PERC Update & other *Hot Topics* on the Legal/Bargaining Front

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Public Employment Relations Commission - Update

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King County (ATU Local 587) Decision 13535-A (PECB, 2023)

This Decision does not necessarily break new ground, but it does contain a good summary of how PERC analyzes breach of duty of fair representation claims that might be made by a member.

In this Decision, PERC describes the standard that it uses to analyze such claims as follows:

To prove a union breached its duty of fair representation, the complainant must prove that the union's conduct is more than merely negligent. *Washington State Liquor and Cannabis Board (Washington Federation of State Employees),* Decision 13333 (PSRA, 2021), *aff'd,* Decision 13333-A (PSRA, 2021). **The conduct must be arbitrary, discriminatory, or in bad faith.** *Id.*

In this Decision, **PERC also outlined the process by which a labor organization can meet its duty of fair representation even when it chooses not to pursue a grievance** that a member has filed and would like the organization to pursue. This is very similar to the process that I advise Locals to go through.

The Examiner concluded, "…[the complainant] did not prove the union acted arbitrarily, discriminatorily, or in bad faith."

We agree with the Examiner. The union met with the complainant, communicated regularly with him, advocated for him, and requested information to represent him in the grievance process. The union later sought a legal opinion on whether to advance the grievance to the third step. The union accepted its counsel's recommendation not to advance the grievance and communicated its decision to the complainant.

This Decision also highlights **the importance of knowing and following PERC's rules of procedure**. The PERC Commission pointed out that the complainant had failed to object to any particular Findings of Fact or Conclusions of Law that had been made by the Examiner, and so the Complainant also **would have lost their appeal to the Commission on that technical basis** as well even if the appeal otherwise had merit.

Spokane School District (SEA), Decision 13619 (EDUC, 2023)

While **most "duty of fair representation" claims are quickly dismissed** by PERC, this Decision shows that **PERC will sometimes uphold such claims. In this case, a labor organization (SEA) misled one of its members** into believing that it was not necessary for the member to take notes during an investigatory interview because her union rep was going to take notes and then provide her with those notes. The Union then refused to provide the rep's notes to the member without being able to provide a good reason for its refusal.

PERC therefore determined that SEA had breached its duty of fair representation because:

- SEA's promise to provide the rep's notes to the member caused the member to miss out on a chance to take her own notes;
- SEA could not cite any compelling reasons why it was refusing to provide the rep's notes to the member; and
- SEA also could not cite a clear existing policy or past practice that it was relying on as the basis for refusing to provide the rep's notes to the member.

This case shows that Locals should **consider adopting formal policies about what information they will and will not provide to their members** and should then act consistently with such policies. Locals should also be consistent in their communications with members on this topic. In other words, Locals should not promise to provide info to members and then refuse to do so.

Finally, Locals should always have a good reason for refusing to provide info to members, which they should be ready to explain upon request.

Good reasons for refusing to provide info could include:

- the info being requested is covered/protected by attorney-client privilege in the case of communications between the Local and its legal counsel;
- the Local has a policy/practice of not providing info of this sort to its members (but if this explanation is provided, the Local needs to be ready to produce the policy or prove the practice being relied upon);
- the info in question would invade the privacy interests of other concerned members of the Local's bargaining unit, or would otherwise infringe upon the legal rights of other bargaining unit members or the public.

King County (King County Corrections Guild), Decision 13622 (PECB, 2023)

This is another case involving an **alleged breach of the duty of fair representation** by a labor organization. A Guild member claimed that he was being discriminated against because of his Muslim faith because the Guild had refused to file a grievance on his behalf in connection with the covid vaccine mandate.

PERC found that the Guild did not breach its duty of fair representation here because:

- the Guild had provided the member with appropriate assistance;
- there was no evidence that the member's religious beliefs played any role in the Guild's decision-making;
- the Guild had a fiduciary duty not to spend the dues that it collected from its members on grievances that had no merit;
- and because no violation of the Guild's CBA with the County had occurred.

