Fire Counsel Notes

Current Events—What's Going On?

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What's been going on in legal matters involving Illinois fire protection district administration? In two words—a lot! This article will highlight (in no particular order) several current issues facing fire protection districts around the state based on calls and correspondence from districts and their attorneys.

Procurement

"To bid or not to bid" continues to be a burning issue for many districts as dissatisfaction with the general requirement of Section 11k (70 ILCS 705/11k) of the Fire Protection District Act that sealed competitive bidding be utilized for purchases greater than $20,000 persists among fire protection districts and those who sell equipment and apparatus to districts. Since its enactment by the General Assembly effective January 1, 2015, all manner of ways to avoid the bidding requirement have been put forward and rumors continue to abound. A recent amendment to Section 11k by House Bill 2473 (Public Act 101-0139) effective July 27, 2019 will hopefully provide a viable means for districts which are unalterably opposed to sealed bidding to procure apparatus and equipment utilizing a joint purchasing program. A word of caution, however, if your district is considering the use of a joint purchasing program. The district needs to verify that the selection process used by the program being considered meets the requirements of House Bill 2473 and includes a competitive solicitation process. Before deciding to use a particular program, districts should check with their legal counsel and undertake to determine exactly how the program they are considering works to be certain that this requirement is met. A second issue which persists since the enactment of Section 11k, is the use of "proprietary specifications" in connection with bidding. Using the specifications of a particular manufacturer, rather than an operational standard like NFPA 1901, will have the practical impact of limiting participation of some bidders in the district's procurement process. While this may be exactly what some districts desire in order to purchase a particular brand of equipment or apparatus, it also skews the process, does not conform to the principle of Section 11k, and may very well lead to paying more than is prudent for an item. In some cases, competitors of vendors whose proprietary specifications are used even decline to take the time to submit a bid on the assumption that their bid will not be seriously considered. Similarly, using a brand name specification in a solicitation can be problematic since many products are available only from exclusive dealers in a designated geographic area. This effectively makes the product unavailable to other vendors in that area. Under its Procurement Integrity Standards, which apply to federal fire grants, the Department of Homeland Security and FEMA have found that "specifying only a 'brand name' product instead of allowing 'an equal' product to be offered and describing the performance or other relevant requirements of the procurement" is indicative of unduly restricting competition (Appendix C, FY 2018 SAFER NOFO). It may be that use of valid joint purchasing programs will alleviate some of the procurement issues which have been encountered since the enactment of Section 11k, but districts still need to exercise prudence in their procurement process.

Personnel

Personnel matters never go away, but they seem to be more frequent and are often now exacerbated by social media. Small issues become big issues overnight. As districts and departments confront disciplinary problems, they need to review their existing policies and procedures again to be sure of two things: First, that they are following the procedures that are in place, and, second, that those procedures are adequate. As to the first point, if there are existing policies, even if outdated or not in conformity with applicable state or federal law, the failure to follow them may give an aggrieved member of the department grounds to challenge a personnel decision. Along the same line, in some cases departments and districts may have procedures in bylaws or other policy type documents that are out of date, but which, if followed, can limit or create an obstacle to handling a personnel matter. Requirements for a vote of the membership on personnel matters put in

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place decades ago, for example, can hinder the process of dealing with appointments, suspensions, and dismissals. Further, such outdated procedures may not conform to current concepts and standards regarding personnel matters. Boards should take time now, before a personnel problem arises, to address needed changes in such outdated or inadequate procedures. Second, districts should take care to follow a process in personnel matters that is consistent with fundamental fairness in handling the matter. Fundamental fairness means that the action (1) is not based on whim or arbitrary decision making, (2) is based on clear delineation of whatever complaint or conduct is the basis for the disciplinary proceeding, and (3) at least in the case of serious disciplinary matters (removal or lengthy suspension), gives the person subject to possible discipline reasonable notice and an opportunity to be heard. While state statutes provide clear procedures for appointments, promotions, and discipline in the career department setting, this is not the case for districts which operate on a volunteer, paid on call, or part time basis. Accordingly, internal procedures are needed to clearly define the process and avoid claims based on discrimination or arbitrary treatment. Districts should also review their insurance coverage and confirm that they have management liability or employment practices insurance coverage which will provide insurance coverage and a defense in connection with a court or administrative agency challenge to a personnel action.

Fire Chief Issues

A close corollary to the personnel issues facing district boards are issues between boards and the district's fire chief. While the Fire Protection Act makes clear that the fire chief serves at the pleasure of the board, this does not prevent broader conflicts from arising when problems arise between the chief and the board. Often these involve the fire department as supporters and detractors of the chief choose sides and social media takes over. Readers who did not read Karl Ottosen's article in the last issue of the Fire Call on "Getting Along With Your Fire Chief" should do so for guidance. Beyond that, boards should establish and put on paper a clearly defined description of both the duties and authorities for the chief's position and a description of the authority retained by the board. This prevents confusion and misunderstanding based on incorrect assumptions and presumptions which can cause problems.

