Fire Counsel Notes

You Should've Called!

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As we all continue to grapple with the COVID-19 situation, it may be a good time to dust off some recurring and recently encountered topics that may have slipped to the side as we experience the pandemic. At page 64 of the 2018 Edition of the *Handbook for Trustees of Illinois Fire Protection Districts,* there is a section entitled "WHEN TO CALL THE DISTRICT'S LAWYER." That section contains a listing of 26 different situations or circumstances when it is prudent for the Board of Trustees of a Fire Protection District to consult with the District's legal counsel. While no one likes to call a lawyer, some recent experiences where that did not happen on a timely basis have led to this article with the hope that it might offer a bit of guidance to Boards as they encounter various situations in administering their districts. This article will not cover all of the 26 different situations listed in the *Handbook,* but rather, it will focus on some real world situations that our office has recently encountered. (No names have been used to protect the innocent!)

The New Station

People are building and adding on to fire stations! Unfortunately, what some Boards forget is that fire protection districts are units of local government and what private individuals and businesses can do in undertaking construction projects, districts may not be able to do because of state or federal law requirements. Since fire stations are government buildings, they must be built to comply with applicable building codes, accessibilities requirements, and other standards. One of those requirements is that the building be designed by a licensed architect or engineer. That, in turn, usually means that the district must hire an architect. And that, it turns out, is required under state law to be done much differently than in the private sector. Under the Local Government Professional Services Selection Act (50 ILCS 510/0/01 et seq.)(Page 368 of the 2018 Text of Laws), unless the fee that will be paid to an architect is less than $40,000.00, it is necessary to go through a formal selection process to pick the architect. This includes publication of a notice soliciting such services and a review process to select the architect. As part of that selection process, the district may not, initially, require architects responding to the solicitation to quote their fee for the work. Only after a preliminary ranking of applicants has been made, is the district permitted to inquire about and negotiate the fee with the top ranked firm. While this may seem counterintuitive to trustees based on their private sector experience, it is the state law. Districts which select an architect without following the procedures of this law run the risk of an objection being made to a selection or a complaint if its procedures are not followed. This, in turn, can result in delay of the project.

Beyond the design of the new station or addition, since the cost of such work is likely going to exceed $20,000.00, competitive sealed bidding will have to be used under the provisions of Section 11k of the Fire Protection District Act (70 ILCS 705/11k) (Page 504 of the 2018 Text of Laws). While most districts are (or should be) now familiar with the bidding rules under Section 11k, when it comes to fire stations, Boards sometimes fall into the trap of thinking that they will simply call up their favorite vendor and order a metal building as they would for their farm or business. Section 11k will not allow that approach. Similarly, districts need to be certain that the architect hired by the district to design the station or addition and handle the bidding process is aware of and understands the procedures and time limits of Section 11k. Procurement procedures differ by type of government in Illinois and, accordingly, what might be permissible for a county, city, township, or school district may not conform exactly to Section 11k. It is important that Boards ascertain that the architect is familiar with Section 11k.

Then there is the Prevailing Wage Act (820 ILCS 130/0.01 et seq.)(Page 807 of the 2018 Text of Laws). The Prevailing Wage Act mandates that all work done for a unit of local government in Illinois by contractors who pay prevailing wages to their workers as determined by the Illinois Department of Labor. Districts are included in that requirement and must include in any written contract a provision requiring Prevailing Wage Act compliance by contractors and subcontractors. They must also give any contractor where there

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is no written contract (an oral contract), a written notice that the contractor must comply with the Act. And, districts must require the submission of "certified payroll reports" to the district by the contractor. Failure to comply can land the contractor and district in trouble with the Illinois Department of Labor including fines and penalties.

Similarly, if the project is going to cost over $50,000, the district must require that the contractor provide a performance and payment bond under the Public Construction Bond Act (30 ILCS 5500/0.01 et seq.)(Page 204 of the 2018 Text of Laws).

And, occasionally, we have the "problem" of Section 4 of the Fire Protection District Act and its strict rules regarding conflicts of interest involving district trustees and district employees (which term includes "members" of the fire department who may not be compensated). (70 ILCS 705/4)(Page 486 of the 2018 Text of Laws). Not infrequently, trustees or fire department members in their private sector business activities are engaged in work involving some phase of construction work such as excavation, electrical, plumbing etc. etc. and they are typically very good at what they do and would give the district a good price for the work. Nevertheless, Section 4 is almost certainly going to prohibit, and worse, potentially make it a felony, for the district and the trustee or member involved to do business with one another.

