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No. 97201-0

**SUPREME COURT OF
THE STATE OF WASHINGTON**

JEOUNG LEE and SHERRI MCFARLAND, on their own behalf and on
behalf of all persons similarly situated,

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY
PUBLIC HOSPITAL DISTRICT #2,

Appellant.

**BRIEF OF *AMICUS CURIAE* ASSOCIATION OF WASHINGTON
PUBLIC HOSPITAL DISTRICTS**

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I. INTRODUCTION

Public hospital districts in Washington deliver critical health care and serve some of our State's most vulnerable patients. Many public hospital districts are located in rural areas of the State and operate small hospitals with limited staff. Like the collective bargaining agreement ("CBA") at issue in this case, the vast majority of CBAs between Washington public hospital districts and unions, including the Washington State Nurses Association ("WSNA"), provide for a single meal period for employees, regardless of their shift length. The Industrial Welfare Act, RCW 49.12.187, permits this specific variance from the meal period regulations in WAC 296-126-092. The Association of Washington Public Hospital Districts ("AWPHD") encourages this Court to uphold the legislative intent of RCW 49.12.187 and affirm the ability of public hospital districts to set variances from meal period regulations, and also to affirm the long-standing presumption in favor of arbitration for public sector labor disputes.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

AWPHD is a nonprofit corporation serving as the trade association for Washington State's public hospital districts since 1952. Its membership includes all public hospital districts in the State of Washington. Its identity and interest are more fully set forth in the accompanying Motion for Leave to file an amicus brief.

For the purposes of this brief, AWPHD surveyed a representative sample of its public hospital district members across Washington State. AWPHD member responses served as the basis for this brief and are presented in a general manner. From small to large hospitals in rural and urban settings, including critical access hospitals that play a vital role in community health care, AWPHD members expressed consistent concerns regarding the two issues presented by this case.

III. STATEMENT OF THE CASE

AWPHD relies on the Appellant's statement of the case.

IV. DISCUSSION

A. **RCW 49.12.187 expressly grants public employers authority to specifically vary from meal period regulations.**

Washington labor regulations require a thirty (30) minute meal period for every five (5) hours worked. WAC 296-126-092. Under express language in the Industrial Welfare Act, however, public employers and employees “may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that *specifically vary from or supersede*, in part or in total, rules ... regarding appropriate rest and *meal periods*.” RCW 49.12.187 (emphasis added). The relevant statute does not require that a public employer variance provide for specific rest or meal periods, announce an

intention to supersede the regulation, or use any other explicit language to vary from the regulation.

Although this Court has ruled that *private* employers may only “enhance or exceed” the standards in WAC 296-126-092, *see Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002), it has never interpreted *public* employer variances permitted under RCW 49.12.187. *See also Hill v. Garda CL Nw., Inc.*, 191 Wn.2d 553, 571, 424 P.2d 207 (2018) (noting that the Court did not reach the question of whether “Washington’s state law meal period protection is considered collectively negotiable”); *Chavez v. Our Lady of Lordes Hosp. at Pasco*, 190 Wn.2d 507, 511, 518, 415 P.3d 224 (2018) (holding that nurses satisfied class certification requirements, but *not* addressing whether the *private* hospital failed to ensure second meal periods). AWPHD urges this Court to recognize and uphold the express *public* employer exception under RCW 49.12.187.

1. The legislature intended to allow public employees to bargain for a variance from meal period regulations

In 2003, following this Court’s *Wingert* decision, the legislature amended RCW 49.12.187 to codify the long-standing practice that rest and meal period regulations did not apply to public employers. *See* House B. Rep. for SSB 6054 (Apr. 24, 2003). In cementing this public employer exception, the legislature recognized:

Because of practical considerations and awkward staffing configurations, especially at transition times, state and local governments and unions negotiated collective bargaining and union-management agreements that allows these employees to work “straight eights.” Employees could eat and take breaks during their “straight eight” shifts, but had to be on site and available to respond in case of emergencies.

Id. at 4. Moreover, the legislature noted that some public employer CBAs do not provide for *any* designated rest and meal periods, allowing employees to limit the length of their workday by working straight eight-hour shifts *without* a meal period instead of nine-hour shifts with designated breaks. *See* Final B. Rep. for SSB 6054 at 1 (May 20, 2003).

