

NO. 39328-0-II

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

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

TEAMSTERS AND EMPLOYEES LOCAL UNION NO. 117, a labor organization, RON NELSON, an individual, and JOHN TORRES, an individual,

Appellants,

v.

STATE OF WASHINGTON
HUMAN RIGHTS COMMISSION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Washington State Supreme Court has held that an agency's written interpretation of the law as it applies to employers and employees is an interpretive statement if it does not implicate legal rights. *Wash. Educ. Assoc. (WEA) v. Wash. State Pub. Disclosure Comm'n (PDC)*, 150 Wn.2d 612, 615, 621-23, 80 P.3d 608 (2003). Here, the Executive Director of the Washington State Human Rights Commission ("Commission") drafted letters regarding an interpretation of the law as it applies to the Department of Corrections ("Department") and the Department's employees. The interpretive letters do not affect legal rights. They do not direct or require the Department to take employment action. In fact, because the Executive Director has no authority to make employment decisions for other state agencies, she could not have impacted legal rights even if she had wished to do so. Since the letters have absolutely no legal effect on the Teamsters' and correctional employees' legal rights, they are interpretive statements.

As the Court held in the *WEA* case, a challenge to an interpretive statement does not present a justiciable controversy. Since interpretive statements address an academic or hypothetical application of the law, they have no legal or regulatory effect. *WEA*, 150 Wn.2d at 623.

Therefore, there is no action or harm to be addressed by the courts. For this reason, the trial court properly dismissed the Petition.

Finally, the Petition for Judicial Review was properly dismissed because the Teamsters and the correctional employees lack standing. A petitioner must have suffered an “injury-in-fact” to have standing under the Administrative Procedure Act (“APA”). However, the Petition alleges only a threat of possible future harm, by another agency, in the form of potentially less favorable employment conditions for some male correctional employees. As a result, the Teamsters and the correctional employees lack standing to bring a Petition under the APA.

II. COUNTER-STATEMENT OF ISSUES

This is an appeal from the Thurston County Superior Court’s dismissal of the Appellants’ Petition For Judicial Review (“Petition”) against the Commission. The Appellants are Teamsters and Employees Local Union No. 117 and two correctional employees, Ron Nelson and John Torres (collectively “Teamsters and correctional employees”). The issues presented in this appeal are as follows:

A. According to the Washington State Supreme Court, an “interpretive statement” sets forth an interpretation of law without affecting legal rights. The Executive Director’s interpretive letters do not require the

Department to take employment action with regard to male correctional employees. Are the interpretive letters at issue “interpretive statements”?

B. The Washington State Supreme Court has held that there is no justiciable controversy when an interpretive statement is academic or hypothetical and does not affect legal rights. The Executive Director’s interpretive letters apply Washington law to facts but do not require the Department to take employment action. Do the interpretive letters fail to present a justiciable controversy between the Teamsters and correctional employees and the Commission?

C. Under the APA, petitioners have standing to seek review of agency action only if they have suffered an injury-in-fact. Do the Teamsters and correctional employees have standing to bring a claim against the Human Rights Commission, based on speculation regarding action the Department of Corrections might opt to take in the future?

III. COUNTER-STATEMENT OF THE CASE

A. Statutory Framework

The Commission is the state agency charged with oversight and enforcement of the Washington Law Against Discrimination. RCW 49.60.010. Under RCW 49.60, it is an unfair practice for an employer to discharge or bar a person from employment because of sex or to discriminate against any person in compensation or in other terms or

conditions of employment because of sex. RCW 49.60.180. The exception to this prohibition is when there is a bona fide occupational qualification as a result of a protected status, such as sex.¹ WAC 162-16-240. Specifically, the rule provides:

[t]here is an exception to the rule that an employer ... may not discriminate on the basis of protected status; that is if a bona fide occupational qualification (BFOQ) applies. The commission believes that the BFOQ exception should be applied narrowly to jobs for which a particular quality of protected status will be essential to or will contribute to the accomplishment of the purposes of the job. The following examples illustrate how the commission applies BFOQs:

(1) Where it is necessary for the purpose of ... maintaining conventional standards of sexual privacy (e.g. locker room attendant, intimate apparel fitter) the commission will consider protected status to be a BFOQ.

