

March 18, 2008

TO: Gerry Stamper

FROM: Teresa Parsons
Director's Review Program Supervisor

SUBJECT: Director's Review No. RULE-07-002
Employees: **Eric Bashaw, Randy Smith, Dean Neppel, Jeffrey Maupin**

On December 13, 2007, I conducted a Director's review telephone conference regarding a Director's review request Mr. Stamper filed on July 16, 2007, alleging Washington State University (WSU) violated WAC 357-31-320(2) (Exhibit A).

Issue of standing to request Director's review of alleged rule violation

The record reflects the following individuals in the request for a Director's review (Exhibit A):

David Goose, Chad Congdon, Jeffrey Maupin, Eric Bashaw, Dean Neppel, Randy Smith, Ed Hosley, and Donald Randy Parsons.

The following individuals participated in the December 13, 2007 telephone conference:

Gerry Stamper, Eric Bashaw, Randy Smith, Dean Neppel, Jeffrey Maupin, and Dwight Swanson (observer); Lawrence (Ev) Davis, Associate Vice President for Facilities Operations; Kendra Wilkins-Fontenot, Senior Human Resource Consultant, representing WSU; and Ariani Mondragon and Sabrina Harris also with WSU's Human Resources Office.

After the Director's review conference, I asked the parties to provide a written response to the employees' standing to bring forth an alleged rule violation under WAC 357-49-010(4), which provides the following (Exhibit D):

. . . an employee who has been adversely affected by a violation of the civil service laws or rules may request a director's review within thirty calendar days of the date the employee could reasonably be expected to have knowledge of the action giving rise to a law or rule violation claim or the stated effective date, whichever is later. . . .

(Emphasis added).

In a January 23, 2008 email, I clarified the reason for my inquiry: Mr. Stamper, who appeared not to be an employee adversely affected by an alleged rule violation, filed the request, naming others who purportedly were adversely affected by the alleged rule violation (Exhibit E). I mailed a copy of the January 16, 2008 letter and January 23, 2008 email to each of the eight employees named in the original request (Exhibits D and E-1).

By email dated January 25, 2008, Mr. Stamper requested additional time to respond to the issue of standing to bring forth the alleged rule violation (Exhibit F). I set a deadline of February 19, 2008, for the parties to respond. I considered both Mr. Stamper's response, received on February 6, 2008 (Exhibit G), and WSU's response, received on February 19, 2008 (Exhibit H).

In his response, Mr. Stamper included a document conferring authorization of representation from the following individuals: Eric Bashaw, Randy Smith, Dean Neppel, and Jeffrey Maupin. The document reads, in part, "[b]ack in June 2007, we the undersigned authorized Gerry Stamper to file a director's review on our behalf for violation of WAC 357-31-320-2" (Exhibit G-1). Since Mr. Bashaw, Mr. Smith, Mr. Neppel, and Mr. Maupin indicated that they authorized Mr. Stamper to file the Director's review request on their behalf, they will be considered parties to the request.

Nature of Alleged Violation

The employees allege WSU violated WAC 357-31-320(2) when the university required them to take annual leave or work extra hours to account for time spent at a hearing before the Public Employment Relations Commission (PERC). The employees allege WSU violated the rule because they appeared at the PERC hearing in response to subpoenas that had been served.

WAC 357-31-320(2) provides the following:

The employer **must** grant a leave of absence with pay for the employee to respond to a subpoena when:

. . .

(2) The subpoena is for a legal proceeding which is unrelated to the personal or financial matters of the employee.

Background

Each of the named employees received a subpoena to attend and give testimony in the matter of Gerry Stamper (Complainant) vs. Washington State University (Respondent), Case 21005-U-07-5362, before the Public Employment Relations Commission. The subpoenas "commanded" the employees to attend the hearing, which was scheduled for June 19, 20, and 21, 2007. The subpoenas were signed and issued by PERC Examiner Sally B. Carpenter at the request of Complainant Gerry Stamper on June 5, 2007 (Exhibits B-2 – 9).

All of the named employees attended the PERC hearing on June 19, 2007. The total time present for each employee is identified in a witness list (Exhibit B-1). On June 20, 2007, Human Resource Manager Stevan DeSoer sent an email to Mr. Davis addressing leave consideration. In his email, Mr. DeSoer wrote, ". . . the University is not obligated to grant a leave of absence with pay. The University views all time spent by witnesses . . . to be **non-work time** which must be accounted for on their regular time sheets" (Exhibit B-10). Mr. Davis then emailed the employees' supervisors, noting they could "allow some flexibility in schedule changes to allow [the employees] to work some or all of these hours off over the balance of this work week as long as no overtime accrues as a result of such an accommodation" (Exhibit B-10).

