LABOR UPDATES

NOTABLE WASHINGTON PERC CASES

WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION (PERC) CASES

WRITTEN BY:
David Worley

Benton County, Decision 13977 (PECB, 2024) | *"Don't Play Favorites with Unions"*

ISSUE

Employer went beyond legal obligations for document production in Union petition to clarify unit by providing documents to Guild attorney at attorney's request. Whether such actions constitute unlawful assistance.

FACTS

Police Union (Guild) filed a petition to sever a clerk's position from its current bargaining unit with the Teamsters to join the Guild. During the hearing, a supervisory employee testified that he had provided public documents to the Guild's attorney. Later, the employee testified that he had provided other policies to the Guild's attorney, at the attorney's request. The Guild did not submit a records request or any fee associated with the records. In prior instances, requests were made to human resources or management in the Sheriff's Office. Conversely, the Guild's request was made by the Guild's attorney directly to a supervisor at the Sheriff's Office—a supervisor who directly oversaw the employees at the heart of the severance petition. The Guild did not submit this request in writing or send the request to a traditional management representative.

HELD

Under RCW 41.56.140(2), it is an unfair labor practice for an employer to control, dominate, or interfere with a bargaining representative. This is known as "unlawful assistance" and occurs when the employer aids one union to the detriment of the other.

The employer argued that it had a duty to provide the information to the union, and that if it had refused, it would have been committing a separate unfair labor practice. However, these arguments failed. Here, the information provided was not through typical channels, but instead was a direct request from the Guild's attorney (who was not the exclusive representative) to a supervisory employee who oversaw the employees subject to the petition. Thus, this was different than a typical response to a request for information. Moreover, the employer did not have a duty to provide information as the Guild was not the exclusive representative of the employees, but sought to establish itself as such and separate

employees from the existing Teamsters union. The employer's agreement to assist the Guild's attorney beyond that which was required by the law constituted illegal assistance.

KEY TAKEAWAYS

Employers should be cautious of providing even minor "assistance" during various labor issues between unions. It would likely be very easy to casually work with the incumbent union, given that a relationship with that union will be familiar and communications may be informal through years of practice. However, employers should be wary in this type of situation where two unions are adverse, as even innocuous communications (if not kept to formal channels and in accordance with standard procedures) may qualify as unlawful assistance.

King County, Decision 13825-A (PECB, 2024) | *"Mandatory Is Not So Mandatory During a Pandemic"*

ISSUE

Whether King County refused to bargain by unilaterally implementing the COVID-19 vaccine mandate without providing the Guild an opportunity to bargain; whether the decision to impose a vaccine mandate with discharge for not complying with the order or receiving an accommodation was a mandatory subject of bargaining; and whether the county breached its good faith bargaining obligation.

FACTS

On August 10, 2021, King County (County) announced that it would require all county executive branch employees to be vaccinated against COVID-19 by October 18, 2021. Those failing to be vaccinated would be subject to termination. King County agreed to negotiate the effects of its decision but not the decision to require the COVID-19 vaccine.

HELD

Employers must bargain mandatory subjects of bargaining including grievance procedures and "personnel matters, including wages, hours, and working conditions" (RCW 41.56.030(4)). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives which are permissive subjects of bargaining.

To determine whether the issue is a mandatory or permissive subject of bargaining, PERC balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative" *(International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 200 (1989)).

The Guild's interests (in favor of mandatory bargaining) were "[s]ubstantial and [c]ompelling interests," including continuing employment, maintaining the existing conditions of employment, and not being "pressured, under threat of job loss," to be vaccinated. However, the Examiner found the County's interest in being able to act decisively to protect employees and prevent them from infecting each other (which the vaccine was purported to accomplish at the time) to be compelling. The County had an interest in preserving and protecting the public health, both by limiting the spread of COVID-19 (again, which the County at that time understood the vaccine to accomplish) and providing the public with essential services.

Because the County's rule was based on an emergency order and evolving understanding of COVID-19 at the time, the County's rule was judged from its perspective at the time. PERC explicitly did not use the benefit of hindsight or refer to the current understanding about COVID-19, which would have undercut the value of the County's vaccine requirement.

Despite the fact that PERC found this requirement clearly created a new working condition, PERC excused the lack of bargaining given the context of the decision. This is questionable, as PERC noted that "working conditions" were mandatory at the outset of its decision, and thus **not** subject to the balancing test it applied. Only those changes that were not clearly mandatory subjects of bargaining would be subject to a balancing test. PERC found that the County's interests in the health and safety of employees and the public, continuity of services, and the need to act decisively during a pandemic were a decisive, urgent, and powerful counterbalance to employees' interests in job security and maintaining pre-pandemic working conditions.