WAC 162-16-240.

WAC 162-16-210 allows a person to request a written opinion from the Commission's Executive Director about whether protected status would be a BFOQ in particular circumstances. *See also* WAC 162-04-070. Contrary to the Teamsters' and correctional employees' assertions, the rule does not provide for a hearing or adjudication as part of the Executive Director's BFOQ opinion process, nor does it allow the Executive Director to take any action besides sending an interpretive letter. Brief of Appellant

¹ "Protected status" means "age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person...." WAC 162-16-200(4).

(“Br. App.”) at 2-4.² Further, the rule does not require that employers obtain an opinion from the Executive Director in order to assert a BFOQ defense.

The APA encourages agencies to advise the public of their current opinions and approaches by means of interpretive or policy statements, which are advisory only. RCW 34.05.230. The statute provides in relevant part that “[a]n 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.” RCW 34.05.230(1).

B. Factual History

The Department of Corrections requested advice, pursuant to WAC 162-16-210, regarding making the female sex a BFOQ for certain correctional employee positions at female prisons. Clerk’s Papers (“CP”) at 6, 10. Specifically, the Department wished to establish sex as a BFOQ for approximately 110 correctional employee positions at three corrections centers for women. CP at 6, 35-36. The Department maintained that the female-only BFOQ designations were essential in order to ensure the privacy rights of the female offenders. CP at 11. In response to this request, the Commission’s Executive Director issued Executive Director interpretive

² Although they assert that the Commission “abdicated its responsibility to conduct an adjudicative hearing,” or that the issuance of the interpretive letters violated

letters stating that being female is a BFOQ for the 110 positions in question.³ CP at 6, 14.

The Executive Director's interpretive letter indicates that it is 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...."⁴ CP at 13. Although not required to, the Executive Director and her staff did obtain and consider statements of correctional employees in the preparation of the interpretive letters. CP at 12-13. The interpretive letter makes clear that it is *not an order* by phrasing its conclusion as a *potential* course of action for the Department, namely that "sex *may* be a BFOQ" for the positions in question. CP at 14 (emphasis added). Further, the interpretive letter does not direct the Department to alter the employment status of any staff currently holding positions; rather it refers to the "*hiring and/or assignment* for the ... positions as specified above." CP at 14 (emphasis added). The interpretive letter provides in relevant part that:

APA procedure, nowhere do the Teamsters cite to any provision in the Commission's enabling statute or its rule for these propositions. Br. App. at 2-4.

³ Of these 110 positions, "...58 are currently held by male staff, 56 are held by female staff, and 4 are vacant." CP at 45. Because the Teamsters only represent bargaining units at two of these correctional centers for women, only 84 of the 110 positions are at issue in this case. CP at 35-36.

⁴ All of the interpretive letters are substantially similar. CP at 7.

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

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

CP at 14.

C. Procedural History

In their Petition, the Teamsters sought an order staying the Commission's "agency action" and an order reversing the Commission's "agency action," or, in the alternative, an order requiring the Commission to conduct an adjudicative proceeding prior to issuing the interpretive letters. CP at 9. In response, the Commission moved to dismiss and the motion was granted. CP at 49-51, 61, 63. The order of dismissal does not include the oral ruling granting the Motion to Dismiss; however, the Verbatim Report of Proceedings ("VRP") contains a transcript of the oral ruling.⁵ VRP at 1-6.

In the oral ruling, the trial court found dismissal of the Petition appropriate for a variety of reasons, including that:

- 1) the Executive Director's interpretive letters were not "agency action" giving rise to judicial review under the APA;

⁵ Teamsters' Notice of Appeal seeks review "of the *decision* and order of the Honorable Anne Hirsch granting Respondent's Motion to Dismiss...." CP at 55 (emphasis added).