One more thing. What about the site for the new station? Is a purchase (or maybe a donation) of a parcel of real estate for the new station to be built on going to be made? If so, did the district have the title to the real estate checked to verify that the person selling or donating the land has a good title to pass to the district? Not doing so can create issues when the district goes to a bank or other funding source for financing only to find that there is a flaw in the district's title that may prevent it from pledging the property as collateral for a loan. Was a survey made of the site to verify that the boundaries are as the district believes them to be and to identify any encroachments or boundary disputes? Was an investigation made of the history of the site to ascertain if there may be environmental issues present such as underground storage tanks or a hazardous materials spill at some time in the past?

The New Truck & Equipment

It also turns out that districts are buying new fire apparatus, ambulances, and equipment. Some of those purchases will be made with federal or state grant money while other purchases will be funded by reserves or borrowing. Those procurements, if they exceed $20,000.00 in amount, will again involve our friend Section 11k. Competitive sealed bidding will, in most cases, be required to make these purchases. Unless the purchase is of used equipment or if new, made through a qualifying joint purchasing program, Section 11k will require the district to establish requirements for the item being purchased and advertise for sealed bids. This is generally going to preclude the use of "proprietary specifications" which are often preferred by districts in buying trucks, but which typically do not work for the sealed bidding process. Using such proprietary specifications can lead not only to complaints, but also to an effort to prevent the purchase and, in some situations, it can generate criticism by the members of the public, "watchdog groups," legislators, or other local politicians (such as appointing authorities). In addition to Section 11k compliance, districts and their trustees and fire department members will again face the strictures of Section 4 of the Fire Protection District Act if the district undertakes to do business with a vendor with whom a trustee or a department member or employee is involved. Engaging in a transaction with the district by a trustee or employee is generally not going to be allowed as the exceptions in Section 4 are extremely limited for those types of transactions.

The "Bad Egg" (personnel matters)

Previous articles (Fall 2018) have discussed issues regarding personnel issues in the fire service. They continue to arise unabated. Often, districts encounter these problems in tense circumstances brought on by some sort of inappropriate conduct, performance, or action by a department member. In the noncareer setting, in particular, the pressure of the moment may lead Boards to act precipitously in dealing with the personnel problem. While in the career (full time) firefighter setting there are clearly applicable and mandatory statutory (and often collective bargaining agreement) procedures for dealing with personnel matters [such as the provisions of Section 16.13b of the Fire Protection District Act (70 ILCS 705/16.13b)(Page 530 of the 2018 Text of Laws) and the Firemen's Disciplinary Act (50 ILCS 745/1 et seq.) (Page 391 of the 2018 Text of Laws)], in the noncareer setting, the same level of clarity does not exist and there are numerous potential pitfalls for the Board in dealing with a personnel matter. For example, are there district or department bylaws or even past practices which govern fire department membership, discharge, and disciplinary matters that have been expressly or implicitly adopted by the Board of Trustees? If so, do they apply to the situation at hand (for example a termination of a firefighter for misconduct)? And, if they do apply, have they been followed? And, if so, do the procedures conform to state and federal law concepts and mandates of nondiscriminatory treatment, due process, and equal protection in dealing with governmental or quasi-governmental employees?

Another common situation. The district is short of personnel during certain times of the day—usually daytime hours—and decides to hire for pay some of its volunteer members to stand duty shifts on a part time basis during the week. How is payment to be made? Will the Fair Labor Standards Act (29 USC, Sec. 201) minimum wage requirements apply and, if so, will it be necessary to pay at the same rate of pay when the firefighter is called to respond during non-duty hours? Have steps been taken to structure the pay to such persons so that their "volunteer" status can be preserved under U.S. Department of Labor rulings or will the district face a backpay penalty when a disgruntled member complains?

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The Inspector's Visit

The Illinois Department of Labor (Illinois OSHA) enforces workplace and worker safety standards in the public sector in Illinois. This includes fire departments. Illinois OSHA performs random or complaint based inspections of departments to assure compliance with the state adopted federal OSHA standards. When an inspection is made, deficiencies in compliance can result in penalties being assessed against a district for failing to correct the deficiencies within the time frame allowed by the agency. Ignoring these timelines or failing to seek relief from them can lead to monetary penalties being assessed against the district.