KEY TAKEAWAYS

Employers generally will not be given much leeway in failing to bargain over mandatory subjects. Moreover, PERC, the Employment Relations Board (ERB), and the National Labor Relations Board (NLRB) typically will side in favor of an obligation to bargain when there is at least a debate about the propriety of unilateral action. Bargaining, in the view of these authorities promotes labor peace and furthers the intent of labor laws generally. However, this decision shows the extent to which external factors may be considered to justify management prerogatives, and how those external factors are viewed without the benefit of hindsight. Here, what would unequivocally otherwise be a mandatory subject was deemed permissive because of the then-perceived immediate need for the employer to act. While this unilateral change occurred in the context of a "once in a lifetime" pandemic, it is foreseeable that other emergent circumstances could be used to justify unilateral actions.

Western Washington University, Decision 13877 (PSRA, 2024) | *Don't Look a Gift Horse in the Mouth*

ISSUE

Interference with employee rights during a grievance process by revoking an offer of an employee benefit.

FACTS

University had two unions (Public School Employees of Washington (PSE) and Washington Federation of State Employees (WFSE)) representing certain staff, with overlap in certain departments. PSE union learned that employees in the WFSE union were receiving $2,000 retention bonuses. PSE union president contacted the University administration requesting that PSE union University employees also receive the $2,000 retention bonus. The University president responded that the retention bonus would be made available to PSE members in certain departments that were facing staffing crises. PSE president did not respond to the University president's offer, and the University did not make the $2,000 payment to any PSE employees.

The following day, a PSE member filed a grievance against the University, alleging that the employer had violated the parties' collective bargaining agreement (CBA) when it provided the $2,000 payment to certain WFSE-represented employees and not PSE-represented employees. PSE also alleged that per the CBA, the $2,000 should have been provided to all PSE employees, not just those in certain departments with staffing issues. Prior to the hearing, the University offered to make the $2,000 payment to the specific PSE employees previously identified if the Union would withdraw the grievance. PSE responded that it would like the University to make the payments, but that would not resolve the grievance.

At the hearing, the arbitrator found that the University had not violated the CBA in making its offer to only certain PSE employees. Notably, no payment had been issued. PSE sought clarification, asking the arbitrator to confirm that the University still had an obligation to make the payment to the previously identified members. The University responded that it had fulfilled its obligation when it made the offer (which PSE did not accept), and therefore the obligation had terminated.

PSE filed another grievance, now alleging that the termination of the offer to the specified employees constituted interference for engaging in a protected activity.

HELD

Summarized, the Union filed a grievance and took a dispute over the employer's interpretation of the CBA to arbitration. During the supplemental arbitration award arguments, the employer stated, for the first time, that the offer had been terminated. Additionally, in response to a request by the arbitrator of the University's post-hearing position, the employer asserted that the CBA did not require the employer to make such an offer again. Depending on the situation and context, PERC found this could be reasonably perceived as a threat of reprisal or force, or a promise of benefit, associated with the union activity of pursuing a grievance to arbitration.

PERC examined two statements that could arguably create interference. The first was the employer's statement that, according to its interpretation of the "me too" clause at the heart of the arbitration, it was only required to **offer** the retention payment and thus it "does not have an obligation to provide another retention payment opportunity to PSE members in Facilities Management or Human Resources." The second was the employer's statement that its previous bonus offer had been terminated.

The first statement was quickly disposed of, as the statement was narrowly focused on the contractual responsibility to offer payment, not whether the payment would be made.

The second statement was a closer call. PERC first found that it was reasonable to perceive that the termination of the offer by the University was directly related to the Union's choice to pursue the grievance to arbitration. However, this statement was made by the University's attorney to PSE's attorneys, not by an employer to an employee. Given the context of the response, PERC found that the statement would not be construed as a threat, but merely a response by the University counsel to a request by the arbitrator of the University's position. PERC held, "the employer is saved from having engaged in interference because of the narrow, sophisticated audience privy to the employer's statement." Not considered in the decision was whether the University was ultimately required to pay $2,000 to any employee. However, because of the nature of the charge against the University (which was not made on some other basis, such as breach of contract), presumably the University was within the contract language to revoke the $2,000 retention bonus.

KEY TAKEAWAYS

While this case presents unique facts, the message can be applied broadly. During a grievance, the employer should be wary of making any statement that could be considered a threat or taking action that could be characterized as reprisal. Threats are construed broadly, and even something as innocuous as a prediction about a future adverse effect or a revocation of a yet-to-be-agreed term could be characterized as retaliatory, in retaliation for the Union proceeding with the unfair labor practice (ULP). To avoid this, employers should ensure that, once the ULP process begins, their communications are through counsel to sophisticated parties on the other side.