NO. 35721-6-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

WASHINGTON STATE UNIVERSITY,

Petitioner,

v.

WASHINGTON STATE PERSONNEL APPEALS BOARD, and DAVID GRIMES, TERRY ST. MARY, STUART BENNETT,

Respondents.

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STATE OF WASHINGTON
BY
COURT OF APPEALS
DIVISION II

REPLY BRIEF OF PETITIONER

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I. ARGUMENT

A. WSU had the right to close its Fire Department.

The PAB recognized that WSU has the right to determine the direction of its operations when they concluded that "This Board does not disregard Respondent WSU's broad authority under Chapter 28B.30 RCW as an institution of higher education to govern and manage its affairs." CP 76, CL 4.14. WSU was attempting to do just that, govern and manage its affairs, when it determined to cease operating a fire department.

Respondents generally contend that as long as civil servants can perform the service it is inappropriate for anyone else to perform that service. See *Brief of Respondent* at 19 wherein they opined that "the PAB decision is based on the premise that an employer cannot claim a lack of work when the work is being performed by a third party, and particularly where the employer has a contract with the third party."

It is puzzling to fathom, given the Respondents' perspective, how WSU could lawfully decide to stop providing any service or activity that it no longer thought was appropriate or necessary for it

to engage in. In the Respondents' view, there would never be a lawful way for WSU to get out of this business or any other as long as civil service employees had been providing that service. What if WSU decided it no longer needed to be in the business of providing apartments for students and sold the apartments to a private company? The apartments would still be in the same location but owned and operated by a private entity. Under Respondents' theory, WSU would have to continue to employ the civil service workers who worked at the apartments even thought there was no work for them to do. Or what if WSU decided to demolish its student apartments, thereby causing the students who lived there to contract for housing in the private sector? Under Respondents' theory, WSU would be required to continue to employ the civil service workers who worked at the demolished apartments because they are still capable of providing these services and the work is being done by the private apartment owners.

Can an institution such as WSU never decide to cease doing some activity that it has at one time engaged in no matter that changes in conditions or societal or business norms may dictate

otherwise? When Pullman was smaller and its fire department did not have the capability to fight large structure fires on campus, and when university buildings were more vulnerable to being damaged by fires, perhaps it made sense for WSU to have its own fire department. However, times and conditions change. Under Respondents' theory, WSU's initial decision to provide fire services is irreversible. The PAB decision did not go that far; however, it did hold that the firefighters that WSU had on staff when it decided it would no longer provide those services must continue to be employed even though there is no work for them to do.

As the PAB held, WSU has the right to manage and govern its affairs. This includes the authority to decide to cease providing a service that it previously thought it necessary to provide. To require WSU to continue to employ the civil service employees who had worked at the defunct department even though there is no work for them to do is contrary to this holding.

B. The Agreement between WSU and the City of Pullman represented compulsory payments by WSU and vested control of fire operations with the City.

WSU spent many years studying the operations of its Fire Department and working with the City of Pullman regarding possible joint operations. Ultimately, WSU decided it was best if it focused its energies and resources on their primary mission, that of providing quality higher education to students and conducting academic research.[1] Since the WSU campus is located in the City of Pullman, and the City is the primary entity in the area equipped to provide fire protection services in the City of Pullman, WSU reasoned that it would let the City fire department carry out its mission on campus and fulfill its statutory obligation to provide fire services. To that end, WSU entered into an agreement with the City to reimburse the City for the additional workload. Such an agreement is not voluntary. By statute, WSU is required to make payments to the City under these circumstances.

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[1] RCW 28B.30.015 outlines WSU's purpose. "The aim and the purpose of Washington State University shall be to provide a higher education in such fields as may be established therein from time to time by the board of regents or by law, including instruction in agriculture or other industrial pursuits, mechanical arts and the natural sciences."

