Firehouse Lawyer

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Inside This Issue

1 The Federal Flag Code
2 Did You Notice This Property Tax Law Change?
4 Surely All Fire Commissioners Saw This Bill!
4 An Excellent FLSA Web Site
6 Interest Arbitration and Comparable Jurisdictions
6 Disclaimer

The Federal Flag Code

A recent client question, which may be interesting to many fire departments around the nation, relates to when it is appropriate (or legal) to lower the U.S. flag at the station to half-staff. Specifically, the facts are that a former chief of the department, who led that district in the 1970's, recently passed away. Many of the senior volunteer members of the department felt it would be appropriate to honor his memory by flying the flag at half-staff, so they asked the Fire Chief and he called me. I admitted that no one had ever asked the question of me in more than 20 years of focusing on the legal aspects of the fire service, but I would perform some research. The Chief said he had already done some "web surfing" and found the Federal Flag Code. I took it from there.

Prior to Flag Day, June 14, 1923, there were no federal or state regulations governing display of the U.S. Flag. The National Flag Code was adopted on that date, but it was not until 1942 that the Congress passed a joint resolution. Codified in the U.S. Code at 36 U.S.C. Sections 171-178, the Flag Code now includes rules for use and display of the flag as well as associated sections related to conduct during the playing of the National Anthem, the Pledge of Allegiance to the Flag, and Manner of Delivery of the flag.

These statutory sections do not include any civil or criminal penalties for non-compliance with the Federal Flag Code, so the rules are essentially guidelines. Congress has adopted some criminal laws relative to the flag but they have sometimes not fared well in the courts. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Supreme Court ruled unconstitutional the criminal sanctions. The Flag Protection Act of 1989 prohibited knowingly mutilating, defacing, physically defiling, maintaining on the floor or trampling upon any U.S. flag, but the Supreme Court struck that law down in *United States v. Eichman,* 496 U.S. 310 (1990). Thus, essentially the First Amendment rights of free speech "trump" any such federal criminal laws. Nevertheless, the Flag Code does provide us with considerable guidance on the use, treatment, display, and showing of respect for our national symbol.

Section 7 (m) of the Flag Code addresses the question of flying the flag at half-staff, but does not directly answer the question posed by my

client. Procedurally, that section specifies that the flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. (Please note that section 6(a) states that, while it is customary to display the flag only from sunrise to sunset, when a "patriotic effect" is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness.)

Substantively, section 7(m) also tells us when and how long to fly the flag at half-staff. On Memorial Day, the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By Presidential order, the flag shall be flown at half-staff upon the death of principal figures of the U.S. Government and the Governor of a State, territory, or possession of the U.S. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, "or in accordance with recognized customs or practices not inconsistent with law." Having given some thought to that last clause or phrase, I recommended to my client that a fire district, in my opinion, could adopt a resolution declaring its custom or practice to honor the memory of "officials" such as present or former commissioners or Fire Chiefs. I believe some cities have done the same thing, either by resolution or ordinance, delegating to the Mayor the power to determine when flying the flag at half-staff is appropriate and for how long. My client representatives and I prepared a resolution, the draft of which includes line of duty firefighter (and other active member) deaths in the list of precipitating events. We recommended flying the flag in that manner on the day of death (or notification thereof) and on the day of any service honoring the person's memory.

Since virtually every public fire station displays the U.S. flag, we would recommend that all fire departments familiarize themselves with the rules, in order that proper respect for the flag is shown at all times.

The timing of this article seems right, as Flag Day is June 14th!

DID YOU NOTICE THIS PROPERTY TAX LAW CHANGE?

Sometimes unheralded little bills slip through the Legislature without much comment or controversy, even though they may impact Washington Fire Districts in a significant manner. That description seems to apply to Engrossed Substitute Senate Bill 5836. This law changes how taxes levied but not yet collected by a fire district are disbursed, when there has been an intervening city annexation. Under current law, prior to the enactment of ESSB 5836, with certain

exceptions the boundaries of all taxing districts, for purposes of property tax levy and collection, were those boundaries existing upon March 1 of the levy year. Thus, if a city wanted to annex land and levy taxes in 2007, collectible in 2008, it was heretofore ordinarily necessary to make the annexation effective on or before March 1. For example, if an annexation of land within a fire district to a city was effective March 2, 2007, no city levy could be made for 2007, collectible in 2008, so the city had to wait until 2009 to collect, and might be providing service much earlier. To address this delay situation, the legislature passed this bill.

Under the new bill, when territory that is part of a fire district is annexed to a city, any ("undelinquent") fire district taxes levied but not yet collected must be paid over to the city. The payment schedule shall be set by the county, but the fire district must pay those collected taxes over to the city no later than July 10th for collections through June 30th, and no later than January 10th for collections through December 31st. Any delinquent taxes still are payable to the fire district, as are "the pro rata share of the current year levy budgeted for general obligation debt", which is an apparent reference to general obligation bond collections.

