

You Shall Read This Article

By Jason Barney

“*Shall*. As used in statutes, contracts or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term ‘shall’ is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means ‘must’ and is inconsistent with a concept of discretion...” (Black, 1990).

Local government workers generally, and law enforcement officers (LEOs) particularly are allowed and often expected to exercise *discretion* in his or her day-to-day duties. Exercising discretion allows thoughtful application of exceptions to rules—that if otherwise literally enforced—might lead to silly or even absurd results. A LEO encountering a suspect allegedly committing simple trespass might simply ask a suspect to leave the premises rather than writing a citation or making an arrest. The LEO exercises discretion and seeks voluntary compliance, swiftly and fairly resolving the issue.

Discretion may not always be lawful, whether in the case of a LEO failing to make an arrest of a DUI suspect (Bailey v. Forks, 1987) or that of a city electrical inspector having failed to disconnect electrical service to a residence where improper wiring caused an immediate threat to life (Campbell v. Bellevue, 1975). In both the DUI and electrical service case the city official failed to comply with the ‘shall’ directive in the applicable RCW or city code, implicating city liability. In the hypothetical example above, the trespass statute (RCW 9A.52.080) includes no ‘shall’ directive obligating a LEO to arrest the suspect. Discretion is allowed as the law has been crafted by the legislature.

A pool member case (Caldwell v. City of Hoquiam et al., 2014) is currently under appeal and highlights the ‘shall’ fundamentals applicable to city officials, but also highlights citizens’ rights of due process, which also need to be carefully considered, especially when seizing property. In Caldwell, a citizen’s dog was declared a ‘dangerous dog’ under the Hoquiam city Code (HCC) because it twice previously attacked another dog. While the HCC says, “A dangerous dog shall be immediately impounded...” the code continues, “...if the owner of the dangerous dog fails to comply with...restrictions ... [emphases added]”. The ‘restrictions’ included procuring special liability insurance, dog enclosures, and warning signs—things that typically take one to several days to accomplish.

The city’s dangerous dog declaration (DDD) was personally served on the dog owner who exercised her right to appeal the declaration in municipal court. The DDD was affirmed by the court and it became final. The next business day after the order was finalized, the city animal control officer visited the dog owner’s residence to ensure compliance only to find that the owner and dog had vanished. Less than two weeks later, the dog attacked and severely injured a person outside of Hoquiam where the owner had moved the dog.

Hoquiam was sued for not enforcing the 'shall' provision in its code (for not immediately impounding the dog upon service of the DDD) and that as a proximate cause plaintiff was injured. The trial court granted plaintiff's motion on this issue, essentially rendering the claim a jury question on damages only. Plaintiff obtained a significant jury award. The city has a motion pending at the Court of Appeals anticipating overruling the trial court because it failed to consider the 'if' that followed the 'shall' in the city code.

We are hopeful the Court of Appeals will recognize the city's duty to impound the dangerous dog was triggered after the finalization of the administrative order, when the owner had exercised her right to due process, and enough time elapsed for her to comply with the restrictions for dangerous dogs outlined in city code. The city code, read in its entirety and harmonized with a citizen's right of due process, completely supports the animal control officer's decision not to impound the dangerous dog upon service of the DDD.

Your municipal code and the state law on dogs (RCW 16.08) may vary, and there are likely instances when immediate impoundment of dangerous dogs is prudent or required. Read the applicable code or law carefully, and seek assistance from your City Attorney or WCIA if you have any questions.