In its agreement with the City, WSU did not retain legal control with regard to how the provision of fire services to its campus would be accomplished. The agreement between the parties specifically indicated that, "The City shall have direction and control of the City Fire Department… ." CP 56, § III A. And, "It is agreed … that the management of the City Fire Department will be exclusively with the City, and the level of fire protection and emergency medical services to be provided to the facilities and campus area of the University will be determined by the Fire Chief, or his representative, using the same criteria applicable to the provision of those services to the remainder of the City." CP 56, § III B.

The agreement specifically acknowledged that the City would have to provide fire services to the campus regardless of whether there was a written agreement to do so. "It is understood and agreed that provision of fire protection and emergency medical services to the University facilities and campus by the City is not dependent upon this Agreement or upon the execution of any agreement between the parties." CP 56, § III D. Further, WSU did not retain

the right to determine how the work was being done or how much work was needed. Those determinations were left with the entity legally responsible for providing them, the City of Pullman.

The Agreement does contain an agreement to arbitrate any disagreements regarding the level of payments in the future. This arbitration provision references RCW 35.21.779 which requires arbitration for mandatory payments when the parties cannot agree and is pursuant to that statute. CP 57, § IV. The parties agreed to arbitrate when necessary because that is what the statute requires. Further, page 8 of the Agreement does acknowledge that in the event the agreement is discontinued the parties would immediately invoke the provisions of RCW 35.21.779 and the related WAC's to set the amount. CP 59, § VIII.

While it is true that the agreement between the City and WSU created an Advisory Board it was just that, advisory. This Advisory Board was required to meet at least once per year and the City was required to consider any concerns that WSU might bring forth. It is not unusual for government entities to create advisory committees or panels composed of various stakeholders in order to effectively

address common concerns. This does not vest ultimate responsibility or authority regarding the statutory obligations of the government entity onto those stakeholders. They are just that, stakeholders or customers of the government entity in the same manner that WSU is a stakeholder of the City of Pullman with regard to fire protection services. WSU has a right to voice their concerns to the City regarding these services, but it does not take away from the legal obligations imposed by law on the City.

C. The Agreement was not voluntary.

To argue that the Agreement was entered into voluntarily is akin to saying that you voluntarily send a check to your local assessor to pay your property taxes. No one forces you to write your check but you really have no choice if you decide to own property. Someone else sets the amount and even though you may be able to appeal that amount, in the end you still have to pay. The voluntary part is the decision to own property. Likewise, WSU's voluntary act was the closure of their Fire Department. The corresponding compulsory payment was not voluntary. While it is true that WSU voluntarily closed their Fire Department, notably the PAB

recognized that WSU had the right to do so; to manage and govern its affairs. Once WSU lawfully decided to close its Fire Department, the payment to the City of Pullman for those services became involuntary and compulsory.

Given that it was now required to pay at some level, WSU had two choices. It could attempt to reach an amicable agreement with the City on how much the mandatory payments would be or it could do nothing and allow a third party, the Community Trade and Economic Development (CTED), to determine the course and direction of those payments. WSU opted for choice no. 1, an attempt to reach agreement with the City. It chose not to leave this decision to someone else, but rather to have some control over how much those payments would be, or at least make an attempt to do so. Fortunately, the City and WSU were able to reach an amicable agreement about the level of payments by WSU and no third party intervention was required. The fact that WSU chose this alternative rather than simply having no agreement at all and letting CTED decide the amount of the required payment to the City does not turn

this situation into a contracting out case. To do so would elevate form over substance.

D. The WWU case is not controlling as the RCW's do not require a state agency to make compulsory payments to a municipality for police services in the same manner as for fire services.

The Respondents argue that the WWU case regarding the campus police force was virtually identical to the situation at WSU. As noted earlier, WSU was faced with a legislative mandate to pay the City of Pullman an equitable amount for fire services. It is undisputed that payments by state agencies and institutions to their city or town for fire protection services are required if the agency or institution makes up more than 10 per cent of the assessed value of the city or town. RCW 35.21.779. There is simply no corresponding specific statute requiring those agencies or institutions to pay for police services in the same fashion. The statute is specific. It applies to the provision of fire protection services.

