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MEMORANDUM

TO: San Juan County Fire Protection District No. 2

FROM: Pacifica Law Group LLP

DATE: February 14, 2024

SUBJECT: Employment Agreement Dated August 21, 2023

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL;
ATTORNEY WORK PRODUCT

I. INTRODUCTION

This memorandum responds to and addresses a list of questions you provided regarding the validity of an Employment Agreement between San Juan County Fire Protection District No. 2 (the "District") and Holly vanSchaick dated August 21, 2023. As set forth in detail below, we think there are several potential grounds on which the Employment Agreement's validity could be challenged. We think there is a substantial likelihood a court would find the District's Board of Fire Commissioners ("BOFC") lacked authority to bind future BOFCs to the Employment Agreement, which involves powers likely deemed to be governmental. It is also likely that any delegation of discretionary powers to the Fire Chief is not valid, as such delegation is not authorized by statute. This is especially true to the extent any delegation would be "exclusive" or remove powers from the BOFC. As a general rule, the BOFC lacks statutory authority to surrender any of its discretionary powers. This includes the power of control over litigation. Moreover, any decisions or discussions at the BOFC's executive session on August 21, 2023 (or any prior executive session) beyond the narrow topic of "evaluat[ing] the qualifications of an applicant for public employment" or "review[ing] the performance of a public employee" would violate the Open Public Meetings Act ("OPMA"), as would discussions of District business (including topics related to hiring a Fire Chief) in any private meeting. Any such violations likely were not cured when the BOFC voted to hire Ms. vanSchaick in open public session. Finally, though we believe

the delegation of duties to the Fire Chief is likely invalid, if it is determined to be valid, any amendment of these duties would likely require the consent of the Fire Chief.

Some of the BOFC's other actions in this matter would likely be legal but for the concerns identified above. But on the whole, we see significant legal issues related to the Employment Agreement.

II. RELEVANT BACKGROUND

A. Employment Agreement History.

Here, we summarize our understanding of the events and meetings leading to execution of the August 21, 2023 Employment Agreement with Holly vanSchaick. Other relevant background is discussed in the analysis section below.

In early to mid-June 2023, the District's general counsel worked on drafting a "Fire Chief Contract for H. vanSchaick." We understand that Commissioner Fuller discussed the contract with the District's general counsel around that same time, including details such as severance. At that point, the BOFC had not yet publicly announced or addressed the subject of hiring a new Fire Chief.

The agenda for the BOFC's July 17, 2023 regular meeting states under "New Business" that the BOFC will "Discuss options for selection of a Fire Chief." The July 17, 2023 meeting minutes note under "New Business" that "Commissioners discussed the selection of a Fire Chief" and "Commissioner Fuller explained that we have an interim fire chief and that they need to start thinking about this process of appointing the next chief." In the audio recording of that meeting, Commissioner Fuller stated it is important to have a Fire Chief in place for morale and other reasons, and that the BOFC will "begin a process" of selecting a Fire Chief. There was no discussion of any particular candidates or specific hiring processes. There was no public comment on the topic of selecting a Fire Chief. The meeting minutes reflect that an executive session took place under RCW 42.30.110(1)(g) to "evaluate the qualifications of an applicant for public employment or to review the performance of a public employee," but that no further action was taken.

The agenda for the BOFC's August 21, 2023 regular meeting agenda contains an item titled "Old Business" that states "Fire chief selection/appointment." It also states there will be an executive session under RCW 42.30.110(1)(g) to "evaluate the qualifications of an applicant for public employment or to review the performance of a public employee." The written agenda does not otherwise elaborate on selecting or hiring a fire chief. At the beginning of the meeting, the BOFC made oral changes to the agenda. The BOFC moved the executive session up in the schedule and added "Fire Chief contract" under New Business. That change was followed immediately by public comment. The audio recording of the meeting indicates there were numerous public comments, both emailed and in-person, regarding the written agenda's "Fire chief selection/appointment" item. Most commenters expressed concern about the "rumor" that the BOFC was going to pick Interim Chief Holly vanSchaick (who joined the District in December 2021 as Assistant Chief) as the new Fire Chief at the meeting and the lack of a public process for

interviewing or advertising for the position, and stated they believed the next Fire Chief should be appointed by a new BOFC (four of the BOFC's five members had terms ending in November 2023) after a transparent public process of recruiting and public input. A few commenters spoke in support of Ms. vanSchaick.

An executive session took place at the August 21 meeting. We understand that this executive session pertained to selecting a Fire Chief. The meeting minutes then describe a motion to appoint Interim Chief Holly vanSchaick "to the position of Chief, salary of $12,083 per month, by Commissioner Biddick, seconded by Commissioner Stameisen." The audio recording contains a discussion by Commissioners Stameisen, Templin, and Negulescu about the hiring process. They explained that a lengthy and robust hiring process was done to hire vanSchaick as Assistant Chief in 2021, that it was clear at the time she was being vetted and hired to hopefully stay with the District, and that vanSchaick was far and away the best option. They further explained that the 2021 hiring process for Assistant Chief included a continuity of operations plan ("COOP") to ensure a smooth transition from Assistant Chief to Fire Chief if succession was necessary. Templin stated the "public was involved in the meetings with the continuity of operations plan."

The BOFC denied a request for public comment on the motion to appoint vanSchaick as Fire Chief. The motion passed 5-0. It was immediately followed by a motion to accept and sign the contract to hire vanSchaick as Fire Chief with a salary of $12,083 per month. That motion also passed 5-0.

We understand that an "Executive Management (Chief & Assistant Fire Chief) Continuity-of-Operations Plan (COOP)" was drafted at some point before the Employment Agreement was executed. It is unclear from the document we received when exactly it was drafted (though the document information shows a creation date of August 2, 2023), to whom it was circulated, and whether the public knows of its existence. The document itself purports to put in place a plan that allows the Assistant Chief to be promoted to Fire Chief in the event the Fire Chief vacates the position. The document states several justifications for this plan, including ensuring smooth transition of leadership, maintaining operational readiness, utilizing existing institutional knowledge, consistency in decision-making, mitigating potential challenges, enhancing community trust, and sustaining organizational culture. As noted above, according to Commissioners who spoke at the August 21 meeting, the hiring process for Assistant Chief in 2021 included a continuity of operations plan, but it is unclear whether the COOP document we've been provided is the same plan discussed in 2021. We have not seen any written documentation of the 2021 plan, nor do we know the details of any public involvement in that plan.

B. OPMA Basics.

The Washington Open Public Meetings Act (OPMA), codified in chapter 42.30 RCW, requires that all meetings of governing bodies of public agencies, including cities, counties, and special purpose districts, be open to the public. "Governing body" means the "multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2).

