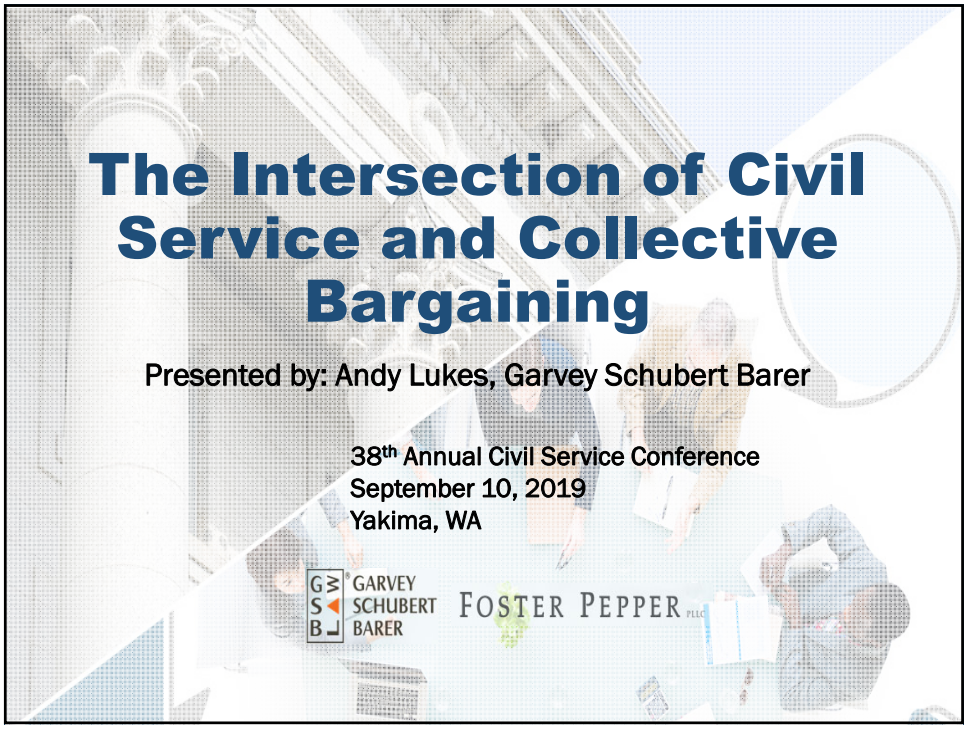


Overview

- 1883 – Federal civil service act. (Pendleton Act)
- Civil service began in WA with passage of RCW 41.08 (Fire Fighters) in 1935.
- RCW 41.12 (City Police Civil Service) passed two years later in 1937.
- At that time, public employees relied on civil service to protect their employment and private sector employees relied on collective bargaining.
- Gradually, public sector employees began to see civil service commissions as extensions of the employer. Began to demand collective bargaining.
- PECB (RCW 41.56) passed in 1967 – That's when the conflict began.
- Ultimately, collective bargaining prevailed.

Civil Service Law Basics

- The fundamental concept: Merit.
- Replace the spoils system.
- Discipline must be for cause.
- Employment decisions should not be made based on political affiliation, religion, favoritism, race, etc.
- Employment decisions should not be arbitrary or discriminatory.
- Ensure public has qualified police and fire employees.
- Local rules must "substantially accomplish" state regulations.

Civil Service Law Basics (cont.)

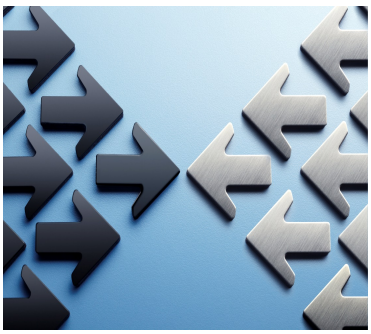
- Must "provide in detail the manner in which examinations may be held, and appointments, promotions, transfers, reinstatements, demotions, suspensions and discharges shall be made, and may also provide for any other matters connected with the general subject of personnel administration. . . ." RCW 41.08.040(1) (See also RCW 41.12.040(1))
- The controlling statutes are:
  - Cities: RCW 41.08 (Firefighters), RCW 41.12 (Police)
  - Counties: RCW 41.14 (Sheriff's Office)
  - State: RCW 41.06 (State Civil Service)
- Note that some jurisdictions, such as the City of Seattle, require civil service for non-public safety employees. These are required by local rules, not state law.

