

No. 39328-0-II

COURT OF APPEALS
DIVISION II
09 JUL 29 AM 11:59
STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON**

TEAMSTERS LOCAL UNION NO. 117,
RON NELSON and
JOHN TORRES,

Appellants,

v.

STATE OF WASHINGTON, HUMAN RIGHTS COMMISSION,

Respondent.

BRIEF OF APPELLANT

Spencer Nathan Thal, General Counsel
WSBA # 20074
Teamsters Local Union No. 117
14675 Interurban Ave. S., Ste. 307
Tukwila, WA 98168
(206) 441-4860

Attorney for Appellants

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR AND RELATED ISSUES.....1

II. STATEMENT OF THE CASE.....2

A. Introduction.....2

B. Nature of Proceedings.....3

C. Statement of Facts.....4

III. ARGUMENT7

A. Dismissal Was Improper Because The Commission Took “Agency Action” Without Following The Procedural Mandates Of The Administrative Procedure Act.....8

B. There Is A Justiciable Controversy Because The Commission’s Orders Directly Affect The Appellants’ Interests And Effectively Preclude The Commission From Fulfilling Its Adjudicative Responsibility.....16

C. Appellants Have Standing As The Agency Action Causes Substantial Prejudice And Injury To Their Interests And Those Interests Are Within The Zone Of Interest The Commission Was Required To Consider.19

IV. CONCLUSION.....22

TABLE OF AUTHORITIES

CASES:	Page(s)
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).....	10
<i>Dennis v. Heggen</i> , 35 Wn. App. 432, 434, 667 P.2d 131 (1983).....	7
<i>Hoffer v. State</i> , 110 Wn.2d 415, 420, 755 P.2d 781 (1988), <i>adhered to on reconsideration</i> , 113 Wn.2d 148, 776 P.2d 963 (1989).....	7
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 961 P.2d 333 (1998).....	7, 21
<i>Robino v. Iranon</i> , 145 F.3d 1109 (9 th Cir. 1998).....	21
<i>Rothwell v. Nine Mile Falls School District</i> , 149 Wn. App. 771, 777, 206 P.3d 347, 350 (2009).....	7
<i>Washington Education Association v. Washington State Public Disclosure Commission</i> , 150 Wn.2d 612, 80 P.3d 608 (2003)	10, 11, 12, 18
 STATUTES:	
RCW 34.05.....	3, 8
RCW 34.05.010(3).....	8
RCW 34.05.010(8).....	12
RCW 34.05.230(1).....	11
RCW 34.05.413(2).....	17
RCW 34.05.570.....	8

RCW 49.60.....	2, 5, 9, 16
RCW 49.60.120.....	16
RCW 49.60.140.....	16
RCW 49.60.230.....	16
RCW 49.60.270.....	16
WAC 162-04-070(1).....	5
WAC 162-04-070(5).....	5
WAC 162-16-210.....	5
WAC 162-16-240.....	5
RULES:	
Civil Rule 12(b)(6).....	7, 21

I. ASSIGNMENT OF ERROR AND RELATED ISSUES

Assignment of Error. The trial court erred when it granted the Respondent's Motion to Dismiss.

Issue No. 1. Does the Human Rights Commission's decision to grant BFOQ determinations to the Washington State Department of Corrections ("DOC") in response to a specific DOC request constitute "agency action" within the meaning of the Administrative Procedure Act, RCW 34.05.010(3)?

Issue No. 2. Is there a justiciable controversy given that the DOC is taking action detrimental to the Appellants' interests in reliance on the Respondent's decision to grant BFOQ determinations to DOC?

Issue No. 3. Do the Appellants have standing to challenge the Respondent's action?

