Firehouse Lawyer

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Inside This Issue

This Issue Dedicated to Lakewood's Fallen Officers

Sometimes it is a struggle to decide what to write about, when approaching the deadline for the monthly *Firehouse Lawyer.* But this time I have the opposite problem: I find myself struggling not to write about something that has been much in the news and much on my mind in the last month. Therefore, since it is in my thoughts during this difficult Christmas season for all of us, I decided to just go ahead and write down my thoughts, and dedicate this issue to the four police officers of the Lakewood P.D. that were ambushed and murdered several days ago at a local coffee shop.

Sergeant Mark Renninger and Officers Tina Griswold, Ronald Owens and Greg Richards were getting ready to start shift. As they had done before, they met at the Forza coffee shop in Parkland, just outside Lakewood's boundaries near McChord Air Force Base. With their laptops out, they were checking for any issues that occurred on the prior shift, while talking and sharing coffee. An armed gunman with an obvious grudge against police, and probably with a large dose of mental illness thrown into the mix, came into the shop and stood in line briefly as if to order something. But then he turned and started shooting directly at the unsuspecting police officers, who had no chance. Actually, one of them somehow managed to get off a shot and wounded the assailant seriously, if not lethally. All four officers died at the scene.

Ever since that day, an outpouring of support has come forth from the Lakewood community, other police departments throughout the nation, and also from the fire service community. Shrines were established at the Forza coffee shop in Parkland as well as the Lakewood Police headquarters. Literally thousands of people visited one or both of those shrines, bringing balloons, stuffed animals, cards and candles. Last week a monumental procession and memorial was held, and attended by thousands of police, fire and other persons from throughout the state and nation (and even from Canada). My wife and I stood along the route of the procession, at one of the Lakewood Fire Stations, to witness the awesome sight of the procession. I was proud to see so many vehicles from my fire service clients, and also other departments in the region, turn out to support the officers, their families, and the Lakewood P.D. Since I have served a few times as a judge pro tem in the Lakewood Municipal Court, I am personally familiar with the

professionalism of the Lakewood Police Department. Also, as a 22-year member of Lakewood Rotary, I have rubbed elbows many times with the police officers. Dave Guttu, a lieutenant—and the incident commander for the memorial and related aftermath of this senseless shooting—is a fine member of our Rotary club.

My overall reaction is that this terrible tragedy affects so many of us so deeply, at many levels. Nine children were orphaned by this nonsensical shooting. Spouses and relatives will never be the same. The Lakewood Police Department cannot help but be drastically affected. Let this insane act unite us, and motivate us, to introduce legislation to address any weaknesses in the system of bail or in the supervision of convicted felons. Something good needs to come from all of this, such as continued support for police officers who put their lives on the line every day for us. We in the fire service are fortunate to have tremendous support from the populace we serve, but traditionally the police have not been so lucky. We need to initiate efforts to change that, not just for a while during this temporary outpouring of emotion, but permanently.

This was the worst possible time for such an event—right before Christmas. But my thought is that we need to use this tragedy as a springboard to move forward. From the depths of winter, at this time of year when the days are shorter, and the nights are longer, than any other time all year long, we need to rise again. (If I sound depressed, maybe I am, but at least I know what the solution is.) This is the time to set new goals, to take stock of where we are in our lives, personally, emotionally, financially, in our relationships, and in every way.

Due to personal circumstances, I am put in mind of the old Beatles song, "When I'm 64". It goes something like this: "When I get older, losin' my hair, many years from now…will you still need me, will you still feed me,…….when I'm 64." Well, all right, I turn 64 in January…not 'many years' from now! (And I am losing my hair.) Therefore, sometimes I think about retiring or maybe just discontinuing the *Firehouse Lawyer.* After all, we cannot just keep going on forever, right? But the fact is, I would be bored to death without all of these wonderful clients bothering me with their difficult problems every week! So I will keep going, one year at a time, until further notice. Maybe 2010 will be the last year for this newsletter. Maybe when 2011 comes and I hit 65, I will slow down a little bit more and ask Brian Snure to help me even more with assisting my fire service clients. In 2012 I will be eligible for Social Security. Rest assured, however, that I am not going to just give up and abandon the wonderful clients that I appreciate at Christmas and in fact year round.

Sorry to rave on for so long, but I needed to get those thoughts down on paper.

SOLE SOURCE EXCEPTION TO PUBLIC BID LAW – A RECURRING QUESTION

With no exaggeration, some client will ask me every month if a factual scenario fits within the so-called "sole source" exception to the public bid law. Over the years I have written many legal opinions about this exception, so I decided to just share some of these opinions in a sort of "Sole Source 101" article.

The following was a part of my legal opinion on the question whether the District may specify by brand name when purchasing self-contained breathing apparatus (SCBA) equipment, such as the so-called "air packs".