Collective Bargaining Law Basics

- Core statutory obligation: the duty to bargain.
- Good faith: sincere attempt to reach agreement.
- Mandatory Subjects of Bargaining: wages, hours, and working conditions.
- Permissive Subjects
- Unilateral changes
- Direct Dealing
- Interest arbitration

Where Conflict Occurs

- Implementation of new civil service rules that involve mandatory subjects of bargaining
- Promotion within bargaining unit
- Transfer within bargaining unit
- Layoff
- Termination
- Discipline



Where Conflict Does Not Occur

- New hires
- Promotion outside of bargaining unit
- Non-unionized workforces
- Implementation after bargaining obligation is satisfied

Case Studies

Rose v. Erickson, 106 Wn.2d 420 (1986)

FACTS

John Rose was a deputy in the Spokane County Sheriff's Department. In 1984, Sheriff Larry Erickson suspended Mr. Rose for 5 days. Since 1973, there had been language in the collective bargaining agreement allowing employees to choose between the grievance procedure and the civil service commission when challenging discipline. Since that time, Mr. Erickson was the first employee to elect the grievance procedure over the civil service commission. Sheriff Erickson refused to process Mr. Rose's grievance, arguing that the language in the collective bargaining agreement was in violation of civil service law, which required challenges to discipline to be processed through the civil service commission.

Rose v. Erickson, 106 Wn.2d 420 (1986)

LEGAL HOLDING

There is a conflict between civil service law (RCW 41.14) and collective bargaining law (RCW 41.56).

Civil service law says: "No person in the civil service shall be reinstated in or transferred, suspended, or discharged from any such place, position, or employment contrary to the provisions of this chapter." (RCW 41.14)

Collective bargaining law says: "…if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation or any public employer, the provisions of this chapter shall control." (RCW 41.56)

The Supreme Court's starting point was that as a matter of public policy, arbitration is preferred. Furthermore, the amendment to RCW 41.56 stating that it should prevail over all other statutes was enacted in 1983. There is an assumption that the Legislature intended the collective bargaining statute to prevail over the civil service statute.

Accordingly, Sheriff Erickson was ordered to process Rose's grievance.

Rose v. Erickson, 106 Wn.2d 420 (1986)

WHY IT MATTERS

Public employers may not refuse to process employee grievances in favor of processing them through the civil service commission.

This case approves of contract language requiring civil service employees to elect the grievance procedure or the civil service commission, but not both. These are known as "election of remedies" clauses.

City of Bellevue, Decision 3156-A (1990)

FACTS

The City of Bellevue began an extensive review of its civil service rules. The union came to some of the meetings where the rules changes were discussed. The union sent a letter notifying the civil service commission that it believed the rules changes encompassed mandatory subjects of bargaining and demanded that those issues be bargained. The Commission ignored the union's letter and implemented the rules changes.

LEGAL HOLDING

The City of Bellevue argued that the civil service commission enacted these rules and was not acting "on behalf of" the city when it did so. PERC rejected this argument. Although it acts independently to a certain extent, the civil service commission was created by the city, funded by the city, and the city manager appointed all five members of the commission. This was sufficient to demonstrate that the commission acted on behalf of the city.

PERC held that the city refused to bargain by implementing civil service rule changes that involved mandatory subjects of bargaining.

City of Bellevue, Decision 3156-A (1990)

WHY IT MATTERS

Public employers should be aware that PERC (and the court) hold that civil service commissions act on behalf of the public employer. As agents of the public employer, the public employer is liable for the actions of the civil service commission.

