Firehouse Lawyer

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Inside This Issue

Property Tax and Budget Resolutions

Every year, in October and November, fire districts need to hold their annual public hearing on the upcoming year's budget, including consideration of whether any property tax increase is needed. See RCW 84.55.120. Of course, due to I-747, codified in RCW 84.55, that increase is limited to 1% over and above the regular property tax amount levied in the previous year (ordinarily) unless the district has sponsored an election in which its taxpayers have voted by simple majority to "lift the lid" (i.e. the 1% limit on tax growth).

A recurring bit of confusion remains, however, on the language to include in the resolution that every county assessor needs to administer the district's levy request for regular property tax levies. Let us say it once again, as we have said it many times before: the statute requires that your resolution set forth the dollar amount of the increase above the previous levy AND the percentage of that increase.

While a Superior Court judge ruled that I-747 in unconstitutional, an appeal of that decision is pending in the state Supreme Court. That court has issued a stay pending appeal, which means that the law is unchanged for now. This year, I have advised clients to proceed as if I-747 is still the law, because it is. Moreover, it was obviously impossible for the Supreme Court to decide the case by the time of the 2006 property tax levy, for taxes to be collected in 2007. If we proceed very far into 2007 without a Supreme Court decision, then that advice, and the proper procedure for preparing for the 2007 levy, will have to be re-examined. I would say the time to reconsider strategy on that issue would be approximately July 1, 2007 (assuming the Court has not ruled) as by then most of you are starting to prepare preliminary budgets. In the meantime, I recommend continuing to abide by I-747, which is the law of the state.

CONDITIONAL OFFERS OF EMPLOYMENT AND ADA

An American Airlines case from earlier this year illustrates how the ADA can and does influence the "sequencing" of hiring processes. The ADA

allows applicants to keep medical conditions private until the last stage of the hiring process, i.e. the medical examination. I think it is very clear that a fire department hiring firefighters, EMTs, or paramedics cannot ask any medical questions or run any medical tests until you are ready to make a conditional offer of employment. American Airlines seems to have gotten that last step intertwined with the background check or similar inquiry, which must precede the physical examination. That case teaches us that you **cannot** advance the physical examination ahead of the background check or similar inquiry; it must be the last step.

I would treat the psychological evaluation in the same fashion. In other words, the offer is conditional on successful completion of the physical **and** the psychological evaluation. If the testing psychologist is not willing to provide "pass/fail" determinations on the psychological evaluations, then the employer needs to determine if the report shows a "failure". Ideally, however, I would treat the psychological just like the physical, because in essence in each instance the employer is relying on the medical or other professional to tell the employer if the prospective employee has a medical (or psychological) condition that renders him/her unable to perform the essential functions of the position.

ARE YOUR YOUTH OR CADET PROGRAMS EXPOSING YOU TO LIABILITY?

As in the past, sometimes the most intriguing articles stem from inquiries to me from clients. Apparently, this year there was an unfortunate fatality in Alabama, wherein a rollover accident led to the death of a firefighter under 18 years of age. In Alabama, a statute prohibits minors from riding along to emergency scenes, as well as actual firefighting. This led to a client inquiry in November, asking whether in Washington minors in a Cadet program at the fire district should be allowed to ride along on actual calls. My conclusion, after researching Washington law, is that minors can participate in riding along to scenes, but cannot engage in firefighting or fire suppression.

WAC 296-125-030 lists "fire fighting and fire suppression duties" among the many prohibited occupations for minors. However, there are exemptions to that rule, applicable to bona fide cooperative vocational education programs and work experience programs certified and monitored by the office of the Superintendent of Public Instruction or the school district of the minor student. Apprenticeship programs are also exempt from the above rule.

I concluded that the mere riding along to scenes presented no liability problem and suggested that the Chief check as well with the district's insurance broker, to ensure they saw no need for an exclusion or insurance rider or endorsement. I do recommend, however, that any Cadet program or Explorer program include many explicit safeguards and rules to protect the minors. Make sure that the program clearly excludes minors from the actual fireground or emergency scene. The program policy should not allow minors to engage in patient care, such as assisting with patients' back boards or cervical collars. Probably it is much safer to limit minors to drills, training, classes and other station activities. When they do ride along, keep them restricted as you would in any other ridealong/observer situation.

The Firehouse Lawyer has been asked to write and review citizen ridealong programs many times, so I have model checklists, releases, SOPs, etc. on those types of programs for those districts who still use unwritten rules.

VIDEOTAPING (AND AUDIO) IN THE WORKPLACE

In this high-tech age, sometimes we have issues that did not exist just a few years ago. Many of you probably "surfed the web" to YouTube.com, in order to see the ugly tirade engaged in during the show of Michael Richards, former Seinfeld star "Kramer". Because of the prevalence of camera phones and other devices, which can create "instant videos" that might end up on YouTube, some HR professionals have started to see a need for policies regarding videotaping or cameras in the workplace. Undoubtedly some employees or even members of the public might object to having their likeness appear publicly or on the internet! Normally, in the absence of a written policy, I analyze such questions by asking whether there is any reasonable expectation of privacy. Probably, there is no reasonable expectation of privacy in members of the public attending a public meeting, but I still think the best practice, before allowing videotaping to proceed, is to disclose to those being taped that this is occurring. Then, if they do not like it they can object or just leave the scene. The same basic etiquette should be applicable to audio taping.

It is not appropriate for a public body to prohibit either video or audio-taping of open public meetings, as after all, those meetings are public. However, it is well established by case law that there is some modicum of privacy that employees may have, at least in certain rooms or parts of a public building such as the female (or male) firefighters' locker room or rest room. Clearly, unregulated photos or videos in such areas should be prohibited and any photos or videos produced under such circumstances could result in potential "invasion of privacy" actions.

If necessary and appropriate, I will be developing a standard policy prohibiting and/or regulating use of video cameras, cell phone cameras, and the like to prevent potential liability for such activities.

FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES

In the June issue, we discussed the U.S. Supreme Court decision in *Garcetti v. Ceballos,* which arguably narrowed the scope of such "free speech" cases in the workplace. The Supreme Court ruled that there is no protection if the speech was part of their official job duties. Hopefully, this case did not make everyone think that now public employees are prohibited from commenting publicly on issues relevant to their employer's public agency. Most such public comments are definitely not made as part of the person's duties. The leading cases are still *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1983). The latter case instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern."

Just to make it perfectly clear, before a public employer disciplines a public employee *because of* such "protected" speech, it might be a good idea to check with legal counsel. Only if that type of behavior or speech is destructive of the employer's mission can it be the subject of discipline. Since fire departments are ordinarily considered para-military organizations, it is important to the chain of command that the Fire Chief, for example, be shown respect by the rank and file. Therefore, in some cases, harsh criticism of the Fire Chief or superior officers could be extremely detrimental to "good order and discipline". Thus, it is not impossible to posit a case for discipline, but it is a very narrow exception, in my opinion. There would have to be some reasonable proof that the speech was disruptive to the operation of the fire department, for example. A pledge, for example, that a firefighter would not obey the officer on the fireground, due to a total lack of respect for the Chief's authority, would be tantamount to open insubordination. In any event, we would say employers need to be careful when considering discipline for speech "as a citizen" on "matters of public concern", but under the right circumstances discipline might be upheld anyway because of the balancing test.

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