II. STATEMENT OF THE CASE

A. Introduction.

The Washington State Human Rights Commission (“Commission” or “WSHRC”) has abdicated its responsibility to conduct an adjudicative hearing to resolve an important issue as to whether the Department of Corrections (“Department” or “DOC”) can designate certain positions at female prison institutions as female-only without violating the Washington Law Against Discrimination, RCW 49.60. Instead of fulfilling its responsibility to conduct an adjudicative hearing, the Commission responded to a DOC request for bona fide occupational qualification (“BFOQ”) determinations by issuing numerous letters (“the BFOQ letters”) granting all of the Department’s requests to designate numerous positions as female-only. The rubber-stamping of these requests after only a cursory review of the issue has, and will continue to have, significant, permanent, detrimental employment impacts on long-term State employees, as it effectively forces the Department’s hand to designate all of the affected positions as female only.

The Commission understood—or should have understood—that the Department would rely on the BFOQ letters to change the minimum

requirements of the positions so as to make them female only, and thereby cause adverse consequences on current DOC employees. Indeed, with litigation pending from female inmates, once the Commission approved the designation of the affected positions as female only, any failure by the DOC to impose such a requirement would leave DOC exposed to claims by female inmates that they were harmed by the Department's failure to designate positions as "female only."

By issuing the BFOQ letters in a perfunctory manner, the Commission has effectively precluded any challenge through its adjudicative process, and has thereby triggered permanent and irreparable employment impacts on innocent State employees. In dismissing the petition for judicial review, the trial court effectively abdicated its responsibility to conduct judicial review of this critical issue, resulting in a miscarriage of justice that runs directly contrary to the mandates of the Administrative Procedure Act, RCW 34.05.

B. Nature of Proceedings.

Teamsters Local Union No. 117 ("Union"), Ron Nelson and John Torres filed an action against the WSHRC alleging that the Commission violated the Administrative Procedure Act by granting BFOQ

determinations to DOC without following the procedures for taking such agency action as set forth in the Act. Clerk's Papers ("CP") 3-15.

The State filed a Motion to Dismiss, contending that: (1) the Commission's issuance of the BFOQ determinations does not constitute "agency action"; (2) there is no justiciable controversy; and (3) the petitioners did not have standing to assert the claim. CP 61-75. The trial court granted the State's Motion to Dismiss. CP 49-51. Although the Court discussed the issues from the bench, the Order does not set forth the trial court's reasons for granting judgment to the State. CP 49-51. The Union timely appealed to this Court. CP 55-59.

C. Statement of Facts.

DOC is an agency of the State of Washington, and operates three institutions for female inmates: the Washington Corrections Center for Women ("WCCW"), Mission Creek Corrections Center for Women ("MCCCW") and Pine Lodge Corrections Center for Women ("PLCCW"). CP 30-31. Teamsters Local Union No. 117 is the certified bargaining representative of supervisory and non-supervisory employees who work at WCCW and MCCCW, including the other named appellants, Ron Nelson and John Torres, correctional officers who work at MCCCW

and WCCW respectively, in positions which the Department has now designated as female only. CP 4-5. There are numerous other correctional officers that are similarly situated. CP 5.

The Commission is the state agency charged by the Legislature with the responsibility for administering and enforcing the Washington Law Against Discrimination, RCW 49.60. CP 64. Moreover, under the Commission's own rules, the BFOQ exception to the general law prohibiting discrimination is "applied narrowly." WAC 162-16-240. Upon request, the Commission's Executive Director can provide an opinion regarding BFOQ status, WAC 162-16-210, or for that matter, on any other matter regarding the law against discrimination. WAC 162-04-070(1). The significance of such opinions is clear:

When any person has relied in good faith on an opinion of the executive director, the commission will not thereafter assert a contrary position against that person, unless the opinion is revoked or revised, or is superseded by a material change in the applicable statutes, regulations, or case law. This paragraph covers persons other than the person who requested the opinion, if the persons have justifiably relied on the opinion.

WAC 162-04-070(5). Under the Commission's rule, an Executive Director opinion binds the Commission, thereby giving a degree of protection to employers that rely on such opinions.