- 2) the Teamsters and correctional employees failed to show an “injury-in-fact” (so as to give rise to standing);
- 3) there was no causation between the Executive Director’s interpretive letters and any action that the Department may take with regard to one of its correctional employees; and
- 4) the Executive Director’s interpretive letters were hypothetical or academic and did not have any immediate effect on their own.

VRP at 4-5. Finally, the court stated that “[t]o me the issue here is between the Department of Corrections and the Petitioners, and the Human Rights Commission cannot and did not make any employment decisions regarding the Petitioners, so there is no relief that could be given to the Petitioners if they were successful in front of the Court at this point.” VRP at 5.

IV. STANDARD OF REVIEW

The issues in this case involve questions of law that were decided or considered at the hearing on the Commission’s Motion to Dismiss. De novo is the appropriate standard of review for questions of law. *Interlake Sporting Assoc., Inc. v. Wash. State Boundary Review Bd. for King Cy.*, 158 Wn.2d 545, 551, 146 P.3d 904 (2006). When a motion to dismiss involves pure questions of law, the standard of review is de novo. *In re Detention of A.S.*, 91 Wn. App. 146, 157 n.6, 955 P.2d 836 (1998).

A party may move to dismiss a complaint for lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted. CR 12(b)(1),(6). For purposes of a CR 12(b)(6) motion, the factual

allegations of the complaint must be accepted as true. *Dennis v. Heggen*, 35 Wn. App. 432, 434, 667 P.2d 131 (1983). A motion to dismiss for failure to state a claim will be granted if it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would entitle plaintiff to relief. *Reid v. Pierce Cy.*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). CR 12(b)(1) is a defense for “lack of jurisdiction over the subject matter.” Absent subject matter jurisdiction, a court may do nothing except enter an order of dismissal. *Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002).

The Petition’s dismissal should be affirmed because the Teamsters and correctional employees have failed to state a claim upon which relief may be granted due to there being no “agency action,” no justiciable controversy, and no standing. The dismissal should also be affirmed because the trial court lacked subject matter jurisdiction as a result of there being no “agency action” and no justiciable controversy.

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V. ARGUMENT

A. Interpretive Letters Issued By The Commission's Executive Director Are No More Than "Interpretive Statements" That Are Not Subject To Judicial Review

1. Judicial review under the APA is not available because the interpretive letters do not qualify as "agency action."

The APA establishes the exclusive means for judicial review of agency action, with some exceptions not applicable here. RCW 34.05.510; *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). "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).

The authority of the Commission's Executive Director to issue interpretive letters is limited by the Commission's rule. Specifically, WAC 162-16-210(2) allows the Executive Director to issue an opinion as to whether protected status would be a bona fide occupational qualification in particular circumstances. Thus, the Executive Director's authority is limited to giving only an opinion. She is not authorized to take any action, such as implementing or enforcing a BFOQ, as a result of a request for a BFOQ interpretive letter. This is in keeping with the

APA's promotion of state agencies issuing interpretive and policy statements, which are advisory only. RCW 34.05.230(1).

The Teamsters and employees allege that “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.” Br. App. at 8. Such an assertion flies in the face of the APA's limited definition of “agency action.” For example, this definition excludes “an agency decision regarding (a) contracting or procurement of goods, services ... as well as all activities necessarily related to those functions....” RCW 34.05.010(3); *accord Foss v. Dep't of Corrections*, 82 Wn. App. 355, 358, 361, 918 P.2d 521 (1996) (where the Department of Corrections excluded from a prison teachers who had been hired by a college to teach in the prison, the exclusion did not constitute “agency action” because it concerned a contract for services and, therefore, was not subject to APA judicial review).⁶

⁶ In *Foss*, the Court of Appeals began its opinion by citing the U.S. Supreme Court and the general use of judicial restraint in cases involving the penal system:

Courts traditionally respond to the unique problems of penal environments by invoking a policy of judicial restraint. This policy is designed to give prison administrators wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447 (1979).

