2021 LABOR UPDATE

WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION (PERC)

1. *American Fed'n of Tchrs., Loc. 1950 v. Public Emp't. Rels. Comm'n*, 493 P.3d 1212, 1217 (Wash. Ct. App. 2021)

Shoreline Community College and the American Federation of Teachers, Local 1950 (AFT) engaged in protracted successor contract negotiations starting in 2017. The parties were unable to come to an agreement on the methodology for compensating faculty for wage increases that the state legislature had approved but did not fund. AFT filed an unfair labor practice (ULP) complaint with PERC alleging that the College refused to bargain over calculation of the wage increases, unilaterally changed the method of calculation, and refused to provide information requested by AFT. The College raised the defense of waiver by contract to all claims, and PERC deferred all three claims to arbitration under WAC 391-45-110.

AFT appealed PERC's decision to defer all of its ULP claims to arbitration to the Washington Court of Appeals, arguing that PERC could only defer its unilateral change claim to arbitration under WAC 391-45-110. The court of appeals affirmed PERC's deferral, holding that WAC 391-45-110 gave PERC broad authority to defer alleged statutory violations pending the outcome of a related arbitration.

KEY TAKEAWAY

WRITTEN BY:
Trevor Caldwell

In ULP cases where there are related grievances or contractual defenses, PERC has broad authority to defer some or all ULP claims to arbitration. Accordingly, employers should be sure to plead all relevant contractual defenses to ULP complaints, and seek deferral to arbitration to efficiently litigate all claims.

2. *Kitsap Cty.*, Decision 13306 (PECB, 2021)

In 2020, the Washington state legislature passed HB 1750, which amended the statutes governing the filling of vacant positions in sheriffs' offices by a civil service commission. See RCW 41.14.060, 41.14.130. The amendment requires civil service commissions to provide appointing authorities a list of the top five candidates based on civil service test scores. Prior to this amendment, the Kitsap County Sheriff's Office had a long-standing practice of requesting the top three candidates for open positions. The Kitsap County Deputy Sheriff's Guild sent the County a demand to bargain after learning that the Civil Service Commission was planning to change its rules in accordance with HB 1750. The County responded that it was not obligated to bargain over the change as it was based on a statutory change, and thus was an illegal subject of bargaining. The Guild subsequently filed a ULP complaint over the

County's unilateral implementation of the change.

The PERC hearings examiner held that the County changed the rule because of the legislature's change to the civil service law, and thus the issue was preempted by state law and an illegal, nonmandatory subject of bargaining.

KEY TAKEAWAY

Whether to implement a change required by statute is an illegal, nonmandatory subject of bargaining, even if it involves a mandatory subject. However, while the decision itself may not be negotiable, its effect on other mandatory subjects may still be subject to bargaining.

OREGON EMPLOYMENT RELATIONS BOARD (ERB)

1. *SEIU Loc. 503 v. Marion Cty.*, UP-037-21 (Oct. 29, 2021)

In response to the COVID-19 pandemic, Marion County implemented a temporary telework policy in March 2020. The policy noted that it was temporary and subject to change or rescission, as necessary, based on public health conditions. The County rescinded the temporary telework policy in June 2021, in response to the Governor's lifting restrictions that prevented in-person work. The union demanded to bargain over the change, claiming that it impacted employee health and safety, which is a mandatory subject of bargaining. The County responded that it was not obligated to bargain over its decision to rescind a temporary policy.

The Board held that the County had violated its duty to bargain by unilaterally rescinding the temporary telework policy. According to the Board, the County's implementation of the temporary telework policy created a new status quo, and thus any change to it concerning a mandatory subject had to be negotiated. The Board found that the County's rescission of the temporary telework policy implicated a mandatory subject of bargaining under ORS 243.650(7)(h)—employee safety—and that it also impacted other mandatory subjects, such as paid leave, that were subject to bargaining. Finally, the Board rejected the County's arguments that the union had waived its right to bargain by not making a demand when the change was announced, or that the County could act unilaterally under the management rights article of the parties' collective bargaining agreement (CBA).

KEY TAKEAWAY

Temporary policies or practices implemented due to COVID-19 likely establish a new status quo. Thus, rescinding those policies or practices to return to pre-pandemic "normal" must be negotiated if they involve a mandatory subject or affect a mandatory subject.

2. *Oregon State Police Officers Ass'n v. State of Or.*, UP-038-21 (Oct. 22, 2021)

In accordance with the Governor's Executive Order 21-29 (EO 21-29), the State of Oregon required state police employees to be vaccinated against COVID-19 no later than October 18, 2021. The union filed a ULP complaint alleging that the state had failed to fulfill its duty to bargain over implementation of EO 21-29 and its effects on mandatory subjects.

The Board held that the State had not violated its duty to bargain under ORS 243.672(1)(e) because EO 21-29 was issued pursuant to the Governor's statutory emergency powers, and thus the State's duty to bargain was defined by the emergency order, not the Public Employee Collective Bargaining Act (PECBA). The Board went on to note that when there is a conflict between a valid emergency executive order and PECBA, the executive order controls.

KEY TAKEAWAY

Employers subject to a valid executive order are not required to bargain over its implementation. However, there may still be a duty to bargain over the effects of such an order on mandatory subjects of bargaining.

3. *Tri-County Metro. Transp. Dist. of Or. v. Amalgamated Transit Union*, Dist. 757, UP 035/036-20 (Feb. 26, 2021)

The Tri-County Metropolitan Transportation District of Oregon (TriMet) alleged that the Amalgamated Transit Union, District 757 (ATU) had unlawfully included proposals on permissive subjects in its final bargaining proposal. In return, ATU alleged that TriMet had engaged in "surface bargaining" (negotiating with no intention of reaching an agreement) and direct dealing with bargaining-unit members.