With the exception of Jeffrey Maupin, the employees' time reports show annual leave taken on June 19, 2007 (Exhibits B-11 – 14 and B-16 – 18). Mr. Maupin's time report shows additional hours worked on June 21 and 22, 2007 (Exhibit B-15).

Summary of Employees' Perspective

The employees contend WSU violated WAC 357-31-320(2) by not granting them a leave of absence to attend a hearing they were required to attend by law. The employees assert that when they received the subpoenas they assumed a leave of absence would be granted because the PERC hearing was held at WSU regarding activities that occurred at WSU. The employees contend the PERC hearing involved an Unfair Labor Practice (ULP) filed by Gerry Stamper and assert they were not parties to the action filed (Exhibit C). Instead, the employees contend they were forced to obey the subpoena or face being arrested, while at the same time told they had to take annual leave. The employees assert WSU is retaliating against them for testifying at the ULP hearing, which they believe the subpoena required them to attend. The employees argue that WSU should make them whole and pay them for time spent attending the PERC hearing.

Summary of WSU's Perspective

WSU argues the employees do not meet the criteria for a paid leave of absence under WAC 357-31-320(2). While WSU agrees the subpoenas were issued at the request of Gerry Stamper, the university asserts the ULP hearing in question directly relates to the employees, both personally and financially. WSU argues the ULP case before PERC

constituted a blocking charge against three union representation cases affecting the employees. Therefore, WSU contends the result of the ULP charge had the effect of determining whether or not the employees would be covered by a contract, which in turn had an impact on their wages. WSU contends the consideration of leave was raised at the PERC hearing and asserts the Hearing Officer requested the university "consider some flexibility" (Exhibit B-10). As a result, WSU asserts the university allowed the employees the flexibility of taking annual leave or adjusting their work schedules. WSU contends the university is not in violation of WAC 357-31-320(2).

Director's Determination

As the Director's designee, I carefully considered all of the documentation in the file, including the Director's review request with attachments, the exhibits, and the verbal comments provided by both parties. Based on my review, I conclude WSU violated WAC 357-31-320(2).

Rationale for Determination

The employees have the burden of proving WSU violated WAC 357-31-320(2) by not providing them a paid leave of absence under the rule. Accordingly, the employees must establish they were served subpoenas "for a legal proceeding which is unrelated to the personal or financial matters of the employee[s]."

Both the subpoenas and the PERC decision identify Gerry Stamper as the Complainant. As indicated on the subpoenas, the employees were "commanded to attend and give testimony in the [Gerry Stamper vs. Washington State University] matter before the Public Employment Relations Commission." The subpoenas were issued under RCW 34.05.446, an administrative law chapter under the Administrative Procedure Act, and WAC 391-08-300 and WAC 391-08-310, governing the Public Employment Relations Commission. The subpoenas state, "[a]ny person who willfully neglects or refuses to attend or to testify as required herein shall be subject to enforcement of this subpoena by the courts in any county" (Exhibits B-2 – 9).

The employees have established they were required to attend this legal proceeding. The question is whether or not the proceeding relates to the employees on a personal or financial matter. In reviewing the PERC's decision (Exhibit C), there is no evidence any employee was a party to the ULP charge other than Gerry Stamper. While Gerry Stamper's ULP charge may have resulted in a situation having some potential, future impact on the employees due to their working relationship to Mr. Stamper, there is no evidence the employees were involved in filing the claim. Therefore, the subpoenas were unrelated to any claim by the employees for personal or financial reasons. Rather, the subpoenas were for a proceeding based solely on Mr. Stamper's complaints alleging ULPs by WSU, which were ultimately dismissed.

The employees have proven that WSU violated WAC 357-31-320(2), and the university should make the appropriate adjustments to the employees' leave balances or pay to ensure the employees are made whole.

Appeal Rights

WAC 357-49-018 provides that either party may appeal the results of the Director's review to the Personnel Resources Board (board) by filing written exceptions to the Director's determination in accordance with Chapter 357-52 WAC.

WAC 357-52-015 states that an appeal must be received in writing at the office of the board within thirty (30) calendar days after service of the Director's determination. The address for the Personnel Resources Board is 2828 Capitol Blvd., P.O. Box 40911, Olympia, Washington, 98504-0911.

If no further action is taken, the Director's determination becomes final.

c: Employees: Bashaw, Smith, Neppel, and Maupin
Kendra Wilkins –Fontenot, WSU
Kris Brophy, DOP

Enclosure: List of Exhibits