ALL ABOARD THE HR EXPRESS:

WASHINGTON LABOR UPDATE

2022 Washington Public Relations Commission (PERC) Update

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Ben Franklin Transit (Teamsters Local 839), Decision 13409-A (PECB, 2022)

In June 2019, the employer and union met to negotiate the successor collective bargaining agreements. The union's secretary-treasurer was the union's lead negotiator. Before the parties began negotiation, the union's lead negotiator launched into a profanity-laced tirade expressing his frustration about the employer leaking information discussed during a grievance meeting. The union's lead negotiator was angry that the room for negotiations was not set up and the employer was late to the meetings. The union's lead negotiator repeatedly said "fuck."

Due to the union's lead negotiator's hostility, the Director of Human Resources and Labor Relations filed an ex parte Petition for Order of Protection alleging harassment. Among other things, the Director of HR advised the court under oath that the union's lead negotiator had, during negotiations the previous day, gotten out of his chair and came towards her directly, "raising his arms and shaking his fist at me." The employer sent a copy of the court order to the union, and requested that, until the terms of the court order changed, the union identify who would represent employees in the union's lead negotiator's absence.

Based on the above, the Examiner concluded that the union had breached its good faith bargaining obligation, because the union's lead negotiator's behavior was hostile, abusive, and not reasonable. PERC reversed the Examiner's conclusion.

PERC reasoned that generally the Commission does not regulate speech by a union or union members, unless the speech is violent, intimidating, or involved threats of reprisals. The Union, their employees, and their members retain their First Amendment rights when engaged in collective bargaining. In this case, the union's lead negotiator did not threaten the employer or Director of HR with violence. PERC concluded that his speech did not rise to the level necessary to deprive him of his freedom to express himself or his displeasure with the employer. Although the union's lead negotiator's speech was vulgar, it was nonetheless constitutionally protected free speech under the First Amendment and the Washington Constitution.

KEY TAKEAWAY

Absent direct threats of violence or intimidation, union representatives are afforded broad First Amendment protection, and vulgar speech does not breach a union's good faith bargaining obligation.

Ben Franklin Transit, Decision 13550 (PECB, 2022)

The employer had supplied supervisors with vehicles for a long time to use while responding to transit incidents. The employer had received a new fleet of replacement trucks for its supervisors. Once the employer received the replacement trucks, it decided to withhold the replacement trucks. The employer asserted that the decision to withhold the trucks was due to its cost-conscious management style and claimed that the plan was to put the vehicles into service in the future one-by-one as the existing supervisor vehicles became less safe and more costly to operate. The Union offered that the employer had acted discriminatorily, because the employer's announcement of its decision to withhold the assignment of the new trucks was shortly after the union's successful organization of the supervisors and victory in a pre-election unfair labor practice case against the employer. To support its assertion, the Union offered an additional piece of evidence: the employer's disparate treatment of two supervisors who had left the bargaining unit and were permitted to drive the replacement trucks.

PERC noted that while the employer had checked the box of articulating a legitimate nondiscriminatory reason for its actions, the union clearly met its burden of persuasion that the employer's stated reasons amount to pretext and the employer's withholding of the replacement trucks was at least substantially motivated by discrimination.

KEY TAKEAWAY

An employer can discriminate against bargaining unit employees by withholding employer-provided vehicles from only bargaining unit employees.

University of Washington, Decision 13483-A (PSRA, 2022)

The University had campus police in charge of patrolling the residence halls. At some point in 2020, the employer received a list of demands from the Black Student Union seeking changes including that the University "disarm and divest from UWPD." The University created Campus Security Responders (CSRs) in response, and assigned patrolling the residence hall to non-bargaining employees.

The issue before PERC was whether the employer refused to bargain when it assigned bargaining unit work to non-bargaining employees without providing the union notice and opportunity to bargain. PERC noted that the question "in a skimming case" is whether the work that was assigned to non-bargaining unit employees was bargaining unit work. Patrolling the residence halls was police bargaining unit work. There was a Memorandum of Understanding (MOU) providing that three police officers would be assigned to the residence halls.

In this case, there was no evidence that the employer had notified the union that the employer would remove residence hall patrols from the bargaining unit and assign it to CSRs. Because patrolling the employer's residence halls was bargaining unit work, the employer had an obligation to notify the union before deciding to assign bargaining work to non-bargaining unit employees.