OMA & FOIA

Other articles in this and prior issues of the Fire Call point out the problems districts can have by not complying with the Open Meetings Act (5 ILCS 120/1 et seq.)(Page 1 of the 2018 Text of Laws) and the Freedom of Information Act (5 ILCS 140/1 et seq.)(Page 28 of the 2018 Text of Laws). Suffice it to say that these two laws likely create more opportunities than any other for boards and districts to stub their toes by noncompliance. The COVID-19 situation and modifications to procedures under OMA have only compounded this problem. New Section 7(e) recently added to OMA allows Boards to hold remote meetings, but with slightly different rules from those previously put forward in Executive Orders issued by the Governor. These new procedures, moreover, are only available when a Declaration of a public health emergency is in effect which authorizes their use. Boards must be aware of exactly when and how the Section 7(e) procedures can be followed and take care that the steps required to use that procedure are followed or an action taken by the Board at the remote meeting could be challenged and potentially be determined to be invalid or be the subject of a complaint to the Public Access Counselor. Similarly, FOIA requests continue apace and districts continue not to timely respond to requests within the 5 business daytime limit under the Act putting them in noncompliance and subject to a complaint to the Public Access Counselor.

New Policies & Procedures

All districts have policies and "standard operating procedures" (SOPs) or "standard operating guidelines" or "bylaws" on a variety of administrative and operational topics. Often districts "borrow" such policies or procedures from another district or department. Some districts are now purchasing policies from services which produce generic documents for each state. In many cases, these policies, whatever their source, are not tailored to the district's situation and can set standards for the district or department that it cannot or does not want to meet. For example, a volunteer department's use of a career department's personnel policies may end up requiring it to follow personnel procedures that it actually does not have to follow and may not want to adhere to. A review of the proposed policy before it is adopted would have potentially identified these problems, but when it did not happen, the Board's hands will likely be tied in dealing with a personnel matter before it while the policy was in effect.

Conclusion

So, back to the title to this article. All of the foregoing paragraphs have in common that they represent situations in which had a call been made to the district's legal counsel sooner than it was, and in time to deal with the original situation or question before it became a major problem, the district could have saved time, effort, and expense in handling the situation. If you have the *Handbook*, take a little time to look over the list on page 64—it might just save you some aggravation and money—and from being told: "You Should've Called!" ■

Legal Reminders for Summer 2020

Sexual Harassment Training

The Workplace Transparency Act adopted last fall by the Illinois General Assembly made revisions to the Illinois Human Rights Act (IHRA). The IHRA now requires all employers (which is defined to include fire protection districts) in the state to provide sexual harassment training to all employees (which is broadly defined), and the Illinois Department of Human Rights has released its model training. All employers, **including by definition units of local government like fire protection districts**, must provide this training to all of their employees, members, volunteers, and **trustees** by or before **December 31, 2020**, and the training must be completed annually thereafter. Information on the training, and a link to a PowerPoint of the training, can be found at: https://www2.illinois.gov/dhr/Training/pages/default.aspx. A pdf version of the PowerPoint can be found here: https://www2.illinois.gov/dhr/Training/Documents/IDHR-SHPT-2020-04-APR-V11.pdf

A Certificate of Participation is included at the end of the PowerPoint. This will need to be printed off for each person who takes the training, and it will need to be properly filled out and placed in the personnel file of each individual employee completing the training. It is imperative that this training be completed.

Minimum Wage

On July 1, 2020, a new Illinois minimum wage of **$10.00 per hour** went into effect. Districts should be certain to make any payroll adjustments required by this change if the district compensates any of its members or personnel at the minimum wage rate.

Budgeting for Grants

Notifications have been issued regarding Small Equipment Grants being made by the Office of the State Fire Marshal. Notifications regarding federal fire service grants have or will soon be issued. Districts receiving grants need to remember to include the grant and its expenditure in their annual budget and appropriation ordinance if the budget has not been finalized for the fiscal year of the district in which the grant will be received and expended or, if the budget has already been adopted in final form, districts should utilize the provisions of the Public Works Finance Act (30 ILCS 370/1.1)(Page 199 of the 2018 Text of Laws) to prepare a supplemental appropriation ordinance just applicable to the expenditure of the grant funds.