Foss, 82 Wn. App. at 358-59.

2. The interpretive letters are interpretive statements not subject to judicial review because they have no legal effect and cannot be violated.

The Executive Director's interpretive letters are interpretive statements. The phrase "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). The interpretive letters themselves make clear that they are interpretive statements, specifying that they are "an *opinion* of the Washington State Human Rights Commission ... Executive Director in response to a *request for advice*, submitted pursuant to WAC 162-16-210, for a bona fide occupational qualification (BFOQ) designation...." CP at 10 (emphasis added). The APA does not provide for judicial review of interpretive statements.

The state Supreme Court's decision in *WEA* is dispositive here. *WEA*, 150 Wn.2d 612. The *WEA* case involved the PDC's application of a statute to school districts and their employees. *Id.* at 616. Specifically, the PDC's analysis was issued as guidelines and pertained to the use of public facilities in campaigns. *Id.* at 614, 616. The *WEA* challenged the guidelines under both the APA and other laws. *Id.* at 614. The court found the guidelines to be an interpretive statement, holding that "the

guidelines have no legal or regulatory effect.” *Id.* at 621-23. The court based its holding on the fact that the guidelines were meant only to aid and assist the school districts and their employees in complying with the law and did not claim to have the effect of law or regulation. *Id.* at 621. In other words, the guidelines did not attempt to force the school districts and their employees to take any specific action, nor did the guidelines threaten any enforcement action against the school districts and their employees.

In the Supreme Court’s analysis of the PDC’s guidelines, the court reviewed the policy behind interpretive statements:

The legislature encourages administrative agencies to issue interpretative statements advising the public of “its current opinions, approaches, and likely courses of action” because it recognizes “that a cooperative partnership between agencies and regulated parties that emphasizes education and assistance *before* the imposition of penalties will achieve greater compliance with laws and rules.” RCW 34.05.230(1); RCW 43.05.005 (emphasis added). However, an agency’s written expression of its interpretation of the law does not implement or enforce the law and is “advisory only.” RCW 34.05.230(1).

WEA, 150 Wn.2d at 618-19. The Court also explained that no formal procedures accompany interpretive statements because a person cannot violate an interpretive statement, and an agency’s written opinion does not subject a person to administrative sanctions:

Furthermore, the issuance of interpretative statements is not governed by formal adoption procedures. There is no need for formal procedures because such advisory statements

have no legal or regulatory effect. A person cannot violate an interpretive statement, and conduct contrary to the agency's written opinion does not subject a person to penalty or administrative sanctions. The PDC's advisory statements serve only to aid and explain the agency's interpretation of the law.

Id. at 619.

Contrary to the Teamsters' and correctional employees' assertions, the *WEA* case is factually similar to this case, and these similarities illustrate why the interpretive letters are interpretive statements that are not subject to judicial review. Br. App. at 11. Like in the *WEA* case, the interpretive letters have no legal or regulatory effect, meaning that they cannot be "violated" by anyone. In other words, there would be no penalty or sanction from the Commission should the Department disregard the letters and continue to hire male correctional employees for the positions in question. As the trial court correctly noted "there is nothing that the Human Rights Commission could do to the Department of Corrections if they decided not to follow the advice that was given. The letters cannot be violated thereby giving rise to a cause of action." VRP at 4. The fact that there would be no repercussions from the Commission to the Department for failing to make a BFOQ designation refutes the Teamsters' and correctional employees' assertion that the Department would ignore the interpretive letters at its peril. *See* Br. App. at 9-10.

Similarly, the fact that there would be no repercussions to the Department for any failure to implement a BFOQ designation belies the Teamsters and correctional employees' assertion that the BFOQ opinions are orders. Br. App. at 9-10.

