Firehouse Lawyer

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Regional Fire Protection Authorities

Effective June 7, 2006, the Legislature implemented certain amendments to the statute governing regional fire protection authorities (RFPA). For those not familiar with that term, or concept, a regional fire protection authority is a municipal corporation in Washington and a separate taxing district. Its boundaries are coextensive with those of the two or more fire protection jurisdictions (e.g. a fire district or districts and/or a city) that want to cooperate and form such an authority. The entity is created by a vote of the people.

An RFPA operates pursuant to a plan, which is formulated by a planning committee and approved by the voters, in accord with this amended statute. The statute outlines broadly how the plan is formulated, what agencies to coordinate with and consult, and includes public input requirements. There is a detailed statutory provision dealing with the authorization of the RFPA to establish a system of ambulance service, requiring procedures to ensure that the system does not compete with existing private ambulance services, unless first there is a finding of inadequacy of service. There have been similar "inadequacy" and "non-compete" provisions in city and county laws for many years. However, those provisions do not exist for fire districts, and it is our opinion that fire protection districts can lawfully establish ambulance services that compete with private ambulance services without running afoul of any law (or proving inadequacy), including the antitrust laws.

In the plan, the RFPA's recommended sources of revenue should also be set forth, to include tax levies and benefit charges, if any. However, if the plan calls for imposition of any benefit charges or levying of any taxes that would need 60% voter approval, then the ballot measure to approve the plan and create the RFPA needs 60% voter approval. Otherwise, the measure needs only majority approval by the voters.

If the voters approve the plan and creation of the RFPA, then the authority is formed on the next January 1st or July 1st, whichever occurs first. Within 15 days after the final certification of the election results, the county Auditor (election officials) publishes a notice in a newspaper of general circulation, declaring the authority formed. The significance of that notice is that any party wishing to challenge the formation or related

procedure must commence their challenge by serving, within 30 days after final certification, their written challenge upon the prosecuting attorney and the attorney general. One would assume the challenge would have to take the form of a Superior Court action, but the statute does not actually so provide, so perhaps some form of Notice of Intent to file suit would suffice. The purpose of such laws is to provide closure or finality, i.e. if there is no timely notice of challenge… then no challenge can be heard.

The statute provides that RPFA plans shall be reviewed, presumably by the governing body, every ten years.

One of the amended provisions appears to be the list of the powers of an RFPA. Most of the typical list of powers usually provided to fire districts or cities are included, plus a sort of "catchall" provision saying the board may exercise powers and perform duties the board determines necessary to carry out the purposes, functions and projects of the authority in accordance with Title 52, if one of the fire protection jurisdictions is a fire district, or other statutes identified in the plan, if none are fire districts. Oddly, the amendatory statute deleted from the powers list, the power of an RFPA to acquire, hold, or dispose of real property and the power of eminent domain.

We believe that deletion is related to the next section, which amends RCW 52.26.100. That section states plainly that, except as set forth in the plan, all powers, duties, and functions of a participating fire protection jurisdiction pertaining to fire protection and emergency services shall be transferred to the RFPA on its creation date. So it appears the property and eminent domain powers would be "transferred". This makes it rather plain that a participating city or fire district is "out of business" completely, at least with respect to fire and EMS, when an RFPA is created. The rest of the relevant provisions make it clear that all funds, assets, and personnel of the participating jurisdictions must be transferred over to the RFPA. Detailed statutory changes make it clear that employees get transferred, with at least equal compensation to what they enjoyed at the time of transfer, no change in benefits, promotional opportunities, or probationary periods. If any of the participating jurisdictions had a civil service system, as city firefighters do (and a few fire districts, such as Lakewood) then the law requires that to be negotiated, so a civil service system shall be established at the RFPA. Existing collective bargaining agreements of course must be honored until they expire, or have been modified.

