Firehouse Lawyer

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Session Laws of 2007 – The Highlights

The *Firehouse Lawyer* is a bit late this month. The primary reason is that I decided to look at each and every one of the 2007 Session Laws (yes, all 340 of the new statutes) just to see if there were any laws of interest to fire districts that may have been missed. Some of you might think the session laws—the new statutes for 2007—contained no highlights other than the statutes on the state poet laureate and the one designating the state vegetable (the Walla Walla sweet onion). However, the purpose of this article is to feature some 2007 statutes relevant to the fire service. It is true, however, that our legislature passes an enormous array of laws on everything from soup to nuts, every year.

These are not presented or discussed in order of importance, but rather in numerical order, starting with the lowest number and proceeding to the highest chapter. (There were 340 chapters in this year's session laws, give or take a few numbers they skipped.) But first I will mention a few proposals that did not pass. The bill to raise the bid threshold from $2500 to ten thousand dollars for public works on fire stations and other facilities did not pass. The change to RCW 52.14.110 expressly exempting work performed by district employees or community volunteers from the definition of "public work" also did not pass.

Chapter 56 of the Laws of 2007 increases the number of board members for the state board for volunteer firefighters and reserve officers from three to five. At least three of the five must not be receiving relief or retirement pension payments under the law. The governor may consider participants who are recommended by the appropriate state associations. Now the members serve six-year terms, with those "first appointed" serving staggered terms of six years, five years, four years, three years, and two years. See RCW 41.24.250 as amended.

Chapter 57 of the Laws of 2007 adds a new section to RCW 41.24 adding vocational rehabilitation services for volunteer firefighters and reserve officers. This chapter also contains an emergency clause, so it was effective immediately after the Governor approved it on April 17, 2007, instead of waiting for the usual 90 days after adjournment of the Legislature sine die.

Chapter 75 amends RCW 41.56.070 to allow collective bargaining agreements of local governments and other municipal corporations to provide for a term of up to six years.

Chapter 76 of the Laws of 2007 adds a new section to RCW 41.06, pertaining to employees of the state. It provides for the director of the applicable state agency to adopt rules and guidelines relating to sexual harassment policies. While not applicable to local governments or political subdivisions of the state, such as fire districts, such rules, policies or guidelines might be helpful or useful to apply by analogy. Therefore, when those are promulgated, local government personnel or Human Resources departments might want to obtain a copy.

Chapter 112 adds another section to RCW 41.06. It just provides that a state agency must allow a volunteer firefighter to respond, without pay, to a fire or medical emergency when called to duty. As an option, the state agency may grant leave with pay.

Chapter 133 is an act relating to "bidder responsibility", so it has application to various public works projects, including those proposed by fire districts. This chapter also amends parts of RCW 39.04, one of the chapters on bid law. The main change, it seems to me, is that one section defines the term "responsible bidder" in great detail. There are no real surprises there, and the section does allow a municipality to adopt relevant "supplemental criteria" for determining bidder responsibility. Those must, however, be included in the invitation to bid or bidding documents. Also, this chapter amends the small works roster statute—RCW 39.04.155--to change the reference about responsible bidder from RCW 43.19.1911 to this new RCW 39.04.010 definition.

Chapter 156 is the new domestic partnership legislation, which could interest the fire service insofar as fire districts and other municipalities are employers. A comprehensive discussion of this new law is beyond our scope today, but employers might want to read this law, especially if the employer desires information about extending employee benefits in these situations.

Chapter 210 (see also Chapter 133, above) makes more changes to the small works roster law, i.e. RCW 39.04.155. But the important change wrought by this chapter, I believe, is in RCW 39.08.010, the performance bond law. Previously, the bond could be waived on contracts of $25,000 or less. Now that amount has been raised to $35,000. Of course, you still have to retain 50% of the contract amount for 30 days after the date of final acceptance.

Chapter 252 is an act relating to property access during forest fires, so it may be of interest to certain fire districts.

Chapter 285 is a new law that I have already discussed somewhat in these pages. RCW 84.09.030 previously established March 1st as the deadline date for fixing taxing district boundaries for purposes of establishing the property tax levy boundary for the next upcoming levy. That deadline is now changed to August 1st, which liberalizes the rules affecting annexations and mergers, for example, or at least the timing of such changes. As discussed in my earlier article, this chapter also makes important changes to the rules regarding the distribution and collection of taxes when cities or towns are annexing fire district territory. You have to read this statute if your district is subject to city annexations.

Chapter 290 pertains to the fire service training account and specifically to the state firefighters apprenticeship trust and the training program.

Chapter 292 is an act relating to volunteer emergency workers and immunity. The act amends sections of chapter 38.52 RCW. It assures immunity for acts done during or while traveling to emergency scenes. The amendments clarify the scope of the immunity and to whom it applies.

Chapter 303 changes somewhat the composition of the LEOFF 2 board, by amending RCW 41.26.715 and changes the terms of office. It also adds a section to RCW 41.26 relative to the appointees being members of the two largest political parties.