As you know, RCW 52.14.110 is the applicable public bidding statute, which requires that insofar as practicable your procuring of equipment should be done pursuant to formal sealed bids. One of the statutory exceptions to this bidding requirement is the situation when availability is clearly and legitimately limited to a "single source of supply". While exceptions to statutes must be narrowly construed so as not to defeat the purpose of the statute, under certain circumstances there may be only one supplier

or one brand name that will suffice. One example is the circumstance where a patented item is essential.

My review of the available law on this subject reveals, however, that the "sole source" exception is not limited only to patented items. The leading case is still *Seattle v. Smith*, 192 Wash. 64, 72 P.2d 588 (1937). In that case, the specifications called for bids for "true Mazda lamps only," which were obtainable from only one source. After reviewing two divergent lines of authority, emanating from the highest courts of various states, the *Smith* court adopted the "liberal rule" for interpreting the sole source exception. The restricted rule, the court said, would limit municipal corporations to using the exception only for patented items, but this would make it impossible according to the court to protect the best interests of the municipality. The court said the public bidding statutes are meant to promote honesty and economy in the public interest, but not to deprive the public of procuring the best article available. Given the technological advancements of our time, it would be best, the court said, to let municipalities have the privilege of using modern methods and improvements.

The *Smith* court found that previous satisfactory experience in the actual use of an article is a reasonable basis for the exercise of such discretion. Furthermore, the court made it clear that the rule was not limited to patented items. In AGO 61-62, No. 24, the Attorney General pointed out that the holding in *Seattle v. Smith* is broad enough to support specification of **brand name** when the public interest is served thereby. In this AG opinion, after noting that the weight of authority is in favor of the Washington view [citing 77 A.L.R. 702] they note that the underlying purpose of the bid laws would be defeated if such limited specs were forbidden when it would clearly aid the public interest to allow it.

In a later AG letter opinion, AGLO 1971, No. 128, the attorney general referred to both the *Smith* case and the above AGO with approval, stating that specifying by brand name was acceptable "only if the officials submitting the call for bids have not drafted these specifications arbitrarily and capriciously, and are acting in good faith."

Recently, I was asked my opinion regarding sole source, based on the value of the inventory of spare parts. I recited the factual scenario as follows:

"The fire district uses a certain model of Motorola radios now. Spare parts such as batteries are maintained for your inventory of radios and it would not be feasible to buy a different brand, other than Motorola, because of the confusion and inconvenience of two separate inventories of differing spare parts. Perhaps more importantly, it is not convenient or infeasible to have two different types of radios.

You have tried to achieve competitive pricing by seeking quotes from four different Motorola dealers. The Motorola regional office has informed you now that only one dealer has any stock of that particular model of radio that you use, because they are discontinuing that model and starting to produce a new model. Apparently, you are not ready to upgrade to a new model of radio entirely for all of your radio stock, and want to keep using the older model. "

Hence, it was my opinion: "If you decide to purchase those ten radios from that one dealer, in my opinion you would not be violating the bid law. Under these circumstances, I would say the product you want is 'clearly and legitimately limited to a single source of supply' and therefore fits within an exception."

It has become evident to me over many years that there are numerous factual scenarios that might support a finding that a purchase is "clearly and legitimately limited to a single source of supply". We might summarize those instances that have been found to legitimately qualify for the exception as follows:

- patented items;
- specifying a particular brand name, but only when that brand is the only one that provides

a feature that must be included or else the public interest will not be served;
- writing specifications narrowly, due to a pre-existing satisfactory experience with a particular product;
- specifying a particular brand name or model, due to the need to maintain an inventory of spare parts, and it would not be practical or in the public interest to maintain two separate inventories of parts for two models;
- specifying a particular process or feature, because firefighter safety strongly calls for favoring one process or feature over the less safe process or features of the competing brands.

We might also point out, as the AG has done in one opinion, that the statute also provides bidding requirements may be waived for "purchases involving special facilities or market conditions." See RCW 39.04.280(1)(b). It is not the purpose of this article to explore or elaborate on the scope of that particular exception. However, it is interesting to consider the scope of "market conditions". Suppose, for example, that new federal emission standards are proposed for 2010, but one manufacturer, and only one, allows fire departments to "piggyback" on other department's purchases of 2009 ambulance chassis, which are exempt from the new standards? While an ambulance chassis would seem to be a sort of generic purchase that normally would be subject to competitive bidding, would not the imminent change in standards and the above facts constitute unique "market conditions" justifying a waiver of competitive bidding? Food for thought.

