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I. INTRODUCTION

The Washington State Human Rights Commission (“Commission” or “WSHRC”) admits that it conducted a fact-specific inquiry to determine whether the Department of Corrections (“Department” or “DOC”) can properly designate certain positions at female prison institutions as female-only without violating the Washington Law Against Discrimination, RCW 49.60. In engaging in such an adjudicative action, the Commission was not generating an interpretative guideline that has general applicability for the public. Instead, it was responding to a specific request from the Department relating to specific positions and coming to a legal conclusion on the issue after conducting a detailed investigation. For this reason, the facts of this case are very different than the facts presented in *Washington Education Association v. Washington State Public Disclosure Commission*, 150 Wn.2d 612, 80 P.3d 608 (2003).

For the Commission to contend that its decision regarding this issue has “absolutely no effect on the Teamsters’ and correctional employees’ legal rights” is to ask this Court to ignore reality. In granting the Department’s request that certain specific positions be designated as female only pursuant to a bona fide occupational qualification (“BFOQ”)

determination, the Commission effectively precluded any challenge through its adjudicative process and dictated the Department's designation of the positions as female-only.

II. ARGUMENT

A. **The Agency Action In This Case Involved Adjudication: Applying Specific Facts To The Law To Reach A Legal Conclusion, Not Offering A General Interpretation Or Guideline Regarding The Significance Of The Law.**

The facts in this case are very different from the facts that the Washington Supreme Court considered in *Washington Education Association v. Washington State Public Disclosure Commission*, 150 Wn.2d 612, 80 P.3d 608 (2003). In that case, the Public Disclosure Commission issued general guidelines, applicable to all school districts, relating to the law that prohibited use of public facilities in political campaigns. These general guidelines were "educational materials" that were "made available on the PDC's website for the public view." *WEA*, 150 Wn.2d at 616. It is clear that the published guidelines in that case had general applicability and were not limited to specific parties or a specific fact situation. For example, the guidelines protested by the WEA prohibited union representatives from distributing "promotional materials

in classrooms or other public areas.” *Id.* The Public Disclosure Commission had not been asked by any party to determine whether the distribution of any particular material in any particular location would constitute a violation of the law. Given this, the Washington Supreme Court concluded that the guidelines were only advisory as they were intended to educate the general public about the agency’s view of the law. *WEA*, 150 Wn.2d at 618-619, 621.

By stark contrast, the BFOQ determinations issued by the Commission in this case are not opinions or guidelines of general application. They are specific determinations with respect to specific correctional officer positions at the Department of Corrections. 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: . . .

CP 13 (emphasis added). Unlike the very general guidelines that were at issue in the *WEA* case, the Commission in this case issued specific determinations with respect to specific positions at the Department of Corrections. Respondent’s description of the action taken makes it clear that it was performing an investigative and adjudicative function when it

reviewed and ultimately granted the Department's request for BFOQ designations. As described by Respondent, its letters granting the BFOQ designations were:

based 'on observations during an on-site visit; statistical information obtained, interviews of staff and administrators, data collected during this analysis; and other related materials. Although not required to, the Executive Director and her staff did obtain and consider statements of correctional employees . . .

Brief of Respondent at 6 (*citing* CP at 13). The Commission was engaging in a fact-specific adjudicative process. This is precisely the type of adjudicative "agency action" that the APA was designed to include within the scope of review.

The legal conclusion issued by the Commission with respect to the BFOQ determination was not a guideline of general applicability; it was a finding made with respect to specific positions at the Department of Corrections, and the order issued by the agency had specific limitations:

1. The BFOQ may be used only in hiring and/or assignment for the . . . positions as specified above.
2. The BFOQ may be rescinded in the event that the duties and responsibilities of the designated positions change or the sex of the offender population changes.

CP 14. Given the specific limitations identified above, it is difficult to understand how the Commission's action can fairly be characterized as anything other than adjudicative action. Given that "the BFOQ may be rescinded" it is clear that the grant of the BFOQ constitutes a fact-specific order.

An order cannot be dressed up as an opinion. The Supreme Court in the *WEA* case 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)). Like the notices in *Bantam Books*, the BFOQ determinations in this case were "'phrased virtually as orders' and were not purely advisory." *WEA*, 150 Wn.2d at 622 (citing *Bantam Books*, 372 U.S. at 68).

The BFOQ determinations issued by the Commission were declaratory orders requested by the Department consistent with RCW 34.05.240(1) and WAC 162-16-210(2). Yet, in order to issue such determinations, "an agency must undergo a formal process to issue a declaratory order." *WEA*, 150 Wn.2d at 620 (citing WAC 390-12-250).

The agency may issue a binding or non-binding order or decline to issue an order. *Id.* (citing WAC 390-12-250(5)). Either way, the agency's determination constitutes agency action because it is adjudicative in nature.