City of Seattle, Decision 13595 (PECB, 2022)

This Decision includes a good description of many of the issues that Locals need to be aware of when they are deciding how to respond to unilateral changes in working conditions that are being considered, proposed and/or implemented by their employer. **The Decision addressed first of all the standard that a union needs to meet in order to prove that an employer has committed a ULP related to a unilateral change in working conditions.**

"To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. A complaint alleging a unilateral change **must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining**. For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment."

"The **Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed**. If the employer's action has already occurred when the employer notifies the union (a *fait accompli*), the notice would not be considered timely, and the union would be excused from the need to demand bargaining.

“If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining that could influence the employer’s planned course of action, and the employer’s behavior does not seem inconsistent with a willingness to bargain, if requested, **then (the union needs to request bargaining in order to trigger a bargaining obligation) ….”**

The Decision also contains the following helpful summary of how PERC determines what constitutes a mandatory subject of bargaining.

"Whether a particular item is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission 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." The decision focuses on which characteristic predominates. . ."

The Decision then goes on to explain the differences between **decision bargaining and effects bargaining from PERC's perspective.**

"For mandatory subjects of bargaining, the parties have a duty to bargain over the decision and the effects of that decision. For permissive subjects of bargaining, the parties only have a duty to bargain the mandatory impacts of the decision. An employer is not required to delay implementation of a decision on a permissive subject of bargaining while impact or effects bargaining occurs. An employer (also) cannot refuse to commence effects bargaining until after the permissive decision is implemented."

The specific factual situation that gave rise to this Decision is also relevant (although not helpful) to Locals that are **trying to use safety-related arguments**

in order to require employers to bargain about an otherwise permissive subject of bargaining.

Specifically, in this case, City of Seattle Parking Enforcement Officers (PEO's) had traditionally been able to access the specific criminal history info of drivers whose vehicles they were about to issue tickets to in order **to determine if those drivers had any history of violence or if other signs of potential danger were present**, such as the fact that the vehicle in question was stolen. When PEO's were transferred from the City Police Dept. to the City Dept. of Transportation, their right to access this specific criminal history information was taken away.

PERC refused to require the City to bargain with the impacted Union about this change in working conditions, citing three reasons:

1) Although PEO's no longer had access to specific info about a driver's criminal history, PEO's could still determine whether a driver was "of interest to the Police Dept." before issuing a ticket, and if the driver was "of interest" to the Police Dept., then the PEO was no longer expected to ticket the vehicle in question and in fact the PEO was expected to leave the area. Therefore, **PERC determined that the safety interests of the PEO's were still adequately protected**.

2) PERC also found that **the employer had a valid reason for restricting the access** of PEO's to the more specific criminal history info that had previously been provided to them because it would violate FBI and WA State Patrol policies to provide that specific info to PEO's now that they were no longer members of the Police Dept.

3) Finally, PERC determined that the Union representing the PEO's **had also not made a clear and timely demand to bargain** with the employer about this issue, thus also waiving its right to bargain.

This Decision once again highlights the fact that whether or not safety-related circumstances can be used by a Local **to turn a normally permissive subject of bargaining (like minimum staffing) into a mandatory subject of bargaining will be very much dependent on the specific facts that are presented in a particular case**. It will be important for Locals in such situations to develop evidence that hopefully will convince PERC that, based on the specific facts presented, the safety-related impacts of a change in working conditions upon the Local's bargaining unit members are significant enough to outweigh any "management rights" interest that might be put forward by the employer.

Spokane County, Decision 13510-B (PECB, 2022)

This case involves an issue that PERC has been struggling mightily, and not so successfully, with recently, in my view. Specifically, **this case involves a situation where an employer is insisting that it will only bargain with a Union for a new CBA if the bargaining process is fully open to the public** and if, for instance, members of the public are actually allowed to sit in on and observe bargaining sessions. Needless to say, CBA bargaining is not a sporting event and should not be open to the public. Parties should not be encouraging their supporters to show up at a bargaining session in order to make the other party uncomfortable. It is OK to share the final result of CBA bargaining with the public, but it is counterproductive to open up the entire process to partisan manipulation and outside influence.