A "meeting" under the OPMA occurs when a quorum of a city council, board of county commissioners, or other governing body gathers and takes "action," defined as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3), (4). "Final action" is defined as "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance." RCW 42.30.020(3).

Fire protection districts are special purpose districts governed by title 52 RCW. The board of commissioners of a fire protection district is a "governing body" for purposes of the OPMA. *See* ch. 52.14 RCW (board manages the district's affairs, holds regular meetings, and has the power to adopt rules governing the district, among other powers); RCW 42.30.020(2). Title 52 RCW expressly applies the OMPA to fire protection district board meetings: "All meetings of the board of fire commissioners shall be conducted in accordance with chapter 42.30 RCW and a majority constitutes a quorum for the transaction of business." RCW 52.14.100.

III. ANALYSIS

A. Depending on What Was Discussed at the August 21 Executive Session and/or Any Other Private Meetings of the BOFC, There Is a Risk That the BOFC Did Not Comply with the OPMA in Entering the Employment Agreement (Question 1).

You have asked whether the Employment Agreement was approved in a manner that complies with the OPMA. While we think several of the BOFC's actions in this matter raise no OPMA concerns, any decisions or discussions at the executive session on August 21, 2023 (or any prior executive session) beyond the narrow topic of "evaluat[ing] the qualifications of an applicant for public employment" or "review[ing] the performance of a public employee" would violate the OPMA, as would discussions of District business (including topics related to hiring a Fire Chief) in any private meeting.

1. The BOFC Likely Was Not Required to "Delegate" Authority to Negotiate the Employment Agreement in an Open Public Meeting (Question 1(1)).

Under the statutory scheme governing fire protection districts, boards of fire protection districts have express power to, among other things, "manage and conduct the business affairs of the district," "make and execute all necessary contracts," and "generally to perform all such acts as may be necessary to carry out the objects of the creation of the district." RCW 52.14.100. There is no statutory requirement that a board delegate authority to negotiate contracts to one individual on behalf of the district. And while we understand that Commissioner Fuller was involved in the drafting/negotiation of the Employment Agreement in or around June 2023, we are not aware of the details of that arrangement or whether the BOFC formally authorized or directed Commissioner Fuller to do so. Regardless, the BOFC has statutory authority in its own right to make and execute contracts. Whether the BOFC otherwise complied with the OPMA in doing so is addressed below.

Even if the BOFC did delegate to an individual or group of individuals authority to negotiate the Employment Agreement, it is not clear such a delegation would constitute "action" for purposes of the OPMA. To answer this question, we would need additional information regarding exactly how any such delegation was made and to whom. The extent to which such an individual or group might constitute a "committee" under the OPMA is addressed in more detail below.

2. The BOFC Did Not Violate the OPMA's Agenda Requirement (Question 1(4)).

Public agencies with governing bodies must make the agenda of each regular meeting of the governing body available online no later than 24 hours in advance of the published start time of the meeting. RCW 42.30.077(1). However, this requirement does not prohibit subsequent modifications to agendas, nor does it invalidate any otherwise legal action taken at a meeting where the agenda was not posted in accordance with this requirement. *Id*. Under this statute, it does not appear that the BOFC's modification of the agenda to add "Fire Chief contract" at beginning of the August 21, 2023 meeting violated the OPMA's agenda requirement. And even if the BOFC's last-minute modification were deemed a violation, this would not invalidate the BOFC's approval of the Employment Agreement if such approval was otherwise legal (see below).

3. Whether the Public Was Informed of the Application and Selection Process or Provided with a Draft Proposed Agreement Does Not Necessarily Implicate the OPMA (Questions 1(2), 1(6)).

The OPMA requires that "meetings" of the BOFC (meaning meetings at which "action" is taken) be open to the public. RCW 42.30.020, .030. The OPMA is not a broad mandate for agencies to disclose information or documents to the public. If meetings occurred at which the BOFC discussed or made decisions regarding the application or selection process or the terms of any agreement (draft or otherwise), those meetings should have been open to the public absent an applicable exemption (see below). But if no such meetings occurred, the OPMA is not implicated.

4. More Information Is Needed to Determine the Impact of the COOP on the Employment Agreement's Validity (Question 1(3)).

As noted above, it is not clear to us when the COOP came into existence, when (or if) it was adopted by the BOFC, who initially proposed or drafted it, to what extent the public was involved in its creation or adoption, and to what extent it impacted the BOFC's Fire Chief decision. At the August 21, 2023 meeting, Commissioner Templin stated that "the public was involved in the meetings with the continuity of operations plan" when Holly vanSchaick was hired as Assistant Chief in 2021. Other commissioners also spoke to the existence and importance of continuity of operations in the BOFC's Fire Chief decision. We have been provided a written COOP, dated in 2023, which sets forth a general plan that "allows" (but in no way requires) the Assistant Chief to be promoted to Fire Chief in the event the Fire Chief vacates the position. An OPMA violation as to the COOP itself would not necessarily invalidate the Employment Agreement. But in order to fully analyze whether the COOP triggered OPMA requirements potentially impacting the Employment Agreement, we would need additional detail on the purpose of the COOP and any procedures involved in its creation and adoption.

5. The Failure to Discuss the Specific Terms of the Contract in a Public Meeting Does Not Necessarily Implicate the OPMA (Questions 1(5), 1(7)).

The OPMA does not appear to require that public agencies negotiate or even mention all contract terms in open public meetings. Contract negotiations by agency employees generally are not subject to the OPMA. In *Salmon For All v. Dep't of Fisheries*, 118 Wn.2d 270, 278-79, 821 P.2d 1211 (1992), the Supreme Court held that "[n]egotiations of employees of a state agency involved with other jurisdictions do not constitute the 'governing body' of that agency even though the agency may ultimately, after evaluation by a director or a 'governing body,' ratify or accept the results of the negotiations of its employees."

Even if one member or a subset of members of a governing body were tasked with negotiating a contract, that subset would likely not be viewed as a committee of the governing body subject to the OPMA. The OPMA applies to meetings of a governing body "or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). A group of individuals is only a "committee thereof" a governing body if the latter has exercised its authority and taken some action to formally bring the former into existence. *See* 2022 Op. Att'y Gen. No. 2, 2022 WL 822483, at *4-5; *Citizens All. for Prop. Rights Legal Fund v. San Juan Cnty.*, 184 Wn.2d 428, 444, 359 P.3d 753 (2015) (a "committee thereof" is an entity that the governing body creates or specifically authorizes). We have seen no information suggesting the BOFC authorized Commissioner Fuller (either alone or in combination with the District's general counsel or others) to act in the capacity of a "committee" of the BOFC in negotiating the Fire Chief Employment Agreement, nor that the BOFC created or authorized any other committee to so act.