The “ability to negotiate different terms” and “to seek innovative solutions” is a practical necessity in unique public work environments. House B. Rep. at 4. If public employers are required to provide a second meal period for employees working longer than ten (10) hours in a day, employees who collectively bargained for a single meal period will be forced to stay on the job an extra thirty (30) minutes. This result would run counter to the legislature’s consideration and approval of CBA provisions providing for *no* rest or meal periods so that public employees could limit their workday. A requirement for a second meal period for longer-shift workers would effectively deny public employees’ long-standing ability to collectively bargain for variances from the meal period regulations.

The legislative history of RCW 49.12.187 clearly establishes that rest and meal period regulations do not apply to *public* employers. The legislature expressly granted public employers and employees the authority to specifically vary from meal period regulations. This Court should uphold that legislative intent and find that the Parties' CBA properly varies from the meal period regulations in WAC 296-126-092.

2. Public hospital districts' and the State's interest in access to health care is at stake

Most nurses employed at Washington public hospital districts work under CBAs that provide for twelve (12) hour shifts.¹ Like the CBA at issue here, the vast majority of CBAs negotiated between public hospital districts and unions representing nurses, including WSNA, contemplate *a* single meal period for nurses regardless of shift length. These arrangements are generally preferred by the employer and the employees, and are rarely raised as a point of contention in CBA negotiations. *See, e.g.,* Pet. for Review at 17.

AWPHD members, citing feedback from Chief Nursing Officers and department-level managers who regularly work with nurses, expressed that most nurses would oppose a second meal period because they prefer to limit the length of their workday. Their opposition may explain why

¹ Although nurses comprise the majority of public hospital district employees who work 12 hour shifts, employees in other positions, including many technical employees, also work longer shifts and would be similarly affected by a ruling in this case.

unions representing nurses have not renegotiated the standard single meal period language found in most public hospital district CBAs. If public hospital districts are required to provide a second meal period, nurses working twelve (12) hour shifts will be forced to stay at the hospital for an extra thirty (30) minutes, or to sign a waiver for the second meal. Nurses would prefer not to be required to stay at hospitals for any longer than necessary during long shifts. Although nurses could sign meal break waivers, this is administratively burdensome for both the nurse and the hospital, and sometimes practically difficult given the often hectic nature of nurses' workdays. A requirement for a second meal period would potentially lead to weaker nurse morale or increased administrative burden for nurses and hospital management.

Furthermore, a requirement for a second meal period could result in patient care and access issues. Nurses should complete handoffs before each meal period to the nurse(s) covering the departing nurse's patients. *See* Mary Ann Friesen, Susan V. White & Jacqueline F. Byers, *Handoffs: Implications for Nurses, in 2 Patient Safety and Quality: An Evidence-Based Handbook for Nurses* 285, 293 (Ronda G. Hughes ed., 2008). Handoffs ensure that covering nurse(s) understand patients' conditions and potential needs during a meal break. *See id.* Handoffs, however, inherently compromise continuity of care; increasing the number of handoffs due to meal periods heightens the risks inherent in handoffs

generally. *See id.* In addition, handoffs often negatively impact patient satisfaction because the patient is cared for by an unfamiliar person who, even with a handoff, may not know the patient's desires. *See id.* at 319. In sum, requiring a second meal period could have a direct impact on patient care and patient satisfaction.

This potential change would also require complex staffing coverage solutions, given the need to cover an extra half hour for every twelve (12) hour nursing shift. Considering the national nursing shortage and difficulty recruiting nurses to smaller or critical access hospitals, some AWPHD members fear that a requirement for a second meal period could exacerbate nurse staffing challenges. *See* Laws of 2008, ch. 47, § 1 (finding that “[t]he *ever-worsening shortage of nurses* available to provide care in acute care hospitals has necessitated multiple strategies to generate more nurses and improve recruitment and retention of nurses in hospitals”); Susan M. Skillman et al., *Washington State Registered Nurse Supply and Demand Projections: 2011-2031*, WWAMI CENTER FOR HEALTH WORKFORCE STUDIES, UNIV. OF WASH. (Dec. 2011) (concluding that supply of registered nurses will fall far short of demand over the next decade). Even worse, AWPHD members are concerned that senior nurses, many of whom are focused on the length of their shifts, may refuse to work a thirteen (13) hour day—as would be required for two meal periods on top of a twelve (12) hour shift—and retire early. Requiring a second

meal period could result in unintended consequences, and ultimately reduce access to quality health care.