If contemplated changes to civil service rules involve mandatory subjects of bargaining, they must generally be bargained prior to implementation.

City of Yakima v. Int'l Assoc. of Fire Fighters, 117 Wn.2d 655 (1991)

FACTS

This was an appeal from a PERC decision involving consolidated complaints filed by the city's police and fire unions. The unions alleged that the city had refused to bargain by unilaterally implementing civil service rules. The unions alleged that the civil service rules pertained to mandatory subjects of bargaining as they related to discipline and promotion to positions within the bargaining units.

City of Yakima v. Int'l Assoc. of Fire Fighters, 117 Wn.2d 655 (1991)

PERC'S HOLDING

PERC held that the city did not qualify for the exemption in RCW 41.56.100 because its civil service commission was not similar in **scope**, **structure**, **and authority** to the state personnel board.

PERC also rejected the city's argument that the Legislature intended to exempt from bargaining any matter that was delegated to a civil service commission. PERC noted that for police and fire fighters, the following subjects are delegated to civil service commissions: Examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions, discharges, and "any other matters connected with the general subject of personnel administration…." RCW 41.08.040(1); RCW 41.12.040(1) PERC stated it was "obvious" that the legislature had not intended to remove all of these subjects from collective bargaining because doing so would have essentially allowed public employers to avoid collective bargaining entirely.

PERC stated, in dicta, that no conflict between collective bargaining law and civil service law occurs when civil service commissions adopt rules related to promotion outside the bargaining unit, permissive subjects of bargaining, or the adoption of rules after the bargaining obligation has been met.

City of Yakima v. Int'l Assoc. of Fire Fighters, 117 Wn.2d 655 (1991)

CITY OF YAKIMA'S APPEAL TO THE SUPREME COURT

Fundamental issue was whether the city was exempt from bargaining certain issues under RCW 41.56.100, which exempts employers from bargaining, "any matter which . . . has been delegated to any civil service commission or personnel board similar in **scope**, **structure** and **authority** to the [state personnel] board . . . ."

- The Court ruled that the scope, structure, and authority of the state personnel board was "far broader" than the Yakima Civil Service Commission.
- State personnel board had broader independence and autonomy.
- State personnel board must demonstrate belief in merit principle, may not be state employees and may not be partisan.
- In sum, the Yakima Civil Service Commission could not be viewed as independent from the employer's control.

A sub-issue decided was that PERC, not the Superior Court, had authority to initially determine whether certain actions constitute unfair labor practices.

City of Yakima v. Int'l Assoc. of Fire Fighters, 117 Wn.2d 655 (1991)

WHY IT MATTERS

Generally, collective bargaining law will prevail over civil service law. It is doubtful that any city or county civil service commission could qualify as similar to the state personnel board under the Court's reasoning. Accordingly, the exception in RCW 41.56.100 will rarely, if ever, apply.

Issues such as this should be initially determined by PERC.

Spokane and Spokane Police Guild v. Spokane Civil Service Commission, 98 Wn.App. 574 (1999)

FACTS

The City of Spokane and the Spokane Police Guild agreed to a collective bargaining agreement that included a new process to promote a patrol officer to sergeant. The civil service commission used a "rule of one" promotion procedure. The city and the union agreed to a "rule of 12" promotion procedure. That procedure took the top 12 scorers on a multiple-choice exam and evaluated them for leadership and supervisory capabilities to determine who would be promoted. The civil service commission refused to recognize the new procedure.

Spokane and Spokane Police Guild v. Spokane Civil Service Commission, 98 Wn.App. 574 (1999)

LEGAL HOLDING

The civil service commission's primary argument was that it qualified for the exemption found in RCW 41.56.030(4). That section states that no public employer may refuse to bargain with the following exception:

> . . . nothing contained herein shall require any public employer to bargain collectively . . . concerning any matter which . . . has been delegated to any civil service commission or personnel board similar in **scope**, **structure** and **authority** to the [state personnel board].