Even assuming the Department had chosen to implement BFOQ designations and, therefore, impacted correctional employee's rights, the Executive Director's interpretive letters would not be transformed into "agency action." Such a result is not contemplated by the *WEA* case. The *WEA* court did not hold that had the school districts and their employees acted on the advice in the PDC's interpretive statement, then the interpretive statement would have qualified as agency action and judicial review would have been appropriate.⁷

The Teamsters and correctional employees attempt to distinguish the *WEA* case from this case by incorrectly claiming that the PDC took *sua sponte* action in issuing general guidelines that applied to "the public across the board." Br. App. at 11-12. In the *WEA* case, the PDC initially issued guidelines in 1993 regarding RCW 42.17.130's application to

⁷ The Brief of Appellant improperly attempts to add facts that are not in the record. For example, Teamsters and correctional employees reference that the Department has now designated certain positions as female only. Br. App. at 5. At the time the Petition was filed, no such allegation had been made. Finally, the Brief of Appellant improperly references the Commission's denial of the Teamsters' request for an adjudicative hearing. The denial occurred after the dismissal of the Petition. Br. App. at 17. All of this information is not properly before the Court of Appeals and should be disregarded or stricken.

school districts and their employees. *WEA*, 150 Wn.2d at 616. Thus, the 1993 guidelines were aimed at school districts and their employees and not “the public across the board” as alleged by Teamsters and correctional employees. *Id.* Approximately eight years later, in 2001, school districts requested that the PDC update the guidelines, meaning that they were not issued *sua sponte* as alleged by the Teamsters and employees. *Id.* at 616. In response, the PDC gathered information and then issued the 2001 guidelines, which referenced information fact-specific to the requestors. *Id.* Thus, just like the PDC, here the Commission’s Executive Director issued interpretive letters in response to specific requests by the Department and not *sua sponte* as alleged by the Teamsters and employees. Br. App. at 11.

Finally, again contrary to the Teamsters and correctional employees’ assertion, the PDC’s guidelines were titled “Guidelines for School Districts in Election Campaigns” and not an “interpretive statement.” *WEA*, 150 Wn.2d at 616; Br. App. at 12. While the title remained the same, the PDC “updated the guidelines as Interpretive Statement No. 01-03”. *Id.* In this case, the interpretive letters identify themselves as a “Bona Fide Occupational Qualification (BFOQ) Analysis” in the “Re:” line at the top of the letter. CP at 10. In the second line of the first paragraph, they state that they are an opinion of the Commission’s

Executive Director. *Id.* Like in the *WEA* case, there is no “agency action” eligible for judicial review as required under RCW 34.05.510, and the Petition’s dismissal should be affirmed.

3. The interpretive letters are interpretive statements, not orders.

As referenced above, the Teamsters and the correctional employees attempt to shoe-horn their way to judicial review by claiming that the interpretive letters are orders that the Department cannot ignore. For example, they allege that “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.’” Br. App. at 3. The record in this case references only a class action offender lawsuit against the Department alleging sexual misconduct. CP at 13. However, in that case or any future case by offenders, the law regarding Executive Director interpretive letters is the same – interpretive letters do not constitute an order by the Commission to implement a BFOQ designation.

In their attempt to equate interpretive letters with orders, Teamsters and correctional employees allege that the Executive Director’s use of the

word “determination” transforms the interpretive letters into orders subject to judicial review. Br. App. at 9. This argument is without merit. WAC 162-16-210(2) itself uses the word “determine” in describing how the Executive Director can provide an opinion “*determining* whether protected status would be a bona fide occupational qualification in particular circumstances.” WAC 162-16-210(2) (emphasis added). Thus, the Executive Director’s interpretive letters are merely using the wording of the Commission’s rule.

B. Judicial Review Is Not Available To The Teamsters And Correctional Employees Because There Is No Justiciable Controversy

The *WEA* court proclaimed that “[w]e steadfastly adhere to ‘the virtually universal rule’ that there must be a justiciable controversy before the jurisdiction of a court may be invoked.” *WEA*, 150 Wn.2d at 622; *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). A justiciable controversy requires the following four elements:

1. an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement,
2. between parties having genuine and opposing interests,
3. which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
4. a judicial determination of which will be final and conclusive.

