

Washington State Auditor's Office
Citizen Hotline Report

North Highline Fire District
King County

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WASHINGTON
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STATE AUDITOR



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Board of Commissioners
North Highline Fire District
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Report on Citizen Hotline Investigation

Attached is the official report on Citizen Hotline Case Nos. H-10-002 and H-10-003 for North Highline Fire District.

These referrals were submitted to us under the provisions of Chapter 43.09 of the Revised Code of Washington. This report contains the results of our investigation.

Questions about this report should be directed to Audit Manager Jim Griggs at (253) 372-6250, extension 105.

Sincerely,

BRIAN SONNTAG, CGFM
WASHINGTON STATE AUDITOR

Investigation Summary

North Highline Fire District King County

ABOUT THE FIRE DISTRICT

Fire districts in Washington State are governed by elected boards of commissioners. The citizens of the district rely on the commissioners to ensure District resources are used for public purposes and the benefit of the district.

The District was created in 1942 and provides fire protection services to 43,000 residents in a 9.3 square-mile area, located in a mostly residential area of Burien and the unincorporated area of White Center. The District maintains two fire stations staffed by 35 career and 48 volunteer firefighters 24 hours a day. Its annual operating budget is approximately \$5 million. An elected, three-member Board of Commissioners governs the District.

ABOUT THE INVESTIGATION

On January 3, 2010, our Office was contacted by two citizens with concerns regarding a Commissioner's potential conflict of interest, possible gifting of public funds and abuse of sick leave policy.

ASSERTIONS AND RESULTS

Assertion 1:

A conflict of interest exists between the former Fire Chief and a District Board Member. The former Fire Chief was a Board Member for a local water district. That water district's manager was a Fire District Board Member. The Board gave the Fire Chief a 57.5 percent pay raise three months before his retirement.

Results

We were unable to substantiate a legal conflict of interest. However, our investigation found:

- On September 7, 2006, the Board awarded the Fire Chief a 57.5 percent pay increase (from \$10,473 to \$16,500 per month, or to \$198,000 per year) three months prior to his retirement on December 31, 2006. As a member of the Law Enforcement Officers' and Fire Fighters' Retirement System Plan 1 (LEOFF1) retirement system, one of the primary factors used as a basis for calculating the Chief's retirement salary benefit was his base salary at the time of retirement.
- The Board's action increased the monthly pension payment to the former Chief to approximately \$12,540 a month, \$150,500 per year, or 120 percent of his salary

prior to the Board-approved salary increase. The former chief is now being paid more in retirement than he was paid in salary three months prior to retiring.

- On November 9, 2006, the state Department of Retirement Systems questioned the pay raise in a letter to the District. Retirement Systems asked if the salary increase was part of an incentive package for the Chief to retire.

According to state law, any form of severance payment based upon termination is a special salary or wages and is not included as base salary under LEOFF Plan 1, and therefore is not included in the calculation of pensions. In order not to be seen as special salary, the District was required to attach the salary increase to the position and offer a similar salary to the subsequent fire chief.

- On November 16, 2006, the District attorney responds to Retirement Systems that the salary increase was not part of the consideration offered under the \$30,500 release and separation agreement also paid to the chief at retirement.
- On December 12, 2006, the District adopted Resolution 403, which set a new Chief salary schedule, to coincide with the salary increase approved in September.
- On December 31, 2006, the Fire Chief retires.
- On March 31, 2007, the Fire Chief received a severance package of \$30,500.

These actions established a new, baseline annual salary for the position of \$153,396 the previous salary was \$119,676.

Further, although not required by District policy or contractual obligation, the Board provided the severance payment in the amount of \$30,500 to the former chief when he retired.

The District did not document or support the public purpose or District benefit for these actions. It appears the primary beneficiary of these actions was the former Chief.

Due to the Department of Retirement System's previous interest in these actions, we will be forwarding the results of this investigation.

Assertion 2:

The District Board granted the Training Secretary a severance package she was not entitled to.

Results

The District eliminated its training secretary position on December 21, 2009, in an effort to save money. The Training Secretary, a Board member's spouse, was paid \$3,986 each month. The District Board approved a seven-month severance package of \$38,814, including accrued vacation and sick leave for the Training Secretary and paid it in early 2010.

We reviewed the District's severance pay policy in effect at the time, which stated the following:

- Severance will be paid only when the District determines a layoff is necessary due to the inability to fund a position.
- Severance will be granted only to individuals who have been continuously employed by the District for five or more years.
- Severance pay is not to exceed one month's salary.

The District's severance payment to the former Training Secretary did not follow the District's policy. This former employee did not have an employment agreement that allowed her to earn this amount of severance pay. The District stated the severance was paid in exchange for a release of claims; however, the District did not document the employee had reasonable claims, or that any claim would be as large as this severance payment amount.

Assertion 3:

The District is granting a Fire District employee time off under Family Medical Leave Act that he may not be entitled to.