The court disagreed, finding that although the civil service commission was similar to the state personnel board in scope, it was dissimilar in structure and authority.

Accordingly, the Public Employees Collective Bargaining Act prevailed over the civil service rules.

Spokane and Spokane Police Guild v. Spokane Civil Service Commission, 98 Wn.App. 574 (1999)

WHY IT MATTERS

Public employers should be careful in relying on the limited exception contained in RCW 41.56.030(4). It only applies if your civil service commission is similar in scope, structure, and authority to the state personnel board.

You should not assume your civil service commission is similar in scope structure and/or authority from the state personnel board and follow what was agreed to in bargaining.

Civil Service Comm'n of City of Kelso v. City of Kelso, 137 Wn.2d (1999)

FACTS

Office issued a 2.5 day suspension for violating department rules governing high-speed chases. On the same day, the officer filed an appeal with the civil service commission and a grievance through his union. The civil service process moved faster than the grievance. After reviewing the case, the civil service determined the discipline should be increased to a 10-day suspension.

Thereafter, an arbitration was held. The city argued that the arbitration should not move forward because the matter had already been decided by the civil service commission (res judicata). The arbitrator disagreed, the hearing proceeded, and the arbitrator reduced the discipline to a written reprimand.

The Court noted that the collective bargaining agreement did not contain an election of remedies clause.

Civil Service Comm'n of City of Kelso v. City of Kelso, 137 Wn.2d (1999)

LEGAL HOLDING

The Court held that the doctrine of res judicata did not apply because the civil service commission and the arbitrator were adjudicating alleged violations of different rights. The civil service commission determined the suspension was "in good faith and for cause." The arbitrator applied a different standard, whether the suspension was for "just cause."

The Court held "just cause" is a more expansive standard. Where the commission was not required to consider anything more than the allegation of wrongdoing and the employer's motivation for the discipline, the "just cause" standard is a term of art in labor law that has been established over decades of case law. Among other elements, it requires arbitrators to consider procedural fairness, discipline issued to other employees for similar offenses, and whether the punishment fit the "crime."

Furthermore, the contract contained a provision stating that all grievances must be resolved through arbitration. The Court interpreted this to mean that the civil service commission was not capable of resolving the alleged contract violation. The Court stated, "Labor contract interpretation is completely outside the scope of the Civil Service Commission's expertise and authority." Id. at 176.

The Court noted the "duplicative review" that its decision allowed but stated, "such inefficiency must be resolved by the parties when they next renegotiate their collective bargaining agreement." Id.

Civil Service Comm'n of City of Kelso v. City of Kelso, 137 Wn.2d (1999)

WHY IT MATTERS

This case is another reminder of the importance to negotiate a strong election of remedies clause. The courts will not have sympathy for employers who fail to do so and are faced with litigating the same facts in two forums.

Note there have been some recent developments in this area. At least two courts have held that arbitration decisions finding just cause for termination bar former employees from prevailing on subsequent employment discrimination claims through application of collateral estoppel (issue preclusion).

- *Scholz v. Washington State Patrol*, 3 Wash. App. 2d 584 (2018)
- *Billings v. Town of Steilacoom*, 2 Wash. App. 2d 1 (2017)

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SEATTLE PORTLAND WASHINGTON, D.C. NEW YORK BEIJING

Election of Remedies

You are a city with a collective bargaining agreement which says the following:

> An employee covered by this Agreement must, upon initiating objections relating to actions subject to appeal through either the grievance procedure or pertinent Public Safety Civil Service appeal procedures, use either the grievance procedure contained herein or pertinent procedures regarding such appeals to the Public Safety Civil Service Commission. Under no circumstances may an employee use both the grievance procedure and Public Safety Civil Service Commission procedures relative to the same action.