Most public hospital districts and unions representing nurses have bargained for a single meal period for nurses working twelve (12) hour shifts. This standard CBA provision specifically varies from the regulations in WAC 296-126-092. This Court should honor public hospital districts' and unions' long-standing labor practice. A requirement for a second meal period would likely result in nurse dissatisfaction, administrative burden, a worsening of the nursing shortage crisis, and a reduction in access to quality health care. In light of the interests at stake, AWPHD urges this Court to find that the Parties specifically varied from meal period regulations pursuant to RCW 49.12.187 and properly bargained for a single meal period for nurses working twelve (12) hour shifts.

B. Alternative dispute resolution is strongly favored in public sector labor disputes.

This Court continues to recognize a strong presumption in favor of arbitration for public sector labor disputes. *See Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996). “In determining whether a dispute is arbitrable under a labor contract, the courts should exercise caution and restraint to avoid usurping the role of the arbitrator by going beyond the question of arbitrability and

becoming involved in the merits of a dispute.” *Hanford Guards Union of Am., Local 21 of Int’l Guards Union of Am. v. General Elec. Co.*, 57 Wn.2d 491, 494, 358 P.2d 307 (1961). A party seeking arbitration “must show only that its claim may fairly be said to fall within the scope of the contract.” *Id.*

Furthermore, the Public Employees’ Collective Bargaining Act (“PECBA”) specifically authorizes binding arbitration in *public* employer CBAs. *See* RCW 41.56.122. PECBA’s stated purpose and intent “is to promote the continued improvement of the relationship between public employers and their employees.” RCW 41.56.010. To accomplish PECBA’s purpose, AWPHD urges this Court to recognize and honor public employees’ right to collectively bargain with public employers for mutually beneficial grievance procedures and arbitration provisions.

There are numerous policy reasons to favor arbitration for public sector labor disputes. Labor arbitrators have long applied a variety of procedural protections for employees under the label of industrial due process. *See* Edward Brunet, Richard E. Speidel, Jean R. Sternlight & Stephen J. Ware, *Arbitration Law in America: A Critical Assessment* 22-23 (2006). On average, arbitration is two times faster in resolving labor disputes than litigation. *See* Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 382-84 (2018). Speedier

resolution can reduce costs and provide certainty in outcomes when compared against traditional litigation. *See* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 8 (2011). Quick resolution is also advantageous for employees to limit employment disruption and for employers to curtail operational impact. *See id.* Furthermore, if employees can bring claims simultaneously through multiple avenues—for example arbitration under a CBA, claims before administrative agencies, and litigation through the courts—there is a greater risk of inconsistent results, which leave both employers and employees worse off. Hearing employee claims through collectively bargained grievance procedures ensure these advantages.

AWPHD members expressed several concerns about resolution of employee claims outside of the collectively bargained grievance process. First, when compared to the cost of arbitration, public hospital districts may incur significant additional expenses if claims may be brought in court rather than through the agreed upon CBA grievance process. Due to the longer timelines involved in litigation versus arbitration, these costs would also include the operational expense of finding staffing coverage for litigants and witnesses. Second, the pre-arbitration grievance process, which in most public hospital district CBAs involves two-to-three meetings between the parties to discuss the issues and potential resolution

thereof, allows for more effective and less adversarial dispute resolution. It is in public hospital districts' interest to retain nurses and to resolve concerns swiftly, especially considering the nursing shortage crisis. *See Skillman et al., supra*, at 3.

Generally, public hospital districts and unions agree to CBA grievance procedures to avoid costly and contentious litigation. If a grievance arises from the terms of a CBA—like the standard single meal period provision at issue here—it is subject to the presumption in favor of arbitration. AWPHD urges this Court to remand this case to arbitration, the most appropriate forum for the claims at issue.

V. CONCLUSION

For the reasons stated above, AWPHD respectfully requests that this Court reverse the Court of Appeals decision and uphold the long-standing principles of the Industrial Welfare Act's public employer exception for meal break regulations, and a strong presumption in favor of arbitration for public sector labor disputes.

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RESPECTFULLY SUBMITTED this 6th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS** with the Clerk of the Court using the Washington State Appellate Courts' Portal which will send notification of this filing to all parties registered to receive such notice.

s/Christy Reynolds

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