Governance and Trustee Matters

Issues continue to crop up in connection with governance and board meetings which are usually tied to situations where Trustees have a conflict of interest in a matter often arising because they are also members of the fire department or have relatives who are serving as members of the department. Since state law authorizes a member of the fire department to serve on the board of trustees by appointment or election, at first blush this might appear to eliminate the issue. It does not. A firefighter/trustee will face on an ongoing basis matters which come before the board of trustees in which he or she will be compelled to confront an evident or potential conflict which could cause the trustee's participation in the consideration of the matter to be questioned or tainted and, in turn, provide a basis for someone dissatisfied with a board action to challenge some important decision or transaction. Personnel matters and procurement decisions are two areas that come quickly to mind. Often opinions on the board, in the department, and even in the community will be deeply divided on such issues and the participation of a conflicted trustee can be the motivation, as well as the legal basis, to attack the decision. Districts having a firefighter/trustee should plan for the situations in which conflicts of interest may exist or appear to exist and have in place board rules for how to deal with those. Taking such an approach can save the turmoil and embarrassment that can come with waiting until it occurs to deal with the conflict.

OMA and Board Meeting Procedures

Some districts still encounter difficulties in dealing with the agenda and notice procedures required under the Open Meetings Act (OMA). An example is a recent call from a district which needed to make a decision quickly regarding its insurance renewal prior the board's next regular meeting. The call disclosed that the board was evidently not aware of its ability under the Open Meetings Act to hold a special meeting on 48 hours' posted notice (with the purpose or purposes of the notice set out in the notice) to deal with the matter. Having a special meeting allows the board to act as needed between regular meetings. While a board may prefer to avoid special meetings and adhere to a set schedule for meetings, it is important for boards to be aware of the availability of special meetings under OMA and their use to address things that do come up outside the regular meeting schedule.

Another OMA question that has recently arisen is who has responsibility for and control over the preparation of the board meeting agenda? As it turns out, OMA does not answer this question. OMA requires that each meeting (regular and special) have an agenda which is posted at least 48 hours in advance of the meeting and is continuously available for view by the public. Under OMA, any matter upon which the board intends to act by adoption of an ordinance or resolution must be identified separately on the agenda. On the other hand, OMA also indicates that matters not on the agenda may be discussed so long as no action is taken. This is the extent of what OMA tells us about the agenda. If we turn to other sources of parliamentary authority, such as Roberts' Rules of Order, Newly Revised, we find that under those rules the agenda for a meeting of a governing body is determined by the body itself. It is likely that this is the source for a preliminary item on some meeting agendas for "approval and amendment of the agenda". While there is nothing wrong with taking such a step, under OMA at least as to action items, the meeting agenda is essentially required to be fixed at least 48 hours before any

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meeting and posted for public inspection and it cannot be amended at the time of the meeting to include an action item. This means that although an item may be added to the agenda at the beginning of the meeting, it cannot be the subject of action during the meeting. Why is this? Because the underlying principle of OMA is transparency and advance notice to the public in the conduct of their business by units of local government. Placing an item on a meeting agenda after the posting of the agenda can mean that a controversial item of business or one in which the public may have an interest will not be known to the public prior to the meeting. So, what to do about the preparation of the agenda? Where disputes may arise regarding the content of an agenda, it is a good idea to establish a procedure by a board rule or bylaw regarding how the agenda will be prepared, by whom it will be prepared, and how items may be placed on the agenda. Typically, this would be a task falling to the president or secretary of the board. When disagreements do arise regarding a particular agenda, it will then fall to the board, as the body, to vote in advance on the content of the agenda for a particular meeting. While awkward, this will maintain compliance with OMA. Two observations on this topic: (1) it is a good idea to have an agenda template and a process for items to be submitted for the agenda with established procedures and deadlines set by the board and (2) it is also important to keep in mind that simply because something is placed on the agenda does not require that the board take any sort of action with regard to it and items on an agenda can be tabled or deferred if that is the will of the board.

EMS Issues

Many districts are straining under the pressures of operating or supporting their local emergency medical services. In some cases, current EMS providers such as city or village ambulance services or private providers are reducing service, seeking additional funding, or threatening to leave the area without service unless the fire protection district steps in with operational or financial support. In some cases, this involves starting or expanding a first responder operation. In other situations, it may mean that the district will be requested by such providers to establish a separate tax levy under Section 22 of the Fire Protection District Act by referendum to support the ambulance service financially. This may involve subsidizing an existing service or beginning an ambulance service as part of the fire department's operations. Any of these scenarios involve significant commitments and require considerable thought before they are entered into. In other situations, where their departments are already involved in EMS, districts are being forced to reduce their department's EMS participation and operation—usually due to lack of personnel or burnout of department members by reason of the number of calls EMS generates by comparison to fire and rescue. Taking such a step may lead to a significant diminution of the level of EMS to the community and, because of that, it needs to be planned for carefully and adequately explained to the public.

New Developments & Requirements

As reported in earlier issues of the Fire Call, the newly enacted Workplace Transparency Act and Cannabis Regulation and Tax Act are going to add some new requirements to district annual responsibilities. More on this later, but be alert. Despite attacks from Springfield on local government, new fire protection districts continue to be formed in different parts of the state where "no man's land" remains or where existing non-district fire department operations can no longer be supported. Likewise, some districts are effectively using new Section 3.3 of the Fire Protection District Act, passed last year, to annex "no man's land" areas that they are required to serve under their county's emergency telephone system, but which do not pay taxes to support the district.

Conclusion

The list could go on and on, but space limitations intervene. The take-away from much of the above discussion is that issues need to be anticipated and dealt with in advance. Waiting until something happens usually results in a worse outcome at a greater expense to the district. Be proactive and take time to review your district's situation in these and other matters. Good luck!■