Importantly, the legislature at the same time amended RCW 84.09.030, which was the law I alluded to above regarding the importance of March 1st. Under this new law, the boundaries for purposes of property taxation, for all taxing districts in Washington, are those official boundaries existing on August 1st. Thus, if your taxing district wants to levy a tax in 2007, collectible in 2008, you no longer need to worry about March 1, but rather August 1, 2007, as your deadline for the "effective date". Of course, this affects fire district annexations and mergers as well as city annexations or incorporations.

So let's consider an example, under the new law. In fact, let's use March 2, 2008 as our effective date of annexation, so you can compare the tax collection scenario with the one discussed above. Before we start, let's remember that tax collections tend to come in to the county, and then get distributed to the taxing district that levied the taxes, in two "bunches". Since "first half" taxes are due at the end of April, and most taxpayers pay right before the deadline, there is an increase in tax collections, over previous months, every April, which we assume the taxing district might not actually receive until May. The same phenomenon recurs in October-November, with "second half" tax collections. So the effective date of March 2nd is probably early enough that the bulk of "first half" taxes will have been levied but not collected. As I understand this statute, **all** of the not yet collected (not in the fire district's accounts) taxes levied in 2007 belong to the city, notwithstanding the fact that the fire district provided the service in January and February **before** the annexation was effective. Somehow it seems that the Legislature, in addressing the apparent unfairness to cities and towns of the former statutory process, has caused unfairness to the fire districts. Perhaps someone can show me how I am mistaken, and that the statute does not mean what it seems to say.

The statute goes on to require the city to provide notification to the fire district of the impending annexation, at least 30 days prior to the effective date of the annexation. Thus, it appears it could give more

notice than 30 days but not less. Then the statute provides that the county treasurer is only required to remit to the city those fire district (or library district) taxes collected thirty days or more after receipt of the notification. Suppose the city provides 60 days notice. Does that mean the fire district taxes collected 30 days after receipt of notice, but before the annexation is effective also belong to the city? Presumably, the city cannot provide service before the effective date, so that reading does not seem reasonable.

In our view, it seems to be good public policy to have the right to receive the taxes commensurate with the duty to serve. I would hope that cities and fire districts or library districts could address these issues contractually, with the goal of accomplishing that end, i.e. the municipality providing the service gets the taxes. But we shall see.

SURELY ALL FIRE COMMISSIONERS SAW THIS BILL!

Unlike the previously discussed bill, no doubt almost all Washington State Fire Commissioners noticed the passage of Engrossed Substitute House Bill 1368. This bill amended RCW 52.14.010, which addresses commissioner compensation. Now, commissioners will be paid $90 per day or portion thereof, and an annual maximum of $8,640 for "time spent in actual attendance at official meetings of the board or in performance of other services or duties on behalf of the district." Of course, we still recommend that each district adopt a resolution defining the scope of other services or duties for which compensation will be approved by the board. As one state auditor put it to me, it is best to have a resolution defining what is the "official business" of the district, as it relates to this statute. No doubt there will still be the occasional question about whether some service is appropriate for compensation. Is it proper to pay a board member to play Santa Claus and ride on the back of the fire truck at Christmas time? Is it proper to pay compensation, in addition to the cost of the meal, when a fire commissioner attends the annual awards banquet, to recognize outstanding volunteers or career firefighters? You might be surprised to compare your current practices, procedures, or even resolutions on compensation with the ideas of the State Auditor's Office on such subjects. Ask yourself, "Was my service really a benefit to the taxpayers of the district, or was it really a social occasion?"

The amended statute is effective in late July 2007, i.e. 90 days after adjournment of the Legislature.

AN EXCELLENT FLSA WEB SITE

While researching a recent client FLSA question about whether "averaging" of overtime for "7k" employees during the year is allowed by the FLSA, I discovered a very good web site on the subject. The

law firm of Chamberlain, Kaufman and Jones (ironically, they are located in my home town—Albany, New York) operates a web site with valuable information for the fire service ("FLSA and Firefighters") at www.flsa.com/fire.html.

Just to review (for most of my readers), 29 U.S.C. Section 207(k) allows "employees in fire protection activities", i.e. firefighters, to be paid overtime only after their "hours worked" exceed a threshold number set forth in a DOL chart, during their formally declared "work period". That work period, by law, must be between seven and 28 days long and should be documented formally in the records of the employer, as to each 7(k) employee. Many of my clients use a 27-day or 28-day cycle or work period for their 7(k) employees. The chart shows 212 hours as the maximum for the 28-day work period, and of course the chart shows correspondingly less as the maximum for shorter cycles. The client in question is now using a 24-day cycle, as they have adopted a "48-96" schedule, which means basically two days on, followed by four days off, for their three-shift or platoon system.