Notably, Respondent does not even attempt to address this critical distinction in its brief. This is because there can be no dispute that the determinations made by the Commission in this case were fact-specific and were made at the request of the Department of Corrections, rather than the kind of general guidelines that were issued to the public as a whole by the Public Disclosure Commission in the *WEA* case.

B. The Agency Action In This Case Is Not Identified As An Interpretative Statement.

The Public Disclosure Commission 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). 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.*

The Respondent offers only a cursory defense on this point in its brief, arguing that the letters identify themselves as “Bona Fide Occupation Qualification (BFOQ) Analysis” and that the word opinion is included in the letter. Brief of Respondent at 16. Yet, under the clear statutory definition of “interpretive statement” in the APA, RCW 34.05.010(8), this is not sufficient, and the 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.

C. There Is No Middle Ground: Once BFOQ Determinations Are Made, The Employer Has No Discretion.

The core of the Commission's argument is that it is the Employer and not the Commission that makes the decision to designate positions as female-only. In making this argument, the Commission asks the Court to ignore reality.

Having obtained determinations from the Commission that the positions at issue are properly designated as female-only, the Department would ignore those determinations at significant peril. If the Department were to continue to staff the positions with men after the Commission granted the Department's request to designate the positions as female-only, the Department would expose itself to significant liability. Again, the Respondent does not address this point.

The Commission's action has significant real-world impact on the employment rights of current DOC employees because the DOC is understandably treating the BFOQ letters as dispositive, adjudicative orders, effectively foreclosing subsequent adjudicative review by the Commission. The record evidence supports this conclusion. 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.

The Department properly recognizes the Commission's determinations for what they are—dispositive fact-specific determinations that effectively require the Department to designate the positions at issue as female-only. The Commission's action is therefore the driving force

that has impacted the employment rights of the Department's correctional employees.

D. 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.

This situation is very different from the situation presented in the *WEA* case. In that case, the Supreme Court 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. This is because the Public Disclosure Commission had merely offered opinions and guidelines and had not sought to enforce the law against WEA or any other entity in response to a specific action. The Court essentially held that the WEA would need to test the issue before there would be a justiciable controversy.

However, it has long been recognized that "one does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60

L.Ed.2d 895 (1979). Here, the Commission acted on a specific Departmental request for BFOQ determinations, issued those determinations, and the record reflects that the Department is now moving quickly based on those determinations to change the minimum requirements of the positions to require that employees in the positions be female. Unlike the academic or hypothetical injuries articulated in the *WEA* case, the Commission's action in this case presents an immediate threat to the employment rights and opportunities of Appellants.

E. 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 Commission asserts three standing arguments, none of which have merit. First, the Commission alleges that there has been no injury-in-fact. As noted above, the United States Supreme Court has already held that one need not wait for imminent injury to occur before seeking declaratory relief. *Babbitt*, 442 U.S. at 298. 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. *Id.* Respondent offers no authority to the contrary.

Second, the Commission claims that there is no causation between the agency action and the injury, which is a reiteration of the argument that it is the Department's action—rather than the Commission's—which is the cause of any injury. As noted above, these arguments disregard the reality that the Commission's BFOQ determinations essentially leave no room for the Department to continue to allow male employees to fill the positions at issue.

Finally, and perhaps most incredibly, the Commission contends that the Union representing the affected correctional officers and the correctional officers themselves are not within the zone of interest that the Commission was required to consider when it issued the agency action. The Commission actually argues to this Court that the inherent sex-based discriminatory impact of a BFOQ determination on workers of the excluded sex is not a necessary consideration for the Human Rights Commission. Brief of Respondent at 27. The reasoning offered by the Commission is confused at best. First, the Commission contends that the privacy interest of inmates and civil rights interests of employees need not be “balanced” but only “accommodated.” Brief of Respondent at 26, footnote 12. This argument makes no sense, and the authority cited

reveals that the interests of negatively affected employees must be considered in any BFOQ determination. *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998). Second, the Commission suggests that it did not need to consider the interests of the employees that the law was designed to protect from sex-based discrimination because the Petition for Review in this case did not allege sex discrimination. This argument is hopelessly circular and in any event does not place the affected employees and the Union that represents them outside the zone of interest that the Commission was required to consider when issuing its BFOQ determinations.

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 (1998).

III. 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 23rd day of October, 2009.



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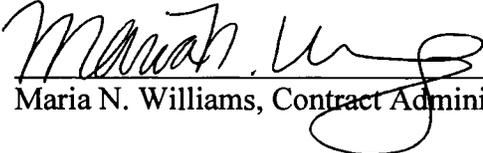
Maria N. Williams hereby certifies as follows:

On October 23, 2009, I caused the original plus one copy of Brief
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