In this case, the Commission went substantially farther than issuing an opinion regarding BFOQ status. In response to the DOC's request for an opinion, the Executive Director "granted" the DOC's request that being female is a BFOQ for numerous correctional officer positions at female institutions. CP 10-13, 31. The Commission took this action without allowing affected parties, including DOC employees and their Union, to provide information, despite repeated requests. CP 31. Moreover, knowing that the Commission's decision would have a detrimental impact on the employment opportunities of numerous male correctional officers, the Commission suggested that the Department include language in its job announcements that being female is a bona-fide occupational qualification. CP 13. The Department is moving quickly to implement these changes, relying on the BFOQ letters as orders of the Commission, despite the fact that the Commission's orders will have a significant, adverse impact on the employment of male correctional officers currently working at the female correctional institutions. CP 31-48.

III. ARGUMENT

When reviewing a trial court's decision to grant a motion to dismiss, the appellate court conducts a de novo review. *Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771, 777, 206 P.3d 347, 350 (2009). A complaint may be dismissed by a trial court under CR 12(b)(6) only "if it fails to state a claim upon which relief can be granted." *Rothwell*, 149 Wn. App. at 777, 206 P.2d at 350; *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *adhered to on reconsideration*, 113 Wn.2d 148, 776 P.2d 963 (1989). For purposes of resolving a motion to dismiss under Civil Rule 12(b)(6), the factual allegations of the complaint must be accepted as true. *Dennis v. Heggen*, 35 Wn. App. 432, 434, 667 P.2d 131 (1983). In addition, all reasonable inferences from the allegations in the complaint must be resolved in favor of the non-moving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Motions to dismiss should be granted sparingly and only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Rothwell*, 149 Wn. App. at 777, 206 P.3d at 351. The State has not met this standard with respect to any of the arguments presented.

A. Dismissal Was Improper Because The Commission Took “Agency Action” Without Following The Procedural Mandates Of The Administrative Procedure Act.

The Administrative Procedure Act, RCW 34.05 (“APA”) authorizes judicial review of rules, agency orders in adjudicative proceedings and other agency action. RCW 34.05.570. “Agency action” is a broadly defined term under the APA:

‘Agency action’ means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

RCW 34.05.010(3). As is apparent from the breadth of this definition, the Washington State legislature sought to ensure that all actions taken by an administrative agency that impact individual rights would be subject to judicial review. The policy reason for such an approach is obvious: if a narrow definition were adopted, administrative agencies could avoid the check and balance of judicial review simply by taking actions which impact individual rights, but which fall outside the technical definition of a final rule or order.

The State argues that the BFOQ letters at issue in this case are “interpretive statements,” and therefore exempt from judicial review under

the APA. This is not correct; the BFOQ letters are in fact orders. Far from limiting itself to offering an opinion regarding the interpretation of RCW 49.60, the Commission in this case went farther and “granted” the BFOQ requests to the Department. CP 13. In each of the BFOQ letters, the Commission concluded as follows:

Therefore for the stated purposes above, sex is **granted** as a bona-fide occupational qualification for the following positions:

...

The **determination** that sex may be a BFOQ in the hiring or assignment for the above positions is subject to the following limitations:

CP 13 (emphasis added). The Commission has gone substantially farther than offering a mere opinion as to the interpretation of the statute, by issuing a “determination” that the bona-fide occupational qualification is “granted” to the Department, effectively compelling DOC to designate the positions as female only. Indeed, the Commission’s effort to immunize DOC from any challenge on this issue is highlighted by the next paragraph in the BFOQ letters:

In an effort to minimize potential misunderstandings or complaints from job applicants, it is suggested that the following language be included in any job announcements used by DOC, when seeking candidates for female-only positions:

Being female is a bona-fide occupational qualification for the position of Correctional Officer at this time, pursuant to an opinion by the Executive Director of the Washington State Human Rights Commission.