The Board affirmed that it is unlawful to include proposals over permissive subjects of bargaining in a final offer, and found that several (but not all) of the proposals in ATU's final offer concerned permissive subjects. The Board did not find that Tri-Met had engaged in surface bargaining, but did find that it had engaged in direct dealing with bargaining-unit members when it consulted with an employee about one of its proposals and when it had directly questioned bargaining-unit members about leaving an apprentice program without losing seniority.

KEY TAKEAWAY

Employers should be sure to include the union in any discussion with individual employees over potential changes that could implicate a provision of the CBA or a mandatory subject of bargaining. When in doubt, providing more information to the union will lessen the likelihood of a direct-dealing ULP complaint.

NATIONAL LABOR RELATIONS BOARD (NLRB)

1. *Elon Univ.*, 370 NLRB No. 91 (Feb. 19, 2021)

Elon University appealed a decision of the NLRB Acting Regional Director's determination that adjunct, limited-term, and visiting faculty were not managerial employees and eligible to form a union under the National Labor Relations Act (NLRA). In reviewing the determination, the Board modified the test for determining whether subgroups of faculty members (such as adjuncts and other nontenure-track faculty) at colleges and universities are managerial employees as previously set forth in *Pacific Lutheran Univ.*, 361 NLRB 1404 (2014). The new test for determining whether certain subgroups of faculty are supervisors consists of two questions: (1) whether a managerial faculty body exercises effective control over areas of college or university decision-making, and (2) whether, based on the faculty's structure and operations, the subgroup of faculty attempting to unionize is included in that managerial faculty body. If the answer to both of the foregoing questions is "yes," then those employees are managerial and not eligible to form a union under the NLRA. Further, it is the employer's burden to prove that both questions are answered in the affirmative. In this case, the Board held that Elon University did not meet its burden to show that its adjunct, limited-term, and visiting faculty were structurally included in the university's managerial faculty bodies and therefore not managerial under the NLRA.

KEY TAKEAWAY

Interest in forming a union among nontenure-track faculty is on the rise. At colleges and universities that are governed by a faculty body, these employees must be meaningfully involved in that governance structure in order to be considered managerial under the NLRA.

2. *Tesla, Inc.*, 370 NLRB No. 101 (Mar. 25, 2021)

Several Tesla employees and the United Auto Workers (union) filed a ULP charge against Tesla alleging that provisions of its confidentiality agreement and management's conduct toward employees during a union organizing campaign violated the NLRA. The Board held that Tesla had violated Section 8(a)(1) of the NLRA by coercively interrogating employees during a union campaign, imposing a rule restricting use of certain software in response to protected concerted activity, and threatening the loss of stock options if employees voted to be represented by the union. Further, the Board found that Tesla had violated Section 8(a)(1) by maintaining a confidentiality agreement which prohibited media contact regardless of whether the communication dealt with confidential information or purporting to speak on the company's behalf. The Board found that such a strict confidentiality agreement was a prohibited "category 3" rule under its balancing test for employer policies under *Boeing Co.*, 365 NLRB No. 154 (2017). Category 3 rules under *Boeing* are unlawful because they prohibit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by company interests.

KEY TAKEAWAY

Employee discipline during union organizing campaigns must be nondiscriminatory, and when employee misconduct involves potential protected activity, employers should consult with counsel before imposing discipline. Additionally, employers should review workplace rules and policies and handbooks for compliance with the requirements set forth in the NLRB's decision in Boeing.

3. NLRB General Counsel Memo: College Athletes are Employees Under the NLRA

On September 29, 2021, NLRB General Counsel Jennifer Abruzzo (the "GC") issued General Counsel Memorandum 21-08 (the "GC Memo") announcing that scholarship athletes at private universities playing football in the Division I Football Bowl Subdivision (FBS) are employees under the NLRA. The GC oversees the investigation and prosecution of ULP cases, which are pursued nationwide by the NLRB's 26 regional offices.

The GC Memo states that Division I football players, and other similarly situated "Players at Academic Institutions," are employees under the NLRA. That means they are protected by Section 7 of the NLRA "when they act concertedly to speak out about their terms and conditions of employment, or to self-organize." In extending the NLRA's protections to football players and other yet-to-be-determined athletes, the GC also reinstated a memorandum addressing the employment status of football players at Northwestern University issued in 2017 by the GC for the Obama Board, but later rescinded under the Trump Board.

KEY TAKEAWAY

Division I FBS football players and certain other "similarly situated" persons formerly known as "student-athletes" are employees and protected by the NLRA. Further, simply calling football players and other "similarly situated" persons "student-athletes" is grounds for a ULP charge.

4. *Columbia Univ.*, 364 NLRB 90 (2016)

While this case is five years old, its applicability came into question during the final year of the Trump Administration. In September 2019, the Trump Board published a Notice of Proposed Rulemaking to address the status of student workers at private colleges and universities under the NLRA. The proposed rule excluded undergraduate and graduate students at private colleges and universities performing work as student teachers and teaching and research assistants from the NLRA's definition of "employee." But the proposed rule was not finalized prior to the 2020 presidential election, and in March 2021 the NLRB withdrew the proposed rule in order to focus its time and resources on adjudicating cases in progress. During the pendency of the proposed rule, the status of student workers under the NLRA was somewhat in question, but with its withdrawal the standards set forth in *Columbia Univ.* came back into full force. The Board in *Columbia Univ.* clarified that students performing work for a university, as part of their academic program of study or otherwise, met the NLRA's definition of an employee, and that their dual status as students did not exclude them from NLRA coverage.

KEY TAKEAWAY

Student workers are protected by Section 7 of the NLRA when they act concertedly to speak out about their terms and conditions of employment, or to self-organize.