-trained firefighter/ paramedics or firefighter/EMTs who work for local governments in many areas of the country. The legislation would clarify what happens in many municipal fire departments where the personnel are cross-trained and are authorized to fight fires but because of the high volume of medical calls, the vast majority of their work, or all of their actual work is not in firefighting. If they are trained and have the legal authority and if they are properly employed by a municipal entity, it would make no difference now if they spend 100% of their time with emergency medical responses and not firefighting.

The bill also contains a provision preserving any collective bargaining agreements or other arrangements established between fire service organizations and their employees if such agreements result in compensation greater than that provided under §207(k).

FLSA Court Briefs

In *Taylor v. County of Fluvanna*, (Western District, Virginia, November 5, 1999), the Federal District Court for

FLSA Court Briefs (Continued)

Western Virginia ruled that §207(k) requires, to qualify for the partial exemption, that the work period be between 7 and 28 days. Therefore, a county deputy sheriff did not qualify when they paid him on the basis of a full calendar month calculation.

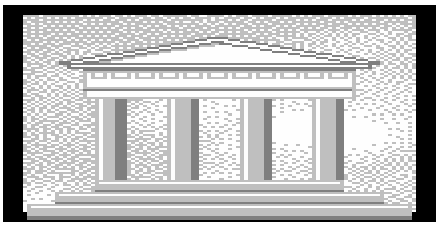
In another basic, straight-forward decision, the U.S. District Court for Northern Illinois ruled that the employer must pay overtime pay to non-exempt workers who work more than 40 hours a week, regardless of whether the workers had agreed to be paid at a lower rate. *See Hardrick v. Airway Freight Systems, Inc.* (N.D. Ill., August 25, 1999).

In *Lockwood v. Prince George's County*, the U.S. District Court in Maryland held on July 29, 1999 that fire investigators did not qualify as §207(k)-exempt employees, primarily because the county failed to prove that the investigators had the authority and the actual responsibility to fight fires. The court said a key inquiry was whether the investigators' actual duties included fighting fires, noting that the county failed to show even one incident where the plaintiffs were called to perform these functions. The court also found that the county did not meet the fourth factor, as they did not perform activities required for or concerned with the prevention of fires. The plaintiffs were entitled to two years of back overtime pay and an equal amount in liquidated damages.

JFQ Publications

Mr. Quinn has available various papers or monographs that might be of interest to special purpose districts, such as "Procedures and Rules for Board Meetings" (January 1996-$10) and "Working Together: The Board and the CEO" (January 1996-$10). Also, in 1995 he published: "Handbook for Local Government Elected Officials," with five chapters, including the Open Public Meetings Act, the Open Public Records Act, Ethics/Conflict of Interest, Public Works/Public Bidding Laws and the Fair Labor Standards Act (29 pages, with 45 page Appendix=$25).

In order to obtain further information, you may contact us at either the e-mail address or the telephone number listed below.



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