Nevertheless, a few employers have recently been using a tactic whereby they try to make unions uncomfortable, and/or even attempt to avoid the bargaining process entirely, by insisting that they will only meet to bargain a new CBA with a Union if all CBA bargaining sessions are fully open to the public. The **Spokane** case cited here continues what I consider to be an ineffective approach by PERC to dealing with this tactic on the part of employers that began with a case out of **Lincoln County**.

The interested Union in this case represents several bargaining units of Spokane County employees. Various CBA's covering those employees were due to expire at the end of 2019. Therefore, the Union notified the County in the summer of 2019 that it wanted to commence bargaining for new CBA's. **In 2018, the County had passed an ordinance providing that, in the future, the County would only engage in CBA bargaining with unions if the relevant bargaining sessions were fully open to the public.** The County therefore responded to the Union's bargaining request by agreeing to bargain, but **ONLY** if the bargaining process was fully open to the public. The Union refused to bargain under those circumstances.

This **standoff** led to a period of inactivity. Then, in 2020, the Union submitted opening bargaining proposals to the County by mail and reiterated its request to engage in further bargaining under circumstances where the bargaining would not be open to the public. **The County continued to refuse to bargain except in public**. The Union then asked PERC to appoint a mediator to assist the parties, which PERC agreed to do. However, the County refused to meet with the mediator. Therefore, the Union, eventually, in 2021, **filed a ULP against the County** for a refusal to bargain. It is important to note that the County did not file a cross-ULP against the Union. Therefore, **the only issue before PERC in this case was whether the County (and not the Union) had committed a ULP.**

PERC found that the County had committed a ULP by insisting that it would only bargain with the Union in public. So far, so good. EXCEPT THAT, in prior cases, PERC has also found that it is a ULP for a Union to insist on bargaining **IN PRIVATE**. And there was no indication in this Spokane County Decision that PERC would have changed its position in this regard if the County had filed a ULP against the Union. **So, probably the only reason why the Union was also not found to have committed a ULP in this instance** (which is what happened in the Lincoln County case) was that the County had not filed a ULP against the Union.

Moreover, PERC also refused to order any meaningful remedy against the County in this case. For instance, the Union had asked PERC to require the County to start the bargaining process at the mediation stage under the circumstances presented and/or to require the County to make all pay increases fully retroactive once the bargaining process did get started. Instead, PERC just issued its standard order slapping the County on the hand and telling them to do better next time.

So, in effect, even though PERC found that the County had committed a ULP,

the County was able to delay the commencement of bargaining for new CBA's with this Union for over three years without paying any significant penalty

for doing so, and it was still unclear even after this decision was issued whether appropriate bargaining was in fact going to take place.

For instance, PERC also did not order the County to bargain with the Union in private.

So, there was **every reason to believe that the impasse that had been created by earlier PERC decisions would continue** to exist. If it is a ULP for an employer to insist on bargaining in public but it is also a ULP for a union to insist on bargaining in private it is unclear what is supposed to happen if neither party backs down, which is perhaps exactly what employers who are pushing this issue are looking for.

From my perspective, **the appropriate solution to this situation should have been (and should be) for PERC to determine that it is a ULP for a party to insist on bargaining in public but that it is NOT a ULP for a party to insist on bargaining in private**. In this respect, I would point out that all collective bargaining sessions are specifically exempted by statute from the necessity of complying with the Open Public Meetings Act (the OPMA). I believe that this is a good indication of the intent of the legislature that collective bargaining should **not** take place in public. I also think that this intent should have been cited by PERC as a reason for differentiating between an insistence on bargaining in public versus a desire to bargain in private.

So far, however, that has not happened, and in light of the way that this issue is now so messed up, **the legislature will probably need to step in again in order to make its intent even more clear that collective bargaining should take place in private** and that it is not a ULP for a party to insist on that outcome. HEADS UP for the State Council's legislative team! Until the legislature acts, or PERC adopts new case law, however, this problem will persist anywhere that an employer is trying to force a union to bargain in public.