Even assuming the BOFC authorized or directed Commissioner Fuller and/or the District's general counsel to act in some capacity with respect to the contract negotiations or drafting, that would not necessarily constitute a "committee" subject to the OPMA. First, with respect to Commissioner Fuller alone, it's unclear whether a single individual could constitute a committee as contemplated by the OPMA. The OPMA does not define "committee." Dictionary definitions more generally indicate a committee could consist of one member. *See* Black's Law Dictionary (defining "committee of one" as "A committee with only one member"); Merriam Webster Dictionary (defining "committee of one" as "a person delegated to perform the duties of a committee"). But Washington case law and Attorney General opinions do not address this question. Regardless, even assuming Commissioner Fuller could be considered a "committee of one" for purposes of contract negotiation, the OPMA applies to committees only under certain circumstances—specifically, when the committee (1) acts on behalf of the governing body, (2) conducts hearings, or (3) takes testimony or public comment. RCW 42.30.020(2). We assume Commissioner Fuller was not conducting hearings or taking testimony or public comment. And "acts on behalf of" refers to situations where a committee exercises actual or de facto decision-making authority for a governing body. *Citizens All. for Prop. Rights Legal Fund*, 184 Wn.2d at 440. The OPMA does not extend to advisory committees and other entities that do nothing more than gather information, conduct internal discussions, and provide advice or information to the governing body. *Id*. at 442, 451. Stated another way, a committee cannot act on behalf of a governing body if the committee is making proposals that the governing body ultimately enacts. 2022 Op. Att'y Gen. No. 2, 2022

WL 822483, at *7. We are not aware that Commissioner Fuller was granted authority to make final District decisions regarding the contract terms or hiring of Holly vanSchaick. And to the extent Commissioner Fuller worked with the District's general counsel in drafting the contract, and/or negotiated terms with vanSchaick prior to a full BOFC vote on those issues, such actions would not make those communications/discussions subject to the OPMA so long as the BOFC retained ultimate decision-making authority.

Finally, it does not appear that the BOFC violated the OPMA's new public comment requirement in approving the Employment Agreement at the August 21, 2023 meeting. Under RCW 42.30.240(1), except in an emergency, "the governing body of a public agency shall provide an opportunity at or before every regular meeting at which final action is taken for public comment." The required public comment "may be taken orally at a public meeting, or by providing an opportunity for written testimony to be submitted before or at the meeting." There is no penalty listed for violating this provision.

Here, "final action" was taken at the August 21 meeting because the BOFC voted on motions to appoint Holly vanSchaick as Fire Chief and to approve her contract. *See* RCW 42.30.020(3). Accordingly, the public comment requirement in RCW 42.30.240(1) applies. And the BOFC appears to have complied with the requirement because there was a public comment session near the beginning of the August 21 meeting, after the BOFC had added "Fire Chief contract" to the agenda. Multiple commenters (both in-person and via emails read at the meeting) spoke on the issue of whether to appoint Ms. vanSchaick as the new Fire Chief. The BOFC's denial of a request for **additional** public comment later in the meeting when the motion to appoint Ms. vanSchaick as Fire Chief had been made does not appear to violate the plain text of the statute.

6. Private Meetings to Discuss Selection of a Fire Chief, or Executive Session Discussions Outside of Certain Specified Purposes, Would Violate the OPMA.

The facts we have been provided do not establish when the BOFC discussed or decided to use the COOP to guide its 2023 Fire Chief hiring process, to limit the hiring process to one candidate, to narrow that candidate to Holly vanSchaick, and to hire Ms. vanSchaick; whether any such discussions or decisions occurred in public meetings, private meetings, or executive sessions; or whether the BOFC held any vote (formal or otherwise) on any of these topics. The fact that Commissioner Fuller and the District's general counsel apparently worked on drafting an Employment Agreement specific to Holly vanSchaick in June 2023, before the BOFC had publicly announced a hiring process or voted in a public meeting to consider or hire vanSchaik as the Chief, seems to indicate the BOFC had already decided to hire vanSchaick at that time. This raises the question when and how that decision took place and whether the OPMA was violated in the process. If decisions, discussions, deliberations, or considerations about the hiring or contracting process took place among a quorum of BOFC members during a private meeting (including over email or by other electronic means), the OPMA was likely violated. *See, e.g., Matter of Recall of Beasley*, 128 Wn.2d 419, 908 P.2d 878 (1996) ("It may be assumed arguendo that discussions between a majority of the members of the school board regarding modification or extension of the superintendent's contract would constitute 'meetings'" under the OPMA). Note that the OPMA does not require the contemporaneous physical presence of a quorum of a governing body to trigger its provisions. Thus, serial conversations between smaller groups may be treated as a

"meeting." *Wood v. Battle Ground School Dist*., 107 Wn. App. 550, 562-64, 27 P.3d 1208 (2001) (exchange of e-mails among board members constituted a meeting under the OPMA).

To the extent any such discussion occurred at the August 21, 2023 executive session (or any prior executive session), this would likely also constitute an OPMA violation. A governing body may hold an executive session only for specified purposes. Relevant here, under RCW 42.30.110(1)(g), a governing body may hold an executive session to "evaluate the qualifications of an applicant for public employment or to review the performance of a public employee." However, "subject to RCW 42.30.140(4) . . . when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public." *Id*.[1]

To comply with the OPMA, the BOFC was required to "limit its action in executive session to that authorized by the relevant exception" (here, RCW 42.30.110(1)(g)). *See Miller v. City of Tacoma*, 138 Wn.2d 318, 327, 979 P.2d 429 (1999). Exceptions are construed narrowly. *Id*. Evaluating the qualifications of an applicant for public employment could likely include personal interviews with an applicant, discussions concerning an applicant's qualifications for a position, and potentially discussions concerning salaries, wages, and other conditions of employment personal to the applicant to the extent they relate to the applicant's qualifications. *See id.* at 328. It could not, however, include identification of a consensus candidate. *Id*. (when council in executive session conducted ballots to arrive at a consensus candidate, it went beyond the scope of RCW 42.30.110(1)(g)). Indeed, discussions or decisions regarding the selection of a candidate would constitute both "action" and "final action" in violation of the OPMA. *Id*. at 329-31 (a collective positive or negative decision, even if informal, constitutes "final action"); *see also* RCW 42.30.110(1)(g) ("when a governing body elects to take final action hiring . . . that action shall be taken in a meeting open to the public").