CP 13. Any reasonable reader of such a job announcement would conclude that a determination had been made by the Commission, and it is apparent from the Commission's phrasing that this is the Commission's desired and intended outcome. In short, without conducting any adjudicative proceeding, the Commission has effectively issued final orders granting BFOQ determinations to the Department which the Department in turn relied upon in designated all of the affected positions as female only. This is precisely the type of "agency action" that the APA was designed to include within the scope of review, given that it is effectively an order being dressed up as an opinion. Appellate courts have expressly cautioned against invitations to decline judicial review of agency actions "in the guise of advice." *Washington Education Association v. Washington State Public Disclosure Commission*, 150 Wn.2d 612, 614, 80 P.3d 608, 609 (2003) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)).

The facts of this case are very different from the facts in the *WEA* case relied upon by the State. In the *WEA* case, the Washington State Public Disclosure Commission (“PDC”) issued guidelines interpreting the meaning of rules regarding the use of public facilities in election campaigns. *Washington Education Association v. Washington State Public Disclosure Commission*, 150 Wn.2d 612, 614, 80 P.3d 608, 609 (2003). The agency took its action *sua sponte*, which is entirely consistent with the APA’s provision regarding interpretive and policy statements:

An agency is encouraged to **advise the public** of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive statements and policy statements into rules.

RCW 34.05.230(1) (emphasis added). The APA contemplates that interpretive statements are **general guidelines**, issued by an agency to advise the public of its current opinions, approaches and courses of action, **not specific actions**, taken in response to a specific request of a party. This important distinction differentiates this case from the *WEA* case. In the *WEA* case, the PDC on its own initiative issued general guidelines regarding the use of public facilities in election campaigns that applied to

the public across the board. In the case before the Court, the Commission took action in response to a specific request from DOC and granted BFOQ determinations.

Furthermore, the PDC in the *WEA* case expressly identified its opinion as an interpretive statement, as expressly required by the APA:

“Interpretive statement” means a written expression of the opinion of an agency, **entitled an interpretive statement by the agency head or its designee**, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

RCW 34.05.010(8) (emphasis added). Indeed, the Supreme Court in the *WEA* case relied heavily upon the fact that the PDC Guidelines were **expressly designated** as “Interpretive Statement 01-03.” *WEA*, 150 Wn.2d at 616. By contrast, it is undisputed that the BFOQ letters issued by the Commission in this case are not “entitled an interpretive statement by the agency head or its designee.” CP 10-13. Not only are the BFOQ letters not “entitled an interpretive statement,” the phrase “interpretive statement” appears nowhere in the letters. *Id.* Under the clear statutory definition of “interpretive statement” in the APA, RCW 34.05.010(8), this deficiency marks an end to the analysis. In the absence of such a

designation, the Commission's determinations are not interpretative statements and therefore constitute agency action.

In addition though, the absence of the phrase "interpretive statement" in the BFOQ letters is not just a technical deficiency—it reflects the reality, which is that the agency action here has significant real-world impact on the employment rights of current DOC employees because the BFOQ letters are being treated by the DOC as dispositive, adjudicative orders, effectively foreclosing subsequent adjudicative review by the Commission. Less than one week after the Commission issued its BFOQ letters, the Department wrote to Petitioner Teamsters Local Union No. 117. In that letter Department of Corrections Labor Relations Manager Todd Dowler observed that:

On February 5, 2009, the Department learned the Washington State Human Rights Commission (HRC) **approved female gender as a bona-fide occupational qualification (BFOQ)** when hiring or assigning staff into specific Correctional Officer positions at the Washington Corrections Center for Women (WCCW), Mission Creek Corrections Center for Women (MCCCW), and Pine Lodge Corrections Center for Women (PLCCW). . . .

The Department requests a meeting with Teamsters Local Union #117 within the next fourteen days in order to address impacts these newly designated BFOQs will have on existing staff at WCCW and MCCCW.

Please also be aware that the newly designated BFOQ positions at PLCCW may cause the Department to layoff correctional officers with permanent status from this institution. In accordance with the Collective Bargaining Agreement between the State of Washington and the Washington Federation of State Employees (WFSE), this may cause probationary staff at the Airway Heights Corrections Center to be displaced.