Results

District officials granted a firefighter 768 hours of paid time off in 2008 and 792 hours of paid time off in 2009 to care for a family member. By comparison, other firefighters represented by the same collective bargaining unit are allowed only 72 hours of sick leave annually to care for a family member and can only accumulate a maximum of 1,350 hours sick leave.

The amount of leave granted this individual, 1,560 hours, equaled approximately 11 years of accumulated sick leave and exceeded the District's maximum allowable sick leave accrual, 1,350 hours, by 210 hours.

The Family Medical Leave Act allows an employee to use accrued paid time to care for family members.

The Washington State Family Care Act expands the definition of "sick leave or other paid time off" to also mean:

1. Time allowed under the terms of an appropriate state law.
2. Collective bargaining agreement.
3. Employer policy, as applicable to an employee for disability under a plan fund program.

The bargaining agreement gives the employee access to LEOFF 1 disability. However, this requires the approval of the King County LEOFF1 Board, which will only grant disability leave in the instance of the disability of the firefighter, not a family member.

We found no provisions for sick leave accruals for LEOFF1 employees in the collective bargaining agreement, or employer policy, therefore, we looked to state law.

The Washington State Family Care Act allows workers with available paid sick leave or other paid time off to care for a spouse with a serious or emergency health condition. It also states it to be in the public interest to provide reasonable leave for medical reasons, for the birth or placement of a child, and for the care of a family member who has a serious health condition. It further states an employee is entitled to a total of 12 workweeks of leave during any 12-month period.

The District has allowed this employee to take an unlimited amount of paid time off which may not represent a reasonable accommodation as intended by the state law.

FIRE DISTRICT'S RESPONSE

General Response.

While the Board disagrees with the conclusions both express and implied the Board does *recognize that it needs to do a better job of defining and managing the employment relationships that it has with its management employees to avoid the situations addressed by the report.*

Specific Responses:

1. Response to Assertion No. 1

The Citizen Hotline Report does not identify any conduct or action that violates a statute, constitutional provision or District policy but instead concludes that there was an undefined failure to demonstrate a public purpose and district benefit. The Board of Commissioners, as the elected representatives of the District, considered all facts available to it at the time of the actions identified by the Auditor, made a discretionary decision based on those facts and implemented that decision in a manner it believed at that time to be appropriate and in the best interest of the District.

The Board of Commissioners has specific statutory authority to enter into employment contracts and establish salaries and benefits. RCW 52.12.021 provides, in part, as follows:

Fire protection districts have full authority to carry out their purposes and to that end may . . . enter into and to perform any and all necessary contracts, to appoint and employ the necessary officers, agents, and employees . . . and to do any and all lawful acts required and expedient to carry out the purpose of this title.

In exercising this authority the Board made a discretionary decision to address a salary discrepancy in the former chief's pay. In response to this discrepancy, the Board of Commissioners established its public purpose and district benefit in adopting Resolution No. 403 establishing its formal rationale for the salary schedule that increased the former chief's salary. The purpose and benefit to the District was to establish a salary schedule that, in the Board's opinion, would appropriately compensate the current and future chief executive officer of the District. A more detailed rationale for adopting the salary schedule was set forth in a letter to the Department of Retirement Systems dated November 16, 2006. The Department of Retirement Systems reviewed the increase and accepted the District's explanation.

The Auditor also questions the severance payment to the former chief without any recognition that the severance payment was made pursuant to a termination agreement in consideration of the former chief's full release of any and all prior or future claims against the District. The Board's decision to pay a severance payment in consideration of avoiding any potential claims or litigation related to the termination of a long-term former fire chief without specific cause represented a discretionary exercise of the Board's authority under RCW 52.21.021.

2. Response to Assertion No. 2.

The severance paid to the former training secretary was not made pursuant to the policy identified by the Auditor but was a negotiated discretionary decision of the Board made pursuant to RCW 52.12.021 as part of a termination agreement based on a review of all applicable circumstances including potential contractual rights of the secretary and the desire of the Board to avoid the cost, expense and disruption of defending a lawsuit for breach of contract or wrongful termination.

The Auditor's report incorrectly focuses on a single paragraph in a policy, which arguably did not apply to the training secretary, to conclude that the District should only have paid one month's salary as severance. The Auditor fails to acknowledge or consider the following relevant information that affected the decision of the Board:

- *The 1997 Policy did not specifically apply to the "training secretary" position.*
- *The employment relationship of the former training secretary was not defined by a single signed "contract" or policy. The former training secretary provided an unsigned employee contract from 2006 and claimed that this established the terms of her employment as promised to her by the former fire chief. Under this alleged agreement, the training secretary had a claim to seven months of severance pay and additional benefits beyond what was contained in the final negotiated termination agreement.*
- *The conflict among existing policies, the alleged contract and the absence of any cause for the termination, exposed the District to potential liability and contractual liabilities for terminating the employee.*
- *The employment history of the training secretary.*
- *The full release and waiver of any and all past present or future claims obtained in the severance agreement.*

The Auditor assumes that the Board had the ability to dictate the termination and severance pay without consideration of the consequences of its decision. Had the Board taken the position recommended in the audit report it would have been making a decision against the advice of its legal counsel and would likely have incurred greater costs and expenses in defending a lawsuit. Because the Board negotiated and entered into a termination agreement with the severance pay provisions, the Board avoided the cost and expense of a protracted dispute over contract terms and obtained a full waiver and release of any and all past, present and future claims. The Board's decision was

made with the guidance of legal counsel and represents a legal and valid exercise of its discretionary authority based on all facts present at the time of the decision.