WEA, 150 Wn.2d at 622-23. These four elements must coalesce in order for the court to avoid issuing an advisory opinion. *Id.* at 623.

The *WEA* court found no justiciable controversy between the WEA and PDC regarding the PDC's guidelines on using public facilities in political campaigns. First, the Court found that whether the guidelines were a correct interpretation of the law was an academic or hypothetical question (as opposed to an actual dispute) because the guidelines have no legal or regulatory effect. *WEA*, 150 Wn.2d at 623. Second, it found that the guidelines did not implicate "actual or direct legal interests of the WEA", again for the reason that the guidelines do not purport to have the effect of law or regulation. *Id.* at 621-23. The Court concluded its justiciability analysis by saying that "[t]he WEA has not alleged an actual, present, existing dispute, or the seeds of a mature one and its claims are not justiciable. The trial court erred in reviewing the claims." *Id.*

Contrary to Teamsters' and correctional employees' assertions, this case is similar to the *WEA* case. Br. App. at 18. For example, whether the interpretive letters are a correct interpretation of the law is an equally academic or hypothetical question as was the case with the PDC guidelines. The interpretive letters are hypothetical because they are an interpretation of how the Washington Law Against Discrimination's administrative code applies to certain correctional employee job

descriptions, but the letters do not implement that interpretation. If the correctional employees have an actual injury in the future, it will be action by the Department that causes the injury. The Department is the party that potentially has an opposing interest with the Teamsters and correctional employees, not the Commission's Executive Director. Due to the interpretive letters being hypothetical and the lack of opposing interests between the Teamsters / correctional employees and the Commission, the first and second elements of the justiciability test are not present in this case.

Further, because the interpretive letters have no legal effect, their issuance does not implicate the Teamsters' and correctional employees' actual or direct legal interests or rights. In other words, it is not possible to "violate" the interpretive letters because they are not orders and have no force of law. WAC 162-04-070. As a result, the issuance of the interpretive letters has no direct impact on the Teamsters' and correctional employees' interests as required by the third element of the justiciability test.⁸ Instead, the Department would have to designate job positions as having a BFOQ, at which point the correctional employees associated with those position would have their interests implicated. They would also then have the right to challenge the designation and any Department action,

which could be done either through a grievance or through an action in superior court. RCW 41.80.030(2)⁹; RCW 49.60.030(2); CP at 5. The Washington Law Against Discrimination does not require an employer to obtain an interpretive letter before making a BFOQ designation. As such, the issuance of an interpretive letter does not constitute the direct impact on legal interests required for a justiciable controversy.

The real justiciable controversy that may relate to this matter is between the Teamsters / correctional employees and the Department.¹⁰ The Commission cannot and did not make any employment decisions regarding the Teamsters and correctional employees or its bargaining unit members. While the Teamsters and correctional employees may be concerned about the impact female-only BFOQ designations could have

⁸ Further, the Teamsters' Petition did not make such an allegation.

⁹ RCW 41.80.030(2) states in part: "A collective bargaining agreement shall contain provisions that: (a) Provide for a grievance procedure...."

¹⁰ The Washington State Supreme Court has held that it is proper to rely on federal case law regarding BFOQ designations. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 327, 646 P.2d 113 (1982). Similar to WLAD, Title VII of the Civil Rights Act of 1964 allows gender-based discrimination when sex is a BFOQ. *Everson v. Michigan Dep't of Corrections*, 391 F.3d 737, 747-48 (6th Cir. 2004). Under federal case law, a justiciable controversy exists between a correctional facility and its employees when the facility plans to implement a BFOQ designation for correctional employee positions. For example, when the Michigan Department of Corrections ("MDOC") planned to bar males from working in certain positions at its female prisons, a group of MDOC employees sued the MDOC alleging that the "female only" designations violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and the Michigan's civil rights laws. *Everson*, 391 F.3d at 739-40 (6th Cir. 2004). The positions in question were approximately 250 positions in housing units at female prisons. *Everson* at 740. The Sixth Circuit U.S. Court of Appeals found that gender was a BFOQ for the positions in question. *Id.*; accord *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998) (after

on the bargaining unit members, that impact comes to fruition only when or if the Department acts. It is the Department's action of implementing BFOQ designations that triggers any real controversy. Thus, the Appellants and the Department may have a dispute and opposing interests, not the Appellants and the Commission. The superior court correctly dismissed the Petition because it does not present a justiciable controversy.