Chapter 304 amends RCW 41.26.547 slightly, respecting transfers of service credit for LEOFF 2 members.

I hope you have found our discussion of these pieces of significant legislation helpful and informative. The reader can see that our legislators deal with all sorts of important issues. We have omitted detailed discussion of chapter 224. That is the law designating the Pacific chorus frog (Pseudacris regilla) as the official amphibian of the State of Washington. Honest! (You can look it up.)

ARE POLITICAL SIGNS ALLOWED ON FIRE DISTRICT PROPERTY?

As usual, many of my articles derive from questions recently asked by clients. This one is no exception. A client called this month and said he had an irate citizen/candidate for office who did not like being told he could not use the fire district property to display his

yard sign urging the voters to choose him for city council. He seemed to think the property in question might be within the right of way, but was informed that the title owner is the fire district. The Chief told him he just did not feel it appropriate to allow political signs on district property because it made it appear that the district endorsed his candidacy for city office, and "if we did it for one we would have to do it for all." My analysis shows that it might well also be a violation of RCW 42.17.130 to allow it.

RCW 42.17.130 is the statute prohibiting use of public facilities or property to support or oppose a ballot proposition or a candidate.

My research into the matter disclosed a few interesting cases that reinforced my opinion that the Fire Chief took the appropriate action in disallowing political signs on the public property. The first case worth discussing is *Herbert v. Washington State Public Disclosure Commission,* decided by Division I of the Court of Appeals on December 18, 2006. In the case, two public school teachers were fined by the Public Disclosure Commission (PDC) for using school facilities (such as school mailboxes and e-mail) to support a referendum and an initiative. A teacher filed for judicial review under the Administrative Procedure Act and the case made its way to the Court of Appeals after the Superior Court affirmed the PDC order. The teacher challenged the constitutionality of the statute—RCW 42.17.130—as applied to him, even as he claimed he fell within some exception. First, the Court rejected the exception argument, stating that there is no "de minimis" exception in the statute, so even a minimal use of facilities can be a violation, and the conduct did not fall within the commonly cited "normal and regular" exception.

Second, the Court dealt with the constitutional question, which is the focus of this article. After much discussion, the Court agreed with the PDC that it is appropriate to apply "forum analysis" to such disputes. In such analysis it is critical to decide whether the forum is a public forum or a nonpublic forum. Speech in public forums is subject to valid time, place and manner restrictions which are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication," *Bering v. Share,* 106 Wn. 2d 212, 221-22, 721 P.2d 918 (1986), cert. Dismissed, 479 U.S. 1050, 93 L.Ed. 2d 990, 107 S. Ct. 940 (1987).

A different standard applies in nonpublic forums. Speech in nonpublic forums may be restricted if "…the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Seattle v. Eze,* 111 Wn. 2d 22, 32, 759 P.2d 366 (1988), quoting from *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 806, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985).

The *Herbert* Court then proceeded to apply forum analysis, holding that the mailbox system and e-mail system of the school is a nonpublic forum because it had not been traditionally open to the public or used without school permission. The Court went on to hold that the regulation was reasonable in light of its purpose and viewpoint neutral. The e-mail and mailboxes exist to facilitate sharing of information and the restrictions of RCW 42.17.130 do not obstruct that purpose—they only eliminate political advocacy. The Court said the statute was enacted to ensure that public resources are not used to provide advantages to a particular candidate or ballot measure, and the restriction on use of the school system's property furthered that purpose. Also, Herbert had other avenues for communication, the Court said. The PDC's interpretation of the law is also viewpoint

neutral, according to the Court, as the PDC does not favor any particular position or party. Indeed, the PDC restricts the use of public facilities for any political activities, regardless of the political position.

It seems to me that the same analysis applies to the request to place political yard signs on the fire station real property. Such fire station land has not traditionally been used by political candidates for the placement of yard signs. We have routinely advised clients not to use the fire station property to place yard signs or similar signs advocating passage of their own ballot measures. The PDC has in the past opined that such signs have no place on property that is publicly owned. Therefore, I think that the Fire Chief was correct in telling a candidate that the district cannot allow yard signs for candidates to be placed upon the fire station property, for fear of violating RCW 42.17.130.

The plaintiff in *Herbert,* and perhaps the candidate in our case, may have had in mind the situation in *Collier v. City of Tacoma,* 121 Wn. 2d 737, 854 P.2d 1046 (1993). In that case, the Court held that political yard signs placed on the public "parking strips" (in other words, in the road right-of-way) required the application of "strict scrutiny" by the Court to the city's regulation or ordinance. Because of tradition, the Court agreed in that case that the parking strips were a public forum, and applied strict scrutiny to the ordinance. In *Herbert,* as here, the situation was distinguishable because the public property was not just a parking strip where political yard signs had been historically placed by candidates. Instead, it was a nonpublic forum.

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