CP 35-37. This letter clearly demonstrates that the Department is relying on the BFOQ letters issued by the Commission as dispositive agency action on the issue, and that the Department is taking action in reliance on those determinations. As noted above, this result was expressly contemplated and intended by the Commission when it issued the BFOQ letters. The BFOQ letters are not mere “interpretive statements”—they are determinations “approving” a change in the minimum qualifications of certain correctional officer positions at DOC institutions.

The State argues that the BFOQ letters are interpretive statements because they cannot be violated by anyone, and because there is no penalty or sanction if DOC disregards the BFOQ letters. CP 68. This is an obfuscation of the issue. The BFOQ letters are not “advisory only.” As noted above, DOC’s reliance on the Commission’s “approval” of the BFOQ positions has an immediate and detrimental employment impact on Petitioners. In addition, DOC would now disregard the BFOQ

designations granted by the Commission at its peril. After all, if DOC fails to designate positions as BFOQ after the Commission granted the requests, DOC would leave itself exposed to subsequent claims from female inmates that they were harmed by DOC's failure to follow the HRC's direction to designate the positions as female-only.

In issuing the BFOQ letters, the Commission took definitive agency action "granting" the BFOQ "determinations" to the Department of Corrections. The Commission now seeks to label this agency action as an interpretive statement for the sole purpose of avoiding judicial review, but this post-hoc argument runs contrary to the form and substance of the Commission's action at issue. Appellants respectfully request that the Court reverse the trial court's order dismissing the petition for judicial review on this basis.

B. There Is A Justiciable Controversy Because The Commission's Orders Directly Affect The Appellants' Interests And Effectively Preclude The Commission From Fulfilling Its Adjudicative Responsibility.

The Commission has been tasked by the Washington State Legislature with the responsibility of administering and enforcing the Washington Law Against Discrimination, RCW 49.60. RCW 49.60.120. Significantly, the Commission is empowered to conduct adjudicative hearings with respect to issues and complaints arising with respect to the Washington Law Against Discrimination. RCW 49.60.140. The statute expressly provides for a procedure for filing complaints under the law which are then heard by an administrative law judge pursuant to the Commission's responsibility to enforce the statute. RCW 49.60.230-49.60.270.

By issuing BFOQ determination letters without conducting an adjudicative hearing the Commission has effectively abdicated its responsibility to enforce the statute through the hearing process. The Commission has pre-authorized the actions of the Department of Corrections after reviewing information provided only by the Department and no other interested parties. The Commission argues that the BFOQ

letters have “no impact” on the Petitioner’s interests, CP 70, but nothing could be further from the truth. As the Commission is well aware, the Department began taking immediate action in reliance on the BFOQ letters and this action, if unaddressed, will result in direct adverse employment actions to Appellants. These factual allegations must be taken as true for purposes of resolving this motion, but they are in any event undisputed.

On February 11, 2009, less than one week after the BFOQ letters were issued, DOC’s Labor Relations Manager wrote a letter to Teamsters Local Union No. 117 indicating its intent to move forward with the BFOQ designations that the Commission had approved. CP 35-37. On February 20, 2009, Teamsters Local Union No. 117 wrote to the Commission pointing out that the Commission’s BFOQ approvals would have a devastating impact on the employment opportunities of many DOC employees currently holding the positions at issue. CP 39-40. Specifically, the approvals are poised to cause displacement, forced relocation and job loss. For this reason, pursuant to RCW 34.05.413(2), Teamsters Local Union No. 117 requested that the Commission conduct an adjudicative hearing. CP 39-40. The Commission denied this request.

Critically, while the Department disputes the extent of the impact on employees, it does not dispute that adverse employment actions will occur as a result of the Department's implementation of the Commission's BFOQ determinations. CP 45-46. Contrary to the assertions of the Commission, the controversy is ripe and justiciable as the Department has expressed an unwillingness to postpone implementation of the BFOQ determinations. CP 42-43, 48.