Similarly, discussions of the COOP plan, the District's hiring policies, the terms of an employment contract, and other such matters would also likely fall outside the scope of the relevant executive session exception. To the extent any such discussions occurred in executive session, the OPMA was likely violated.

7. Consequences and Potential Cure (Question 1.1).

There are three potential effects of an action taken in violation of the OPMA. First, each member of a governing body who attends a meeting where action is taken in violation of the OPMA with knowledge of that violation can be held liable for a civil penalty of $500.00 for the first violation ($1,000 for subsequent violations). RCW 42.30.120(1)-(2). Second, the public agency will be held

[1] Under RCW 42.30.140(4), the OPMA does not apply to "[c]ollective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement" or "that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress." "Professional negotiations" is not defined for purposes of this statute, but the term likely refers to separate "professional negotiations" statutes that once applied to teachers in lieu of other collective bargaining laws. *See, e.g.*, 1972 Op. Att'y Gen. No. 20, 1972 WL 122902, at *1-2.

liable for the attorney's fees and costs incurred by any person who prevails against the agency in any action in the courts for a violation of the OPMA. RCW 42.30.120(4). And third, any "action" taken at a meeting held in violation of the OPMA is null and void. *See* RCW 42.30.060(1). Relevant here, "action" includes but is not limited to deliberations, discussions, considerations, and "final actions." RCW 42.30.020(3).

The effect of an OPMA violation on the Employment Agreement is as follows: Any deliberations, discussions, considerations, or final actions taken during the August 21, 2023 executive session that were outside the scope of "evaluat[ion] [of] the qualifications of an applicant for public employment" under RCW 42.30.110(1)(g) would be invalidated. Thus, any deliberations, discussions, or decisions during the executive session with respect to adopting or rejecting any particular hiring procedure (for example, hiring a new Fire Chief according to the provisions of the existing COOP), limiting the candidates to a single individual, deciding Holly vanSchaick should be hired for the position, or any other non-exempt topic related to the BOFC's ultimate appointment of Ms. vanSchaick would be invalidated. The same is true for any such deliberations, discussions, or other actions taken at private meetings.

This would not necessarily invalidate the Employment Agreement itself. The general rule is that a later agency action, taken at a properly noticed public meeting in compliance with the OPMA, will "cure" a violation of the OPMA. In such cases, a court is not required to hold the subsequent agency action to be "null and void." For example, in *Org. to Pres. Agric. Lands v. Adams Cnty*., 128 Wn.2d 869, 913 P.2d 793 (1996), the Adams County Board of Commissioners considered the grant of an unclassified use permit for a regional landfill. Two of the three commissioners had informally and privately discussed the permit application in violation of the OPMA. The Washington Supreme Court held that these private discussions did not render the Commissioners' later permit grant void because the final vote occurred in a proper, open public meeting and there was "extensive opportunity for input by opposing parties in this case." *Org. to Pres. Agric. Lands*, 128 Wn.2d at 883-84. *See also Clark v. City of Lakewood*, 259 F.3d 996, 1014-15 (9th Cir. 2001) (city task force's meetings conducted in violation of OPMA were null and void, but ordinance later passed at public meeting was not null and void under OPMA).

But a subsequent vote taken without public comment, where the public is not given an opportunity "to view the decision-making process at all stages," could be ruled void. *See Org. to Pres. Agric. Lands*, 128 Wn.2d at 884 (an OPMA violation may not be cured if the subsequent formal action is merely a summary approval of decisions made in private meetings); *Miller*, 138 Wn.2d at 331 (action taken in public meeting to appoint an individual to a planning commission invalid where council arrived at consensus candidate by secret balloting during executive session in violation of OPMA); *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1089-91 (9th Cir. 2003) (settlement approved by city in executive session without public comment was void, and subsequent public meeting at which city approved payment of funds and took other action required under the agreement did not cure the violation).

Here, although the BOFC ultimately approved the Employment Agreement in an open public meeting, it did so quite summarily and without allowing additional public discussion. If an OPMA violation is found with respect to the executive session or any other private meeting, a court likely

would find the violation was not cured by the vote following the BOFC's return from the executive session—meaning the Employment Agreement would likely be deemed invalid. Short of holding a new vote on the Employment Agreement in an open public meeting with full opportunity for public discussion, we do not see another viable route to cure any such violation.

B. The Board Likely Lacked the Power to Bind Future Boards to the Employment Agreement.

The Employment Agreement was executed on August 21, 2023 by Holly vanSchaick and commissioners Biddick, Negulescu, Stameisen, Templin, and Fuller. Section 2 of the Agreement states its term is from August 21, 2023 to August 30, 2028, unless earlier terminated. Under section 3, Ms. vanSchaick "assume[d] the duties of Fire Chief and chief executive officer of the District and shall have full responsibility for all District operations, finances, budgeting, statutory and regulatory compliance, facilities, training, emergency response, hiring and firing, personnel, matters (including paid staff and volunteer members), management of consultants and contractors, communications, equipment, implementation of District policy and public relations together with those duties and responsibilities customarily assumed and performed by a chief executive officer of like and similar organizations and as may be otherwise directed by the District."

At the time the Employment Agreement was executed, four of the five members of the BOFC (Templin, Stameisen, Negulescu, and Biddick) had terms ending November 28, 2023. Biddick was re-elected for a 6-year term in the November 2023 election; three new commissioners replaced Templin, Stameisen, and Negulescu (Hansen for a 2-year term, Ehrmantraut for a 4-year term, and Gaylord for a 6-year term). You have asked us to investigate the status of the Employment Agreement in light of Washington authority precluding current governing boards from binding future boards.