One perceived shortcoming in the prior law was addressed. An amended section makes it clear that an RFPA can incur indebtedness

and issue municipal bonds, up to three-fourths of one percent of the taxable property within the boundaries and not to exceed twenty years. Also, general obligation bonds are allowed to be issued, but not to exceed 1 ½ percent of the value of taxable property. These bonds may be retired by excess levies, and such bonds and levies take a 60% approval of the voters. There is also a 40% "validation" requirement, i.e. the number of persons voting must be not less than 40% of the voters in the RFPA who voted at the last preceding general state election. The maximum term for these G.O. bonds is 25 years.

One question asked of me recently is still not addressed by the RFPA statutes. I was asked: "When a city annexes into a fire district for service, pursuant to the provisions of RCW 52.04.061 et seq., the city can now levy taxes up to $3.60 per thousand of AV (less the fire district and library district levies if any). Is there any similar provision for RFPA's?" Frankly, I do not see any such provision. RFPA's have available the revenue sources set forth in RCW 52.26.050, i.e. property taxes and benefit charges, and may impose ambulance service charges as well, if the proper process is followed, and inadequate private service is available.

FIREHOUSE LAWYER IS MOVING

I am moving my office, but it appears that I will still be the *Firehouse Lawyer.* Lakewood Fire has informed me that they need my office space here at Station 2-1, as the training wing only has three offices, and now all will be needed for training personnel. I am in the process of gaining approval to lease space in another fire station, from another good, local client. Hopefully, my contact information, such as telephone numbers, e-mail address, and mailing address will not all be changed. Stay tuned, and we will update you later, making necessary changes to the web site, with new photos, etc. In the meantime, I have a large, heavy, oak desk, with executive return, for sale. Best offer, and you get to haul it away. Still in very good condition after 23 years of use and many moves. Not me…the desk.

OFF DUTY DRUG ABUSE – TWO CASES

Two recent cases seem to provide some hope to public employers attempting to deal with off duty drug use by their employees. In *Turner v. Unemployment Compensation Board of Review,* No. 871 C.D. 2005 (Pennsylvania Commonwealth Court, May 16, 2006), a state appeals court denied unemployment benefits to a former public works department director who tested positive on a random drug test for marijuana.

He was subject to random drug testing, as he held a commercial driver's license. Although the employer's policy only addressed on duty drug use, the testing provision was part of the policy too. The court said that the random testing provision enforces the requirement that the employees also be free from drugs remaining in their systems while on duty, even if the actual use was during off duty time. Otherwise, the employer would have to establish independent proof of on duty use, which would make random testing meaningless, the court said.

In another case, a Madison, Wisconsin firefighter ran afoul of certain employer rules, even though all of his drug use was during off duty time. The Wisconsin Court of Appeals held, in *Gentilli v. Board of Police and Fire Commissioners,* No. 2005AP1818 (Unpublished), that the employer's rules were not unduly vague and did affect off duty drug use. Gentilli had been a city firefighter since 1980. In 1999, a law enforcement task force began to suspect some city firefighters were involved in illegal drug activity. The internal investigation revealed that Gentilli used and possessed marijuana and cocaine while off duty, and that he also knew other firefighters who did so. He admitted at one point that for about 10 years he had consumed and shared cocaine and marijuana, although he changed his testimony later.

The Fire Chief fired Gentilli and others for violating five department rules, including a rule requiring firefighters to observe "laws and ordinances" and a mandate "to speak the truth at all times". Madison also had a rule prohibiting the bringing of "disrepute" to the department. The Wisconsin court upheld the termination imposed by the Madison fire board, and also cited a 2000 decision of the 7th Circuit Court of Appeals (federal) in which that court upheld a discharge for off duty conduct by the same city board for "bringing the department into disrepute."

The message of the Gentilli case seems to be that clear department rules are enforceable and do put employees on notice that off duty conduct can lead to termination, such as off duty drug use and failing to report the use by other employees. The city also had a rule requiring firefighters to inform superior officers "of every neglect or disobedience of orders" that may come to a firefighter's knowledge.

DISCLAIMER