PERC also considered a dissenting colleague's position regarding the University's concern about instances of police misconduct around the country. There was, however, no indication that the union's police had behaved improperly and concerns about the behavior of others in distant locations cannot legally justify the employer's skimming of bargaining unit work and unilateral transfer.

KEY TAKEAWAY

An employer's concern with nation police misconduct does not justify skimming bargaining unit work, when the union had not behaved improperly.

Snohomish County Fire District 7, Decision 13518 (PECB, 2022)

A firefighter/EMT for Snohomish County Fire District 7 submitted a religious exemption to the requirement for employees to be vaccinated for COVID-19. The employer's commission chair allegedly stated that he "would actually ask, all those people who filed a religious exception, search their soul, to know that there are those who truly, irrevocably have faith-based opposition to vaccines, and that there are people, sometimes there is a political reason for doing something." The commission chair also asked employees seeking an exemption "to look at your own situation and those of your fellow firefighters to say which one really needs accommodation, so that we may find as many accommodations as possible. But we still need to have a workforce out there." Following these comments, there was also a motion to approve a draft memorandum of understanding negotiated between the union and employer for the unvaccinated worker to use their leave banks until exhausted and then take one year of unpaid leave. The firefighter/EMT failed to state a cause of action for discrimination, because he did not allege that the employer denied him any ascertainable right, benefit, or status based on his protected activity. The complaint only alleged that the employer's discriminatory acts were based upon the firefighter/EMT's religious belief. PERC noted that it does not have jurisdiction to enforce civil rights laws, or resolve all disputes that might arise in public employment.

KEY TAKEAWAY

When an employer made broad statements regarding vaccine exemptions, an employee failed to allege that their employer denied him any ascertainable right, benefit, or status based on his exercise of protected activity.

Othello School District, Decision 13488 (EDUC, 2022)

This case concerns a school's plan to return to in-person instruction after using hybrid in-person and online instruction during the 2020-21 school year. The complaint alleged that the employer refused to bargain this change to in-person instruction. The employer did not violate RCW chapter 41.59 when it began requiring teachers to provide in-person instruction during the 2020-21 school year. The decision to offer hybrid learning was not a mandatory subject of bargaining. Even if it was, the union waived its right to bargain in the parties' COVID-19 MOU. There was also insufficient evidence to establish that the employer unilaterally changed employees' terms and conditions of employment by mandating in-person and online instruction. This was at most, a single, isolated deviation from established policy that does not amount to an unlawful unilateral change.

The format of the employer's overall educational program is a core managerial interest. The decision to have teachers appear in-person is "inseparably bound to the employer's programmatic decision to resume face-to-face learning." The decision to resume in-person teaching is a permissible subject of bargaining. And, even if the decision to provide in-person instruction was a mandatory subject of bargaining, the union waived

its right to bargain via the parties' COVID-19 MOU. This was not a unilateral change, but a modification to its overall educational program, and therefore, not a subject of mandatory bargaining.

KEY TAKEAWAY

An isolated deviation from an established policy does not constitute a unilateral change.

Snohomish County, Decision 13480 (PECB, 2022)

In September 2021, the employer began utilizing a shift bid process that contradicted the process described in the parties' contract. The union filed a grievance. While the grievance was pending, agents of the employer communicated with bargaining unit employees regarding the grievance in various ways.

The parties were in the process of bargaining a successor contract. While the parties were in negotiations, in October 2021, a former union president emailed bargaining unit employees informing them he had received a copy of one of the union's proposals. The employer provided the documents to the former president; it also discussed a pending grievance with the employee.

In this case, the complaint lacked facts alleging the employer circumvented the exclusive bargaining representative. The complaint alleged that the employer shared information with employees regarding proposals made during negotiations. It also alleged that the employer discussed pending grievances with employees and shared its viewpoint. The complaint did not allege any facts that the employer engaged in direct negotiations with one or more bargaining unit employees—it merely alleges that the employer shared information. The allegations concerning circumvention were dismissed for failure to state a cause of action.

KEY TAKEAWAY

Sharing information with bargaining unit employees did not constitute engaging in direct negotiations.

PERC Announcement—PERC Issues Proposed Rule Changes

PERC announced that it has formally filed its proposed rule changes for public comment and potential action by the Commission. These amendments are proposed to better align current practices with existing rules and update those rules to account for statutory changes.

The public meeting for comment was held October 7, 2022, via Zoom. The proposed rules will go to the Commission for action at its November 8, 2022 meeting.