C. The Teamsters and Correctional Employees Lack Standing For Judicial Review Under The APA Because They Have No Injury-In-Fact And Are Not In The Zone Of Interest

1. Petitions filed under the Administrative Procedure Act must comply with the standing requirements of RCW 34.05.530.

Even in cases involving "agency action," a person must have standing to obtain APA judicial review. RCW 34.05.530 provides as follows:

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

assuming, *arguendo*, that the plaintiffs raised a colorable Title VII claim, the Court concluded that gender constituted a BFOQ for the six posts at issue).

- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

The first and third prongs are referred to as the ‘injury-in-fact’ test, while the second is the ‘zone of interest’ test. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). “The ‘injury in fact’ test requires *more* than an injury to a cognizable interest. It requires that the party seeking review be . . . among the injured.” *Id.* at 328 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (emphasis added)). The requirement that the Teamsters and correctional employees be among the injured, in turn, means that there must be *causation* between the agency action and the injury-in-fact. Here, the Teamsters and correctional employees fail to demonstrate any injury-in-fact or causation between the Commission’s actions and what the Department may or may not do regarding the Teamsters and correctional employees.

- 2. The Petition did not allege “injury-in-fact” and, as a result, the Teamsters and correctional employees lack standing.**

The Teamsters and employees cannot meet the “injury-in-fact” test because they have not asserted an injury to a “cognizable interest.” In fact, the Petition alludes to *potentially* less favorable employment

conditions. CP at 7. It couches harm as possibly occurring in the future by using phrases such as “the agency action *threatens* to undermine the bid positions,” “the agency action *would* force,” and “*to the extent* that the agency action displaces affected employees.” CP at 7 (emphasis added). The Teamsters and correctional employees pointed out that the Department wrote a letter regarding the implementation of BFOQ designations and the potential impact of the planned implementation. Br. App. at 19. However, none of the Teamsters’ and correctional employees’ arguments change the fact that there is no evidence in this case showing that a BFOQ designation has been implemented or how an individual correctional employee has been injured by that. For this reason, none of the Appellants are “among the injured” and the first prong of the standing test is not met.¹¹

The Teamsters and correctional employees also fail to show the requisite causation between the interpretive letters and the alleged future harm to the correctional employees. The Department is the bargaining unit members’ employer and the agency with sole authority to make decisions affecting their employment. CP at 5. The Department requested the interpretive letters from the Commission’s Executive Director, CP 6,

¹¹ In addition, the Teamsters and correctional employees have failed to allege substantial prejudice, which is required in order to obtain relief under the APA’s judicial

35-36, showing that the Department, and not the Commission, would make any decisions that may impact the correctional employees. The Teamsters and correctional employees fail to show an injury-in-fact caused by the interpretive letters. The superior court correctly ruled that the Teamsters and correctional employees lack standing.

3. The Teamsters and the correctional employees lack standing because maintenance of their current working conditions is not in the zone of interest protected by RCW 49.60.

The Teamsters and correctional employees also fail to meet the second prong of RCW 34.05.530(2), namely, the “zone of interest” test. The Teamsters and correctional employees must show that their asserted interests are among “those that the agency was required to consider when it engaged in the agency action challenged.” RCW 34.05.530(2). “Resulting from concerns that not every person ‘potentially affected by agency action in a complex interdependent society’ should be permitted to have judicial review, the ‘zone of interest’ test serves as a filter to limit review to those for whom it is most appropriate.” *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 797, 920 P.2d 581 (1996) (citing William R. Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 824-25 (1989)).

review statute. RCW 34.05.570(1)(d). For this reason alone, the Petition’s dismissal should be affirmed.