The Washington Supreme Court, and more recently the Washington Attorney General, have noted the principle that one board of county commissioners cannot enter into contracts binding upon future boards of commissioners. *State ex rel. Schlarb v. Smith*, 19 Wn.2d 109, 112-13, 141 P.2d 651 (1943); 2012 Op. Att'y Gen. No. 4, 2012 WL 1850632, at *2. This same principle presumably applies to other types of governing boards, including boards of commissioners of fire protection districts. However, application of this principle is "complicated" because boards of commissioners constitute the legislative body of the public entity but also perform functions that are more properly described as executive or administrative. 2012 Op. Att'y Gen. No. 4, 2012 WL 1850632, at *2. The Washington Attorney General explained in 2012: "The clearest principle we can discern from a study of the case law is that county commissioners may not bind the core legislative functions of future boards, but do have the authority to enter into contracts or make administrative arrangements that carry out the executive functions of the board, even though some of these arrangements will inevitably limit the freedom of future boards to make different administrative choices." *Id*. at *2. The Attorney General reviewed cases from Washington and other jurisdictions and explained:

> It therefore is reasonable to conclude that a distinction may be drawn between the core legislative powers of a legislative body and those powers which are more properly described as administrative or proprietary. The hallmark of the first

> category is the authority of a legislative body to exercise continuing discretion in the setting of legal standards to govern behavior within the jurisdiction. If a contract impairs this core legislative discretion, eliminating or substantially reducing the discretion future bodies might exercise, the courts are likely to find that the contract has improperly impaired the legislative authority of future commissioners. By contrast, counties have, and greatly need, authority to enter into contracts and make administrative decisions concerning the management of public property and the day-to-day conduct of government business. A contract that facilitates public administration, and which places no significant constraint on future policy-making is likely to be upheld.

Id. at *4.

The Washington Supreme Court has applied a similar principle in the area of employment contracts. In *Certification from the U.S. District Court for the Eastern District of Wash. in Crossler v. Hille*, 136 Wn.2d 287, 961 P.2d 327 (1998), the Court addressed the certified question whether a county district court judge was bound by a county personnel handbook, approved by the county commissioners and previous district court judges, in her decision to terminate a district court clerk. The Court first held that the county commissioners had no authority to impose employment policies on a district court judge; while the commissioners were required to budget money enabling judges to fill clerk positions, they did not have authority to determine the employment policies of the elected judges. *Id*. at 294-95.

The *Crossler* Court also rejected the claim that the judge at issue was bound by her predecessor's voluntary agreement to the terms of the handbook. The Court cited the general rule that "where the nature of an office or employment is such that it requires a municipal board or officer to exercise supervisory control over the appointee or employee, together with the power of removal, such employment or contract of employment constitutes exercise of a governmental function, and such contracts must not be extended beyond the life of the board." *Id*. at 295 (quoting 10A Eugene McQuillin, The Law of Municipal Corporations § 29.101, at 44 (3d ed. 1990)). The Court deemed the clerk's employment "governmental" because the position required supervisory control by the judge, the judge retained the power of removal, and the judge's tenure was finite. *Id*. at 295-96.

In so holding, the *Crossler* Court cited and discussed an Oregon Court of Appeals case, *Bd. of Klamath Cnty. Comm'rs v. Select Cnty. Emps.*, 148 Or. App. 48, 939 P.2d 80 (1997), in which outgoing county commissioners attempted to bind the incoming county commissioners to a county director of personnel through an employment contract permitting termination only for death, disability, or cause. The *Bd. of Klamath Cnty. Comm'rs* court stated the principle that an outgoing elected governing body of finite tenure that enters into a contract involving a "governmental" function cannot bind a subsequently elected body. *Id*. at 53. The court then concluded that the personnel director's contract called for the performance of governmental functions. *Id*. at 53. The court noted that the director was responsible for certifying that all new county employees were qualified and for terminating all county employees; was required to determine the appropriateness of allocations of personnel and to assess the training needs, resources and priorities of the various county departments (which the court held were "functions of the governing body of Klamath

County"); was required to direct countywide personnel programs and to interpret the rules, policies and procedures governing those programs as well as to negotiate, approve and interpret all collective bargaining agreements entered into by the county; and was required to recommend new and revised policies, procedures and regulations to the commission. *Id*. at 53-54. "In sum, with respect to personnel, the commissioners have chosen to allow their Director of Personnel to exercise their governmental functions of making policy judgments, ranking and evaluating policy objectives and making choices among competing goals and priorities." *Id*. at 54. The court also concluded the commission at issue was an elected governing body of finite tenure because a majority of its members were required to stand for election at the same time. *Id*. at 54. The court held the outgoing body could not bind a successive body to a contract calling for governmental functions, and thus the contract at issue was unenforceable. *Id*. at 54-55.

The *Crossler* Court summarized the *Bd. of Klamath Cnty. Comm'rs* decision as holding that "the outgoing county commissioners could not bind their successors because the commissioners allowed the director of personnel to exercise the county commissioners' governmental functions of making policy judgments, ranking and evaluating policy objectives and making choices among competing goals, and because the board of county commissioners is an elected governing body of finite tenure due to the fact a majority of the board must stand for election at the same time." 136 Wn.2d at 297.

There is not much Washington authority applying or elaborating on the above principles. Accordingly, we looked at secondary sources for additional guidance. McQuillin's treatise on municipal law describes the general principles governing duration of contracts and binding of successors as follows: "The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils." 10A McQuillin, The Law of Municipal Corporations § 29:103 (3d ed.) (footnotes omitted). McQuillin further explains with respect to employment contracts: "[T]he general rule seems to be that a contract of employment extending beyond the term of the office of the members of a public board . . . is, if made in good faith, ordinarily a valid contract . . . . However, where the nature of an office or employment is such that it requires a municipal board or officer to exercise supervisory control over the appointee or employee, together with the power of removal, such employment or contract of employment constitutes exercise of a governmental function, and such contracts must not be extended beyond the life of the board." *Id*.

As the above authorities demonstrate, whether a particular contract may validly bind subsequent boards is a highly fact-dependent analysis. Under the facts here, particularly given the analysis in *Crossler*, a court likely would find the Employment Agreement unlawful. First, a court would likely conclude the Employment Agreement involves the governmental powers of the BOFC. As an initial matter, "[i]t is well established that the creation, maintenance, and operation of a fire department and all reasonably incident duties are a governmental function." *Stifer v. City of Kent*, 132 Wn. App. 523, 529-30, 132 P.3d 1111 (2006); *see also Yakima Newspapers, Inc. v. City of*

Yakima, 77 Wn. App. 319, 324, 890 P. 2d 544 (1995) ("Provision of fire services is a governmental function. The fire chief's job performance impacts that function."); *Lynch v. City of N. Yakima*, 37 Wash. 657, 661-62, 80 P. 79 (1905) ("The duties of an officer or employé of a fire department are regarded as for the benefit of the community, and not for the mere advantage of the municipality as a corporate body."). The Employment Agreement makes the Fire Chief responsible for District operations—a governmental function under the above authorities.