Again, this situation is very different from the situation presented in the *WEA* case. In that case, the Supreme Court properly concluded that the legitimacy of the PDC's guidelines regarding the use of public facilities in election campaigns presented an academic or hypothetical question that did not affect direct legal interests of the WEA because there was no allegation of "an actual, present and existing dispute or the mature seeds of one." *WEA*, 150 Wn.2d at 622. Here, by contrast there is a very real and existing dispute that is poised to have a significant, detrimental impact on dozens of DOC employees. The situations are so dramatically different, that even citing the *WEA* case in this situation is misleading at best.

C. Appellants Have Standing As The Agency Action Causes Substantial Prejudice And Injury To Their Interests And Those Interests Are Within The Zone Of Interest The Commission Was Required To Consider.

The Appellants here are certainly among the injured, and the injuries are far from speculative. It is known that all male correctional officers currently working at the female facilities in newly designated BFOQ-female positions, including the individual Petitioners in this case, will be removed from their bid positions. CP 32-33. These employees are not able to displace other employees with lower seniority; rather they are left vulnerable because they can only be reassigned to vacant positions, temporary positions or positions not filled by bid. *Id.* This will generally result in changes to shift, days off, and work locations, but for some it will involve displacement from the institution, and for some it will involve separation. *Id.* In fact, the Department itself has acknowledged that “facilitating voluntary transfers may produce a result in which it is not necessary to . . . separate male correctional officers.” CP 45-46. These injuries are not speculative; the only thing uncertain is which employees will be impacted, and how deeply they will be impacted. The fact that there is some uncertainty as to the precise injury that will occur to

particular individuals does not divest affected individuals or their Union from having standing to assert the claim. Respondent offers no authority to the contrary.

Respondent also argues that Petitioners lack standing because they were not within the zone of interest that the Commission was required to consider when it issued the agency action. This argument is absurd. Apparently, the Washington State Human Rights Commission—the agency charged by the Legislature to protect the interests of employees against employer-based discrimination in the workplace—is actually asserting to this Court that it is not required to consider the interests of the employees at the Department of Corrections when reviewing a request to establish a sex-based BFOQ for positions currently held by those employees. To make such an argument, the Commission would have to turn its statutory charge on its head. According to the Commission the only circumstance that is relevant is “DOC’s desire to ‘maintain conventional standards of sexual privacy’ for the inmates.” CP 74. Focusing solely on the “purpose” of the job, the Commission apparently regards it as unnecessary to balance the interests of staff against the privacy interests of inmates, despite the fact that every court to consider

the issue has done exactly that, including the Ninth Circuit Court of Appeals in the case cited by Respondent. *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998). In making such an argument the Commission has deviated from its legislative charge to protect employees against sex-based discrimination and it has revealed its misguided bias and improper focus, which warrants a rigorous judicial review of its action.

At a minimum the issues of standing, substantial prejudice and the extent of injury are factual matters that cannot be resolved on a motion to dismiss. The pleadings are adequate to assert the claim. Recalling the high standard of review that Respondent must meet to warrant dismissal of the Petition on a Civil Rule 12(b)(6) motion, the Respondent simply has not demonstrated “beyond a reasonable doubt that no facts exist that would justify recovery.” *Reid v. Pierce County*, 136 Wn.2d at 201.

IV. CONCLUSION

The trial court's dismissal of the Petition for Judicial Review was not appropriate. The Commission has failed to meet its heavy burden to establish that relief could not be granted. The Commission has taken agency action to grant the Department's BFOQ requests, and this action significantly impacts the rights of Appellants. Having taken action that affects individual rights so deeply, Appellants respectfully request that the Court reverse the trial court's dismissal of the Petition for Judicial Review.

DATED this 28th day of July, 2009.



Spencer Nathan Thal, General Counsel
WSBA #20074
Teamsters Local Union No. 117
14675 Interurban Ave. S., Ste. 307
Tukwila, WA 98168
(206) 441-4860
Attorneys for Appellant