3. Response to Assertion No. 3

The Board is equally concerned with the amount of LEOFF I disability leave payments that it is obligated by law to make to the employee in question. The Auditor's report represents a misunderstanding of the applicable law and ignores the documented actions that the Board of Commissioners has undertaken to attempt to resolve the issue.

RCW 49.12.265 gives employees the right to use sick leave benefits or other paid time off to care for family members. Under RCW 49.12.265 "Sick Leave or other paid time off" is defined as . . . time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for illness, vacation, and personal holiday. If paid time is not allowed to an employee for illness, "sick leave or other paid time off" also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability under a plan, fund, program, or practice that is: (a) Not covered by the employee retirement income security act of 1974, 29 U.S.C. Sec. 1001 et seq.; and (b) not established or maintained through the purchase of insurance.

LEOFF I is not covered by ERISA and the District's LEOFF I disability leave is not funded with a third party insurance policy. Accordingly, because the District's LEOFF I employees are not provided sick leave benefits under a sick leave policy, the LEOFF I employees may use disability leave benefits (which are essentially unlimited) to care for sick family members.

The Board has obtained two formal legal opinions affirming the above interpretation. Unfortunately, the applicable laws do not require that an employee be reasonable in use of the leave granted by the State Legislature. Nonetheless the Board is continuing to work diligently to explore all of its options to resolve this issue in a manner that recognizes the statutory rights of the affected employee and complies with the law.

AUDITOR'S REMARKS

We thank District officials and personnel for their assistance and cooperation during the investigation.

This firefighter has long since exceeded six months of paid leave. The District's payments are therefore not supported by RCW 49.12.

APPLICABLE LAWS AND REGULATIONS

North Highline Fire District Administrative Staff Employee Manual, adopted July 21, 1997

Section 21. Severance Pay

Severance pay will only apply when the district, in its sole discretion, determines that a layoff is necessary due to the inability to fund a

position. Severance pay does not apply to any other type of termination of employment . . . In addition, severance pay will only be granted to an individual who has been continuously employed by the district for five (5) years or more. An employee who is eligible for severance pay will be granted severance pay equal to one month's salary.

RCW 49.78.010

Legislative findings.

The legislature finds that the demands of the workplace and of families need to be balanced to promote family stability and economic security. Workplace leave policies are desirable to accommodate changes in the workforce such as rising numbers of dual-career couples, working single parents, and an aging population. In addition, given the mobility of American society, many people no longer have available community or family support networks and therefore need additional flexibility in the workplace. The legislature declares it to be in the public interest to provide reasonable leave for medical reasons, for the birth or placement of a child, and for the care of a family member who has a serious health condition.

RCW 49.78.220

Entitlement to leave

- (1) Subject to RCW 49.78.260, an employee is entitled to a total of twelve workweeks of leave during any twelve-month period for one or more of the following:
 - (a) Because of the birth of a child of the employee and in order to care for the child;
 - (b) Because of the placement of a child with the employee for adoption or foster care;
 - (c) In order to care for a family member of the employee, if the family member has a serious health condition; or
 - (d) Because of a serious health condition that makes the employee unable to perform the functions of the position of the employee.

RCW 49.78.240

Unpaid leave permitted — Relationship to paid leave.

- (1) Except as provided in subsection (2) of this section, leave granted under RCW 49.78.220 may consist of unpaid leave.
- (2) If an employer provides paid leave for fewer than twelve workweeks, the additional weeks of leave necessary to attain the twelve workweeks of leave required under this chapter may be provided without compensation.

RCW 49.78.370

Effect on existing employment benefits.

Nothing in this chapter diminishes the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this chapter. The rights established for employees under this chapter may not be diminished by any collective bargaining agreement or any employment benefit program or plan.



ABOUT THE STATE AUDITOR'S OFFICE

The State Auditor's Office is established in the state's Constitution and is part of the executive branch of state government. The State Auditor is elected by the citizens of Washington and serves four-year terms.

Our mission is to work in cooperation with our audit clients and citizens as an advocate for government accountability. As an elected agency, the State Auditor's Office has the independence necessary to objectively perform audits and investigations. Our audits are designed to comply with professional standards as well as to satisfy the requirements of federal, state, and local laws.

The State Auditor's Office employees are located around the state to deliver our services effectively and efficiently.

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