A police officer has engaged in misconduct. After a *Loudermill* hearing, you decide to terminate the officer. The day after the termination letter is issued, the union files a grievance on the officer's behalf *and* the officer files an appeal with the city's civil service commission. Can the city refuse to process the grievance? Can the civil service commission refuse to process the appeal? What happens if both the appeal and the grievance move forward and each results in a conflicting approach? Discuss.

If there are dual filings with the grievance procedure and the Public Safety Civil Service Commission, the City will send a notice of such dual filings by certified mail to the employee(s) and the Guild. If both appeals are still pending after thirty (30) days from the receipt of such notice by the Guild, the appeal through the grievance shall be deemed withdrawn. The withdrawn grievance shall have no precedential value.

Duty to Bargain

A city's civil service commission is contemplating three civil service rule changes that would affect civil service employees who are members of a bargaining unit represented by the Teamsters:

1. Adding, for the first time, a requirement that new applicants submit to drug testing.
2. Requiring, for the first time, employees to pass a psychological screen as a prerequisite to a promotion outside the bargaining unit.
3. A new rule that would require employees to elect between processing their appeal through the civil service commission or the collectively bargained grievance procedure, but not both.

Which, if any of these rules, must be bargained with the Teamsters?

GSB:10501696.1

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Andy helps employers solve labor and employment problems. He believes negotiated solutions are usually more efficient and cost effective, but can also draw from his extensive litigation experience if necessary.

As a member of the Labor and Employment Practice Group, Andy advises and represents employers in their dealings with labor unions, which include union organizing campaigns, representation and election proceedings, collective bargaining, contract negotiations, grievance settlement negotiations, grievance arbitration, unfair labor practice settlement negotiations, and unfair labor practice hearings.

Andy also advises and represents employers in non-union contexts regarding wage and hour laws, discrimination, disability issues such as the duty to provide reasonable accommodations, and state and federal leave laws.

Andy's clients benefit from his well-rounded background. He is former labor mediator and hearing examiner for the Public Employment Relations Commission. There, he successfully mediated resolutions to more than 100 labor disputes and issued binding decisions in unfair labor practice proceedings.

Previously, Andy practiced law in a well-known Seattle labor and employment firm that represented many of the region's labor unions. Andy frequently draws on this experience to develop effective strategies for the employers he represents today.

Practice Focus

Labor, Employment and Immigration

Labor Advice

Training

Litigation

Alternative Dispute Resolution

Labor and Employment Litigation

Workplace Misconduct

Admissions

United States District Court, Eastern District of Washington, 2014

United States District Court, Western District of Washington, 2013

Washington, 2013

Prior to law school, Andy owned and operated a successful small business. That experience allows Andy to resolve his clients' labor and employment issues with a deep understanding of their business objectives.

Outside of work Andy enjoys hiking, mountain biking, and spending time with his wife, two dogs and a cat.

Education

Gonzaga University School of Law, J.D., *cum laude*, 2012

University of Washington, B.A., English Literature, 2005

Professional Activities

Leadership Team Member, King County Bar Association, Alternative Dispute Resolution Section

Community Activities

Pro Bono Asylum Advocate, Northwest Immigrant Rights Project

News

Garvey Schubert Barer Welcomes Andrew G. Lukes to its Labor and Employment Practice Group in Seattle
GSB Newsroom, 10.1.18

Speaking Engagements

"Pre-Negotiation Tasks: Laying the Groundwork for Success," 2019 WAPELRA Fall Conference
Speaking engagement
Bremerton, WA, 9.19.19

"Ethics of Negotiating," 42nd Annual Collective Bargaining & Arbitration Conference
Speaking engagement
Seattle, WA, 3.29.19

"Ethics: How Do We Address Revised WSBA Opinion 2223?" King County Bar Association's Alternative Dispute Resolution Program
Speaking engagement
Seattle, WA, 12.13.18

Legal Alerts

Washington Paid Family & Medical Leave Act: What Employers Need to Know to Be in

GARVEY SCHUBERT BARER

Compliance
GSB Newsroom, 6.5.19