Seattle Housing Authority, Decision 13562 (PECB, 2022)

This is **another case involving an allegation of a breach of the duty of fair representation that was dismissed by PERC**. I am including it here mainly because of the following description of a union's duty of fair representation, which I think is also helpful to keep in mind:

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Washington State Supreme Court adopted three standards to measure whether a union has breached its duty of fair representation:

1) The union must treat all factions and segments of its membership without hostility or discrimination.
2) The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.
3) The union must avoid arbitrary conduct.

Each of these requirements represents a distinct and separate obligation.

Ben Franklin Transit, Decision 13550 (PECB, 2022)

There is interesting info in this Decision both about unilateral change issues and regarding what a Union needs to prove in order to establish that discrimination based on someone's union activities has occurred. In this instance, PERC found that no unilateral change in working conditions had occurred because no mandatory subjects of bargaining were involved in the change, but PERC did find that the employer had engaged in unlawful discrimination based on the union activities of impacted bargaining unit members.

This Decision involved **a situation where a Union had recently successfully organized a bargaining unit of Supervisors**, thus changing them from non-union to union employees. While the Supervisors were non-union employees, the employer had allowed them to use employer-owned vehicles in order to perform certain aspects of their job duties. Moreover, while the Supervisors were still non-union employees, the employer had ordered new vehicles with the clear intent of allowing the Supervisors to use those new vehicles to perform some of their job duties.

However, between the time when the new vehicles were ordered and the time when they were delivered, the Supervisors filed a Petition with PERC to join a Union. **As soon as the employer learned of this Petition the employer announced that it was no longer planning to allow the Supervisors to use the new vehicles that had been ordered as part of their job duties** once the vehicles arrived and instead the employer stated that it was going to make the Supervisors keep using existing, older vehicles to perform their job duties, and the employer followed through with this decision, thus leading to the ULP.

PERC applied the balancing test that was referred to in the **City of Seattle** case that was discussed earlier in this presentation in order to decide whether a mandatory subject of bargaining was involved in this situation and determined, using that test, that **there was no change in a mandatory subject of bargaining**.

The primary argument made by the Union in this regard was safety (citing the **Everett** decision that many of you are familiar with). **In other words, the Union argued that it was unsafe for the Supervisors to be required to keep driving older vehicles** rather than being allowed to use newer, presumably more reliable vehicles.

Although PERC said that this argument presented a “close call” **PERC decided that the older vehicles were still in good enough shape that it was not clearly unsafe for the Supervisors to keep driving them**, and therefore PERC concluded that no unilateral change ULP had occurred because such ULP’s require that the change in dispute must involve a mandatory subject of bargaining.

PERC did find, however, that the employer had engaged in unlawful discrimination against the Supervisors here because of their union activities.

PERC outlined in this Decision the **requirements that a union must meet in order to win a discrimination case**.

First of all, the Union must initially show that:

1) union activities had occurred and that the decision-makers for the employer were aware of those activities;
2) that the individuals engaging in the union activities were harmed in some manner by actions taken by the employer; and

3) that there was a causal connection between the union activities in question and the negative actions or decisions made by the employer. The Union can use circumstantial evidence to meet its burden in this regard. **PERC also reiterated that timing is important here.** In other words, the closer the timing between a negative decision that has been made by an employer and the union activities that are the subject of the ULP, the more likely it is that discrimination has occurred.

Once a Union has met the initial burden of proof described above, **the burden then shifts to the employer to produce evidence** showing that it had a legitimate, non-discriminatory business reason for acting as it did.

If the employer meets this burden, then **the burden of proof shifts back to the Union to prove by at least a 51% margin** that the "neutral" reason advanced by the employer is just a pretext for discrimination and that at least one of the employer's significant motivations in taking its actions was anti-union discrimination (**the Union does not need to prove that anti-union discrimination was the employer's ONLY motive, just that it was a significant motivating factor behind the employer's actions**).