The “zone of interest” test focuses on who the agency was required to consider when it took action. The Commission rules specify that the Executive Director will provide a determination of whether protected status would be a BFOQ in particular circumstances. WAC 162-16-210. Here, the particular circumstances are women-only correctional facilities and the Department’s desire to “maintain conventional standards of sexual privacy” for the inmates for the jobs in question. CP at 11. The Commission rules also specify that the BFOQ designation applies “to jobs for which a particular quality of protected status will be essential to or will contribute to the accomplishment of the purposes of the job.” WAC 162-16-240. Thus, the touchstone for a BFOQ is both the *circumstances* and the *purpose* of the job, and not the specific employment terms of the people who currently are performing the job. In other words, the male correctional employees’ “contractually negotiated and established schedule, work location, and working conditions” were not what the Legislature intended the agency to protect when issuing its interpretive letters.¹² CP at 5.

¹² Contrary to Teamsters’ assertions, there is no balancing of interests as part of the BFOQ determination. Br. of App. at 20-21. Instead, the Ninth Circuit has held that a BFOQ involves “accommodating” two interests: those of the correctional employees not to be discriminated against and the interests of inmates to maintain some level of privacy. *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998). The *Robino* court concluded that the BFOQ in that case imposed such a *de minimis* restriction on a male correctional employee’s employment opportunities that it was unnecessary to even decide whether the female sex was a BFOQ. *Id.* Moreover, the *Robino* court conducted the analysis in the context of a case between the correctional employees and the employer, which is the

The Teamsters and correctional employees allege that the Commission “would have to turn its statutory charge on its head” in order to argue that it need not consider male correctional employees’ interests when issuing the BFOQs in question. Br. App. at 20. Not so. The Teamsters and correctional employees did not plead a sex discrimination claim in their Petition. Instead, the Petition sought judicial review and an order requiring the Commission to conduct an adjudication prior to the Executive Director issuing the interpretive letters. CP at 9. Thus, the issue of whether male correctional employees in the positions in question will be discriminated against is not before this court in this case.

Because the Executive Director issued interpretive letters that are not eligible for judicial review under the APA, it is not necessary to decide whether the Teamsters and correctional employees have standing to seek judicial review under section RCW 34.05.530 of the APA. Nevertheless, the superior court correctly held that the Teamsters and correctional employees have no standing.

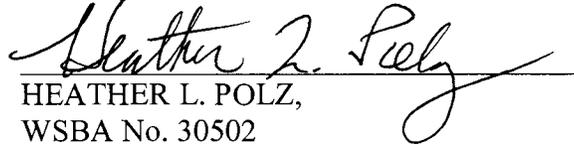
proper posture for such a determination because it allows the court to weigh the impact of a BFOQ on male employees’ specific circumstances. *Robino* at 1110.

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the superior court's order of dismissal be affirmed.

RESPECTFULLY SUBMITTED this 25th day of September, 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script, reading "Heather L. Polz", is written over a horizontal line.

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NO. 39328-0-II

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

TEAMSTERS LOCAL UNION NO.
117, a Washington Labor Organization,
RON Nelson, an individual, and JOHN
TORRES, an individual,

Appellants,

v.

STATE OF WASHINGTON HUMAN
RIGHTS COMMISSION,

Respondent.

CERTIFICATE OF
SERVICE

STATE OF WASHINGTON
BY _____
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COURT OF APPEALS
DIVISION II

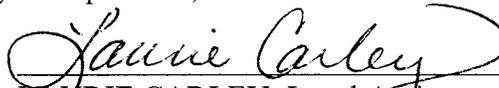
I certify that on September 25, 2009, I caused copies of the Respondent's Brief, Verbatim Report of Proceedings, and this Certificate of Service, in the above-captioned matter to be served upon the parties herein, as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of September, 2009.


LAURIE CARLEY, Legal Assistant