Comparing the BOFC's statutory duties to those delegated under the Employment Agreement also supports a conclusion that the Agreement involves governmental functions. As noted above, commissions like the BOFC often perform a variety of functions including both legislative and executive/administrative duties. Under title 52 RCW, boards of fire protection districts have the "power **and duty** to . . . manage and conduct the business affairs of the district, to make and execute all necessary contracts, to employ any necessary services, and to adopt reasonable rules to govern the district and to perform its functions, and generally to perform all such acts as may be necessary to carry out the objects of the creation of the district." RCW 52.14.100. Boards also have responsibility for budgeting and other financial matters. *See, e.g.,* RCW 52.16.020 ("The board of fire commissioners may include in its annual budget items of possible outlay to be provided for and held in reserve for any district purpose, and taxes shall be levied therefor."); RCW 52.14.010(3) ("The board shall fix the compensation to be paid the secretary and all other agents and employees of the district."); RCW 52.16.050 (warrants for payment of claims and other obligations of the fire district); RCW 52.16.130, .160 (taxing authority); RCW 52.16.061 (issuance and sale of bonds). The Employment Agreement delegates to the Fire Chief "full responsibility" for a broad range of District activities ranging from operations to finances to budgeting to personnel matters, most of which are arguably functions of the governing board per the statutory scheme governing fire protection districts. Many of these activities are similar to the ones deemed "governmental" in *Bd. of Klamath Cnty. Comm'rs*. *See* 148 Or. App. at 53-54.

Second, the Employment Agreement gives the BOFC supervisory authority and the power of removal with respect to the Fire Chief. *See* Employment Agreement § 7 (requiring Chief to attend BOFC meetings, provide information to BOFC regarding District matters upon request, and provide regular reports to the BOFC); §§ 14-15 (termination and/or discipline by BOFC); § 17 (performance evaluation conducted by BOFC). The Employment Agreement was also executed by a board with finite tenure in the sense that a majority of the BOFC commissioners' terms were due to end in November 2023. Under *Crossler* and the Oregon authority cited therein, a court likely would conclude these factors indicate an improper attempt to bind successor boards.

In sum, we think a court likely would find that the Employment Agreement at issue an unenforceable attempt to impair the governmental powers of future BOFCs.

C. Supermajority and Unanimous Vote Provisions in an Otherwise Legal Fire Protection District Employment Agreement Are Likely Unlawful (Questions 3 and 4).

As noted above and below, we think there is significant risk the Employment Agreement is invalid on one or more grounds. Applying the same reasoning as above, we also think the supermajority and unanimous vote provisions referenced in the District's questions 3 and 4 are likely invalid.

Although not as clear, we also think that even if such an agreement were validly entered into, there are serious questions whether the BOFC can impose by contract a supermajority requirement that is not otherwise allowed by statute or Board resolution.

Section 14(a) of the Employment Agreement states that the District "may terminate this Agreement, at any time, without cause, by unanimous vote of the BOFC and with written notice to the Chief." Section 15(b) of the Employment Agreement provides that "[s]ubject to the Chief's Due Process rights specified in section 16, upon a supermajority vote (4 out of 5) of the BOFC, the District may discipline or terminate the Chief for just cause." In requiring more than a majority vote, these provisions limit the BOFC's authority to terminate the Fire Chief.

Our Supreme Court has held that the framers of the Washington Constitution never intended "ordinary legislation" to require a supermajority vote, and that the Constitution as a whole reserves the supermajority vote for special circumstances. *League of Educ. Voters v. State*, 176 Wn.2d 808, 821-26, 295 P.3d 743 (2013). Under that reasoning, supermajority requirements likely cannot apply to BOFC actions constituting "legislation." But fire protection districts are authorized to take many actions that do not constitute legislation, including, as relevant here, "to enter into and to perform any and all necessary contracts" and "to appoint and employ the necessary officers, agents, and employees." RCW 52.12.021; *see also* RCW 52.14.100 (board has the power and duty to "manage and conduct the business affairs of the district," to "make and execute all necessary contracts," and to "employ any necessary services," among other things). The question is whether a board of fire commissioners may limit its decision-making authority by entering into a contract that requires a supermajority or unanimous vote for certain actions.

Under fire protection districts' authorizing legislation, "[a]ll meetings of the board of fire commissioners shall be conducted in accordance with chapter 42.30 RCW and a majority constitutes a quorum for the transaction of business." RCW 52.14.100. A quorum is the minimum number of members who must be present at a meeting so that official decisions can be made. Black's Law Dictionary (11th ed. 2019). But a quorum is different from a minimum vote requirement.

Fire protection districts' authorizing legislation allows two specific actions by unanimous vote. *See* RCW 52.14.010(3) ("The board may, by resolution adopted by unanimous vote, authorize any of its members to serve as volunteer firefighters without compensation."); RCW 52.14.013 (the board "may adopt a resolution by unanimous vote causing a ballot proposition to be submitted to voters of the district authorizing the creation of commissioner districts"). And a few statutes authorize specific action by majority approval. *See* RCW 51.14.065 (the board "may authorize a change to its electoral system pursuant to RCW 29A.92.040 by majority vote"); RCW 52.16.050 (warrants for payment of claims must be issued on vouchers approved and signed by a majority of the board and the secretary). But neither these statutes nor anything else in the statutory scheme appear to require all board action to occur by majority vote.

Given that lack of a requirement of majority vote with respect to all other BOFC matters, the BOFC likely would be deemed to have the discretion to adopt its own rules regarding what matters require a supermajority vote. We are not aware that any such rules have been adopted by the BOFC. And

the District's website does not link to any general rules regarding the exercise of BOFC authority. If any such rules have been adopted, that would change our analysis. But the appropriate means to adopt supermajority requirements in our view is by resolution or adopted rules of procedure, rather than as a matter of contract negotiation.

We recognize that there is a contrary argument that because the fire district authorizing statute imposes no general requirement that action be taken by majority vote, a district could bind itself in a contract to termination or disciplinary actions by a supermajority vote. Fire protection districts (and more specifically their boards) have broad express powers to enter into and perform any and all necessary contracts, as well as to do "any and all lawful acts required and expedient" to carry out the purpose of title 52 RCW. RCW 52.12.021; RCW 52.14.100. As municipal corporations, fire protection districts also have powers "necessarily or fairly implied in or incident to the powers expressly granted." *See Municipality of Metro. Seattle v. Division 587, Amalgamated Transit Union*, 118 Wn.2d 639, 826 P.2d 167 (1992). As part of the express power to contract, such districts may generally negotiate terms or conditions, not in themselves unlawful, which might be deemed beneficial or advantageous to them or their constituents. *Cf. Hite v. Pub. Util. Dist. No. 2*, 112 Wn.2d 456, 463, 772 P.2d 481 (1989). This arguably could include provisions like the supermajority and unanimous vote requirements in the Employment Agreement, if otherwise lawful.