PERC found that the Union had met its burden of proof in this instance to show that discrimination based upon union activities had occurred. Both the timing of the employer's change in plans, forcing the Supervisors to keep using older vehicles, and direct statements from the employer's HR Director that this change was related to the union activities of the Supervisors supported the conclusion that the employer was motivated by anti-union discrimination in making its decision. **PERC therefore determined that a ULP had occurred and issued an order directing the employer to allow the Supervisors to use the new vehicles** that the employer had purchased instead of being required to keep using the older vehicles.

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

This Decision contains an interesting discussion regarding the standard that PERC uses to decide if an employer has committed a ULP when the employer transfers a union's bargaining unit to someone outside of the union's bargaining unit. **The union must first of all establish that the work in question is "bargaining unit work" (work that has been performed either exclusively or almost exclusively by members of the bargaining unit in question).** If the union can meet that test, PERC then once again applies a "balancing test" in order to determine if the Union's interests in keeping the work outweigh management's interests in transferring the work to someone else.

The PERC Commission found in this case that a ULP had been committed, reversing a Hearing Examiner decision to the effect that no ULP had occurred. **There was no question here that the work in question was the "bargaining unit work" of the union that had filed the ULP.** The "closer" question was whether the union's interests were stronger than management's interests under the "balancing test".

I personally do not think that this was a close question and that the **PERC Commission made the clearly correct choice in finding that a ULP had occurred, but it is indicative of the dangers of a "balancing test" and of how important the individual preferences of individual decision-makers can be** that the Commission had to overcome the Decision of the Hearing Examiner and the dissent of one of the three Commissioners in order for the majority of the Commission to arrive at what I would consider to be the correct decision in this instance.

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

This case is worth discussing both for its entertainment value and as **a guide to acceptable behavior during the bargaining process**. As you can see by reviewing this presentation, Ben Franklin Transit seems to be struggling right now in terms of fulfilling its obligations pursuant to RCW 41.56. However, this case actually involves some questionable behavior on the part of a Teamsters rep when he was bargaining against Ben Franklin.

The Teamsters rep became upset with the Ben Franklin bargaining team during a collective bargaining session (perhaps with good reason) and began **loudly swearing at them and using admittedly inappropriate language as well as gesturing with his hands**. This in turn upset some members of the employer's team, one of whom decided to ask a local court to issue a protective order against the Teamsters rep because she claimed that she was now afraid that he might harm her. Ben Franklin also then filed a ULP against the Teamsters claiming that the Teamster rep's conduct violated the Union's obligation to bargain in good faith.

In this Decision, the Commission reversed a Hearing Examiner decision and determined that the behavior of the Teamster rep did not cross the line of being a ULP. PERC based its decision primarily on a determination that the Teamster rep did not in fact threaten violence and did not do anything that was even close to an assault and that **even though he used the "f" word multiple times and was otherwise "uncivil" his behavior was not so outrageous as to constitute a ULP**. PERC left it unclear just exactly what it would take in order for a union rep's behavior to cross the line so as to be a ULP. Although the Teamsters were able to (barely) avoid getting tagged with a ULP in this instance, it is still not a good idea to lose your cool during the bargaining process.

City of Richland v. IAFF, Local 1052, (134699- I-21, 2022)

Last but not least I also wanted to mention this helpful Interest Arbitration Award involving the PFML, which I was able to assist Local 1052 to obtain last summer. **By means of this Award, Local 1052 was able to force the City of Richland to begin providing supplemental benefits** to the members of the Local's two bargaining units while those individuals are off on PFML leave.

In other words, **this Award allows Local 1052 members to use the paid leave that they have earned through their employment with the City of Richland in order to supplement the PFML benefit** that they receive from the State of WA while they are off on PFML leave, so that they can receive the equivalent of their normal salary while they are on PFML leave.

This is a very significant decision from the perspective of making the PFML benefit useful to IAFF members, as without having their paid leave officially designated as a “supplemental PFML benefit” Local members need to take a significant cut in pay in order to go off on PFML leave. **I believe that any Local whose employer has not already agreed to designate paid leave as a “supplemental PFML benefit” should put that issue on their wish list for their next bargaining process with their employer.** There are other PFML-related issues that might warrant bargaining about as well, which we can discuss if you want during our Q and A period.