The WWU case is not similar to the situation at WSU. There was no similar statute requiring WWU to pay the City of Bellingham for police services. There is not such a statute now nor was there such a statute cited in the WWU case. WWU entered into a contract

with the City of Bellingham to provide police services. They did so of their own accord and the Higher Education Personnel Board determined that they could not lay off police officers as a result. Again, no mention was made of any obligatory or compulsory payments; a controlling distinction from the case at hand. Reliance on the WWU case as controlling precedent is misplaced.

E. The reasons provided by the trial court were not sufficient and it is proper to consider the agency record to examine if those reasons were tenable.

The reasons given by the trial court in their oral opinion are scant and unclear. A simple recitation that the standard was high and had not been met provides little if any clarity or reason regarding the court's decision. The court is to look initially to the petitioner's allegations to determine whether, if true, they clearly demonstrate the agency acted illegally or arbitrarily and capriciously. *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 293, 949 P.2d 370 (1998). We cannot tell from either the oral opinion or the written order if this occurred. No mention was made as to the apparent conflicts between the various holdings, findings, conclusions and discussions of the PAB. Rather, the court

provided simply a blanket statement that the decision was not arbitrary and capricious or illegal. These are not tenable reasons.

It is proper for the appellate court to conduct an appropriate review of the administrative agency's action to determine if the granting or denial of the writ was proper. See, for example, *Petroni v. Board of Directors of Deer Park School Dist. No. 414*, 127 Wn. App. 722, 727, 113 P.3d 10 (2005), wherein the Court of Appeals, in reviewing a trial court decision denying a writ or certiorari, examined three issues. First, whether the specific statutory provisions governing the discharge of an employee apply to a nonrenewal of a provisional teacher; second, if so, were the reasons given sufficient under the applicable statute; and, third, if the reasons were proper did the Board comply with the statutory requirements. It is clear that this analysis required an examination of the record from the administrative forum. See also *Pierce Cy. Sheriff v. Civil Service Commission*, 98 Wn.2d 690, 695-696, 658 P.2d 648 (1983), where the court examined the record before the Commission to determine if its actions were arbitrary and capricious. In like manner, it is proper for this court to conduct a review of the PAB

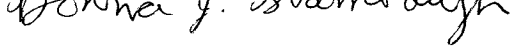
record to make its determination as to the appropriateness of the denial of the writ.

II. CONCLUSION

For the foregoing reasons and those outlined earlier, WSU respectfully requests that the Court reverse the decision of the trial court and, after consideration of the record before the PAB, reverse the decision of the PAB and enter judgment in favor of WSU.

RESPECTFULLY SUBMITTED this 8th day of May, 2007.

ROBERT M. MCKENNA
Attorney General



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DIVISION II
07 MAY -9 PM 2:00
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DEPUTY

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

I, Karin Skalstad, being first duly sworn, upon oath, depose and say: That at all times mentioned herein I was over 18 years of age and not a party to this action; that I am the legal assistant to Donna J. Stambaugh, attorney for Petitioner; that on May 8, 2007, I mailed the original and one copy of the Reply Brief of Petitioner and Affidavit of Mailing via FedEx Standard Overnight to:

David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

I also mailed one copy of same via Fed Ex Standard Overnight to:

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A copy was mailed via standard first class U. S. mail to:

Personnel Resources Board
P.O. Box 40911
Olympia, WA 98504-0911

Karin Skalstad

Karin Skalstad

SIGNED and SWORN to before me, this 8th day of May, 2007.

Nanette Dornquast

Nanette Dornquast (Print Name)
NOTARY PUBLIC in and for the State
of Washington, residing at Spokane County
My appointment expires: 5-5-08

NANETTE J. DORNQUAST
COMMISSION EXPIRES
NOTARY
PUBLIC
5-5-08
STATE OF WASHINGTON