D. Any Delegations of Discretionary Powers in the Employment Agreement are Likely Unlawful (Questions 5.1, 5.2, 5.3, and 6.1).

You asked several questions regarding the propriety of the Employment Agreement delegating the BOFC's discretionary powers to the Fire Chief. We do not believe the Employment Agreement can legally delegate any discretionary powers to the Fire Chief; it may only delegate ministerial and administrative powers that can assist the BOFC in exercising its discretionary powers.

1. The Basics of Delegation.

Whether a municipal corporation like the Fire District may delegate a power largely depends on (1) the nature of the power at issue and (2) what authority for delegation, if any, exists in the operative statutes.

Courts divide the powers and duties of municipal corporations into two categories. The first category comprises powers that are discretionary and legislative. The exercise of these powers require discretion to perform. Discretion "implies knowledge and prudence and that discernment which enables a person to judge critically what is correct and proper." *See* 1987 Op. Att'y Gen. No. 7, 1978 WL 267884, at *2 (quoting *Cole v. Webster*, 103 Wn.2d 280, 284, 692 P.2d 799 (1984)). Examples of discretionary powers are rulemaking and placing employees on probation or reducing their pay.

The second category of duties are ministerial and administrative. These are functions "designed to carry out and effectuate the provisions of the laws." 2A McQuillin, The Law of Municipal

Corporations § 10:46 (3d ed.). So, while rulemaking may be a discretionary power, many functions that support rulemaking are administrative or ministerial. These include:

- gathering facts and conducting research;
- preparing drafts;
- conducting required public hearings; and
- summarizing information, preparing recommendations, and submitting these materials to the Board.

See 1987 Op. Att'y Gen. No. 7, 1978 WL 267884, at *3. Another example of a ministerial duty is collecting taxes, which does not require discretion. *Whatcom Cnty. v. Taxpayers of Whatcom Cnty. Solid Waste Disposal Dist.*, 66 Wn. App. 284, 293, 831 P.2d 1140 (1992). But setting tax rates or determining when, as a matter of policy, taxes must be paid would change that ministerial power into a discretionary one.

If a power is ministerial or administrative, then it is presumed that the power is delegable. *See Roehl v. Pub. Util. Dist. No. 1 of Chelan Cnty.*, 43 Wn.2d 214, 240, 261 P.2d 92 (1953) (explaining this presumption can be overcome if the statute forbids delegation of ministerial duties); *Whatcom Cnty. v. Taxpayers of Whatcom Cnty.*, 66 Wn. App. at 293 (1992). If a power is discretionary or legislative, however, then it can be delegated only if there is a statute that expressly authorizes the delegation of that specific power. *See Noe v. Edmonds Sch. Dist. No. 15 of Snohomish Cnty.*, 83 Wn.2d 97, 103, 515 P.2d 977 (1973).

Examples of statutes that include express authorizations include:

- RCW 28B.50.140(14), which states that the board of trustees of a community college "[m]ay . . . delegate to the president or district president any of the powers and duties vested in or imposed upon it by this chapter."
- RCW 28B.10.528, which provides that boards of institutions of higher education "shall have power . . . to delegate to the president or his designee . . . any of the powers and duties vested in or imposed upon such governing board by law."
- RCW § 43.33A.035, which provides that the state investment board "may delegate by contract to private sector or other external advisors or managers the discretionary authority, as fiduciaries, to purchase or otherwise acquire, sell, or otherwise dispose of or manage investments or investment properties on behalf of the board [subject to certain limitations]."

As demonstrated by these examples, a statute authorizing express delegation generally (1) uses the term "delegate," (2) specifies what power(s) may be delegated, and (3) specifies to whom those power(s) can be delegated.

2. There Is No Statutory Authority for the BOFC to Delegate Its Discretionary Functions (Question 5.1).

The relevant statute to examine for a potential authorization to delegate discretionary authority is RCW 52.14.100, which describes the BOFC's powers and duties:

> The board has the power and duty to . . . manage and conduct the business affairs of the district, to make and execute all necessary contracts, to employ any necessary services, and to adopt reasonable rules to govern the district and to perform its functions, and generally to perform all such acts as may be necessary to carry out the objects of the creation of the district.

In contrast to the statutes described above, the text of the law does not include an express authorization to delegate any discretionary functions. Nor does there appear to be any other statute that expressly authorizes the BOFC to delegate discretionary functions.

Absent an express authorization, the BOFC may only delegate ministerial and administrative functions. The contract does not define the term "full responsibility," nor the many tasks assigned to the Fire Chief, including "operations," "finances," and "budgeting," and "statutory and regulatory compliance." In the abstract, it is difficult to determine whether these terms describe responsibility for ministerial or discretionary tasks. But any delegation of discretionary tasks would be improper. For example, it is likely that the BOFC could rely on the Fire Chief to gather information, prepare a draft budget, and present that budget to the BOFC. But the BOFC likely could not delegate the authority to approve that budget.

3. The BOFC Likely Cannot Surrender Any of Its Authority or Powers to the Exclusive Control of the Fire Chief (Questions 5.2 and 5.3).

As explained above, the BOFC likely lacks the authority to delegate any of its discretionary powers. Thus, if a power is discretionary, the Fire Chief cannot have exclusive authority to use that power, because the BOFC lacks the authority to delegate that power and the Fire Chief lacks the authority to use that power at all. The BOFC may, however, rely on the Fire Chief to complete administrative and ministerial tasks that support the BOFC's discretionary acts.

Another doctrine, related to delegation, also limits the ability of the BOFC to give an "exclusive" delegation to the Fire Chief: surrender. Generally, "[u]nless authorized by statute or charter, a municipal corporation, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers." 2A McQuillin, The Law of Municipal Corporations § 10:43 (3d ed.). *See also King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 611, 949 P.2d 1260 (1997) ("When the Legislature or state constitution has granted a power to the legislative authority of a municipality, the municipality may not limit the scope of that power, or surrender any of it under Const. art. XI, § 11, our state supremacy clause.") (collecting cases). For example, in *City of Raymond v. Runyan*, a public works commissioner attempted to surrender his authority over certain public works contracts in order to avoid potential conflicts of interest. 93 Wn. App. 127, 130–31, 967 P.2d 19 (1998). While the commissioner could delegate certain administrative

duties, such as signing change orders, he could not surrender his statutorily granted authority to oversee the contracts. *Id.* at 137–38. Accordingly, a conflict of interest could not be avoided through "exclusive" delegation or surrender.

Here, the BOFC is granted certain powers by statute. It cannot surrender these powers to another party by contract, absent a statutory authorization. Accordingly, even if certain delegations of authority were proper, the BOFC likely could not delegate discretionary powers such that the Fire Chief's authority in that area was exclusive and the BOFC could take no actions to fulfill its statutory duties.