GARRITY AND THE RIGHT AGAINST SELF-INCRIMINATION

Since I seem to be hearing more about the right or privilege against self-incrimination, during employers' internal investigations of misconduct, especially alleged employee off-duty misconduct that might be criminal in nature, I think it is time to write about the case of *Garrity v. New Jersey,* and its progeny. In *Garrity v. New Jersey,* 385 US. 493 (1967) the U.S. Supreme Court addressed the issues presented when a public safety officer is sought to be interrogated in various types of investigations that might lead to criminal charges against them. Police officers were investigated for alleged traffic ticket "fixing" in municipal courts. No offer of immunity was made. They answered the questions and were later convicted of conspiracy to obstruct justice. Despite the officers' objections that the statements were made under threat of discharge, the New Jersey Supreme Court upheld the convictions. But the U.S. Supreme Court reversed, holding that the Fifth Amendment freedom from self-incrimination, which had not been waived, required the Court to set aside the convictions.

A year later, in *Gardner v. Broderick,* 392 U.S. 273 (1968), the Supreme Court ruled that not only is it unconstitutional to use involuntary testimony of a public employee in a subsequent criminal prosecution, but also it is unconstitutional to base a discharge upon refusal to waive the immunity conferred by the privilege against self-incrimination. The officer was warned that he would be questioned and informed of his right to claim the Fifth Amendment privilege against self-incrimination. However, he was also asked to sign a waiver of immunity and told he would be discharged if he refused. After he refused to sign a waiver, he was charged with violating the disciplinary regulations, given a hearing and discharged. Again, as in *Garrity*, the Supreme Court found coercion and held the discharge unconstitutional. But the Court's decision did show it recognized the need to vindicate the employer's interest in investigating employee misconduct. The *Gardner* Court stated in dictum that if the policeman had been asked to answer questions specifically, directly, and narrowly related to performance of duties and without being required to waive immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, then the privilege would not have been a bar to dismissal.

The doctrine developed further in *Leftkowitz v. Turley,* 414 U.S. 70 (1973), when the Court held that testimony regarding one's job may be compelled where the government offers an immunity broad enough to supplant the rights the employee must relinquish, or in other words, use immunity as to later use in a criminal case. The Court stated that although an individual's rights must be protected, the threat of discharge may be employed since the government must have some means to protect its interests where an employee refuses to testify despite an offer of immunity. Public employees are not given an unqualified right to refuse to account for official actions and still maintain their employment. *See Uniformed Sanitation Men's Assn. v. Comm'r of Sanitation,* 392 US. 280 (1968).

These legal principles were well explained in *Confederation of Police v. Conlisk,* 489 F. 2d 890 (7th Cir. 1973), *cert. den.* sub nom. *Rockford v. Confederation of Police,* 416 U.S. 956 (1974). In applying the *Garrity* principles, as fleshed out in later cases, the federal circuit court in *Conlisk* explained that a municipality must advise an employee of his right to exercise the Fifth Amendment privilege and must warn him that even though the answers and the fruits thereof may not be used in a criminal prosecution, a failure to answer may result in dismissal. Any attempt to impose discipline without these rights being afforded is subject to invalidation.

Thus, in light of these cases, it would seem that a public employer, faced with a need to investigate alleged misconduct by, for example, a police officer or firefighter, would want to provide a notice somewhat like this:

> ADVISEMENT OF RIGHTS: A charge of misconduct, while on duty or off duty, has been filed against you. During this investigation, you have a Fifth Amendment (constitutional) right or privilege not to incriminate yourself by answering one or more questions that may be asked. The answers you provide to the investigator's questions, and the fruits or results of those answers, may not be used against you in any criminal proceeding in which you are a defendant, under our state's laws. However, your refusal to answer, or to cooperate in this investigation, may result in discharge or discipline, because our policies require all personnel to cooperate in disciplinary investigations. Do you understand your rights, as they have been explained to you?

By the way, later cases have made it clear that the fundamental doctrines of these cases apply as well to off duty conduct that may not relate directly to official performance of duties, but does relate to fitness to serve in public office, such as allegations of theft or lack of moral character. In *Broderick v. Police Comm'n of Boston, 368 Mass. 33, 330 N.E. 2d 199 (1975), cert. den.* 423 U.S. 1048 (1976), the court affirmed the denial of a declaratory judgment sought by police officers, they not be compelled to answer questions about their conduct at an off duty Law Day celebration. At that out-of-town convention, it was alleged the officers acted in a rowdy and riotous way, used offensive language, and broke into a hotel liquor cabinet. They refused to answer the internal investigation questionnaire. **The court held the requirement that they answer questions regarding off-duty, non-criminal conduct did not violate the Fifth Amendment, the Fourth Amendment, or the right to privacy protected by federal or state constitution or law.** The court explained its interpretation of the *Gardner* limitations by noting that the conduct related to fitness to perform the public's business. Therefore, we conclude that whenever off duty conduct is work-related, the *Garrity* principles do not bar the inquiry any more than when the conduct is on duty.

DISCLAIMER