Hours worked means and includes time when the employee is actually performing services for the employer. Since only "hours worked" count toward the maximum, certain leave time hours such as "Kelly days" or "Kelly hours" do not count, nor do sick leave or vacation, even though employees are paid for that time. Obviously, overtime at time-and-a-half or compensatory time if agreed to, is only paid when one works more than 40 hours or the threshold number on the chart for 7(k) employees. Please note, however, that FLSA overtime may be quite different from contractual overtime. For example, suppose the employer agreed to pay overtime after 168 hours per work period, when the DOL chart actually has a higher figure for the threshold. The agreement does apply to require overtime rates to be paid. Finally, certain "off the clock" hours may still be "hours worked" and must be counted, such as when the firefighters maintain equipment, do job-related paperwork at home, testify in court pursuant to subpoena on work-related calls, and similar services.

Regular rate is the term DOL uses to designate the hourly rate you must use in calculating overtime under the FLSA. Regular rate includes such items as longevity pay and shift differential but some other special pays such as educational incentive are not included when calculating regular rate.

On call time and stand by time have been topics the *Firehouse Lawyer* has reported on in these pages many times. Generally, such time is only to be counted as "hours worked" if the employee is not free to use the time for personal purposes, and is essentially at the beck and call of the employer.

Schedule adjustments within the work period are generally allowed by DOL without penalty, but my client asked about averaging FLSA hours during the year. That cannot be done, as overtime is required in each work period in which the maximum allowed is exceeded. In other words, overtime owed for FLSA hours worked during one work period may not be offset by "hours not worked" during some other work period.

Contractual overtime is above and beyond what the FLSA requires, so check your collective bargaining agreement carefully before assuming that OT is not required. You may be "home free" under the FLSA and have to pay OT under the CBA.

Compensatory time is allowed for public employers, but of course at time-and-a-half rates. There must be an agreement, hopefully in writing, to allow comp time. If the employees are represented, the agreement must be with the union. If unrepresented, individual employees may sign comp time agreements. Employees must be allowed to use their comp time as they see fit, but the courts have held an employer may require an employee to use up comp time, for example, if they have too much comp time. (There are prescribed limits or "caps" on comp time for various types of employees.)

See the above web site and my previous articles for more detailed information.

INTEREST ARBITRATION AND COMPARABLE JURISDICTIONS

Clients sometimes ask me how interest arbitrators in Washington analyze and rule on the critical interest arbitration determination of "comparable jurisdictions", which plays into the contract clauses on wages and benefits primarily. In Washington, interest arbitration is available to bargaining units consisting, for example, of uniformed employees such as firefighters and paramedics (also fire-only dispatchers). The statute, RCW 41.56.465 gives some minimal guidance, when it provides that, with respect to fire departments, comparison of the wages, hours and working conditions shall be done with "like personnel of public fire departments of similar size on the west coast of the United States. However, when an adequate number of comparable employers exists within the state of Washington, other west coast employers may not be considered." We assume that "like personnel" refers to a similarity of job duties. Except for the very largest departments in the state (arguably), we believe that an adequate number of comparable employers can ordinarily be found within the state of Washington in most cases.

The interest arbitration decisions of well-known and often chosen arbitrators, as reported on the web site of the Public Employment Relations Commission, are instructive. By perusing a few recent decisions, we can learn what those arbitrators believe is critical in searching for "comparability". In particular, we can search their thoughts on how "similar size" is determined. In one case, Arbitrator Alan Krebs wrote: "The most commonly referenced criteria are the population and assessed valuation of the communities served. Consideration is also frequently given to the proximity of the jurisdiction to be compared and whether it is in a similar economic environment, such as in a rural area or part of a large metropolitan area." Some arbitrators have used a range of 50% to 150% of the size, when applying the criteria, but this can result in too small a sample in some cases. On the other hand, as Arbitrator Krebs noted, sometimes a band of 50% to 200% has been appropriately used. In the same case, the Arbitrator refused to consider two cities as comparables, stating that arbitrators are not usually willing to consider jurisdictions that are more than twice the size of the subject employer. *See City of Redmond and IAFF Local 2829,* PERC #17577-I-03-0406 (2004).

Arbitrator Mike Beck long ago pointed out that it is common and appropriate to consider geographical proximity and similar "labor markets" in selecting comparators. *King County Fire Protection District No. 16 and IAFF Local 2459* (1988). Arbitrator Beck also has, on more than one occasion, discussed the needed number of comparators, and has reduced the list from more than 20 down to approximately ten to twelve, which he found to be an adequate number and not unduly burdensome. *See, e.g. Clark County Fire Protection District No. 6 and IAFF Local 1805* (1990).

In summary, it seems that an outside range of 50% to 200% (less, if it is still feasible to gather enough comparables) is about right. While population served is a critical factor, assessed valuation is relevant, and often it is important to note geographical proximity and the similarity of economic conditions, i.e. the labor market.

DISCLAIMER