It is even less likely that any delegation is proper given that the Employment Agreement conditions any changes to that delegation on the consent of the Fire Chief. Courts have expressed additional concerns over delegations when the delegating body lacks control over the delegee. *See Roehl*, 43 Wn.2d at 241 (discussing importance of board maintaining control over delegee). The requirement that the Chief consent to changes in the delegation also implicates the concept of surrender, described above. If the Agreement were interpreted to require the Chief's approval for BOFC action or an abdication of the BOFC's powers, that would likely be an illegal surrender of authority.

4. The Employment Agreement Likely Does Not Delegate Control Over Litigation by or Against the District to the Fire Chief (Question 6).

Two questions are relevant to resolving the Employment Agreement's effect on control over litigation. First, can the BOFC delegate control over litigation by or against the District? Second, do the terms of this contract, on their face, delegate control over litigation to the Fire Chief? The answer to both is likely no.

First, control over litigation has the hallmarks of a discretionary power. It requires "knowledge and prudence and that discernment which enables a person to judge critically what is correct and proper." *Cole*, 103 Wn.2d at 284. Accordingly, absent a statutory authorization to delegate that power, it does not appear that the BOFC can do so.

Second, even if the BOFC could delegate complete control over litigation, it does not appear that the terms of the contract so delegate that power to the Fire Chief. Control over litigation does not clearly fit into the categories of "operations, finances, budgeting, statutory and regulatory compliance, facilities, training, emergency response, hiring and firing, personnel, [sic] matters (including pad staff and volunteer members), management of consultants and contractors, communications, equipment, implementation of District policy and public relations." Employment Agreement § 3. That leaves the question of whether control over litigation is one of "those duties and responsibilities customarily assumed and performed by a chief executive office of like and similar organizations and as may be otherwise directed by the District." *Id*. For municipal corporations, it does not appear to be the case that control over litigation is customarily assumed to be performed by the chief executive officer. In *Koler/Land Use & Prop. Law, PLLC v. City of Black Diamond*, 20 Wn. App. 2d 629, 501 P.3d 1209 (2021), the court examined a dispute over whether a city's mayor or city council had the power to execute legal services contracts on behalf of the city. It concluded that, because the Legislature had granted that power to the city council

and the city council had not delegated authority over legal appointments to the mayor, the power to execute legal services contracts and appoint counsel resided with the city council. *Id*. at 635-40. This strongly suggests that the baseline assumption is that control over legal counsel (and presumably control over litigation decisions normally made a client) resides with the BOFC, and is not "customarily assumed to be performed by the chief executive officer" of a municipal corporation.

The Rules of Professional Conduct (RPCs) that govern attorneys in Washington also strongly suggest that the BOFC maintains control over litigation. As explained by RPC 1.13, a lawyer retained by an organization "represents the organization acting through its duly authorized constituents." RPC 1.13(a). *See also* January 22, 2024 Letter from CSD Attorneys at Law (explaining that counsel represents the Commission, and counsel has no ethical duties to the Fire Chief). RPC 1.2, which defines the allocation of authority between a lawyer and client, is also instructive. It states that, generally, "a lawyer shall abide by a client's decisions concerning objectives of representation." RPC 1.2(a). For a lawyer representing the District, the BOFC is the client, not the Fire Chief.

E. Assuming the Employment Agreement is Valid, Any Amendment Would Likely Require the Mutual Assent of the BOFC and the Fire Chief (Questions 7.1, 7.2, and 7.3).

You asked several questions regarding potential amendments of either the powers and duties of the Fire Chief or the Employment Agreement itself. As explained above, we believe the Employment Agreement is likely not valid as written. And if it is valid, it likely only can be construed to authorize the Fire Chief to take certain actions to assist the BOFC in performing its discretionary duties. The Employment Agreement likely cannot be construed to limit the BOFC's discretionary powers in any way. However, assuming that it is valid, any amendment of the Fire Chief's duties would likely require the consent of the Fire Chief.

If it is valid, the Employment Agreement likely requires the Fire Chief's consent in order to reduce or remove duties and powers from the Fire Chief. The Agreement does not contain express terms regarding the removal of duties. A contract generally cannot unilaterally be amended by one party. *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998) ("Mutual assent is required and one party may not unilaterally modify a contract"). Here, the Agreement further enshrines this principle by explicitly stating that "[t]he duties, responsibilities and authority assigned and granted to and assumed by the Chief may, from time to time, be modified by the District as mutually agreed upon by both parties." Employment Agreement § 3.d; *see also id.* § 21.b ("This Agreement may not be amended orally, but only by agreement in writing and signed by both parties."). So, assuming that the Employment Agreement is valid, the BOFC could not amend it to reduce or remove duties and authorities without the consent of the Chief.

Likewise, if valid, the Employment Agreement likely requires the Fire Chief's consent to add duties. Here, two express terms are relevant. First, when listing the duties of the Fire Chief, the Agreement says that the Fire Chief shall have full responsibilities for, among other things, "duties and responsibilities customarily assumed by a chief executive officer of like and similar

organizations and as may be otherwise directed by the District." Employment Agreement § 3. But later in the same section, the Agreement says that "[t]he duties, responsibilities and authority assigned and granted to and assumed by the Chief may, from time to time, be modified by the District as mutually agreed upon by both parties." *Id.* § 3.d. This likely creates an ambiguity regarding whether certain duties can be added by resolution or motion without mutual agreement. The first paragraph of Section 3 references the performance of duties "otherwise directed by the district." But Section 3.d states that that modifications of the duties of the Fire Chief require mutual assent. In general, ambiguities are resolved by looking to the intent of the parties when forming a contract. *See Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602, 17 P.3d 626, 629 (2000) ("If there be any ambiguity in a contract, the interpretation which the parties have placed upon it is entitled to great, if not controlling, weight in determining its meaning."). But if the parties disagree regarding the interpretation of the ambiguity, the terms are construed against the drafter. *Id.* Further, a court would likely be hesitant to interpret the Employment Agreement in a way that would give no effect to Section 3.d's requirement of mutual assent. *See Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007) ("Our goal is to interpret the agreement in a manner that gives effect to all the contract's provisions."). Accordingly, it is likely that, under the terms of the contract alone, the BOFC may not add duties to the Fire Chief's Employment Agreement without the consent of the Chief or amendment of the Agreement.

IV. CONCLUSION

We welcome your questions and comments on the above analysis. We would be pleased to assist further as the situation evolves.