Administrative Law



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Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter, and encourage your feedback. Feel free to forward our newsletter to your colleagues, and encourage them to join the Section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

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U.S. Supreme Court – Seminole Rock Deference on the Rocks?

Jeffrey B. Litwak

In Decker v. Nw Envtl. Def. Ctr. 568 U.S. (2013), Justice Scalia penned a lengthy concurrence and dissent opinion largely focused on whether the Court should continue to defer to an agency's interpretation of its own regulations under Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). This Seminole Rock deference is also known as Auer deference under the more recent case, Auer v. Robbins, 519 U.S. 452 (1997). Under Seminole Rock deference, the Court will defer to the agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent with the regulation. Justice Scalia's opinion in Decker is his second recent opinion questioning whether the Court should defer to an agency's interpretation of its own regulations. In Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254 (2011), he wrote a short and sole concurrence, stating that, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases," and that he is receptive to reconsidering such deference.

Justice Scalia's opinion is *Decker* is lengthier and more direct, stating that deference to the agency's interpretation of its own regulation is, "a dangerous permission slip for the arrogation of power." None of the

other justices suggested Decker was the case to reconsider Seminole Rock deference. However, Chief Justice Roberts and Justice Alito wrote a short concurrence, stating, "The bar is now aware that there is some interest in reconsidering (Seminole Rock and Auer), and has available to it a concise statement of the arguments on one side of the issue." So, the Supreme Court seems poised to take a case that squarely presents a question involving such deference. For administrative law scholars and practitioners, there is nothing as exciting as predicting when and how the Supreme Court will reconsider Seminole Rock deference.

The Washington Supreme Court defers to an agency's interpretation of its own regulations. See Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659 (2004). In Port of Seattle, the Washington Supreme Court explained, "Because Ecology is the agency designated by the legislature to regulate the State's water resources, ... this court has held that it is Ecology's interpretation of relevant statutes and regulations that is entitled to great weight."This is the same reasoning that gives Justice Scalia such heartburn. Although the Washington Supreme Court does not cite federal cases as rationale for its deference, any change to deference in the federal courts might just trickle down.

Legislative Update

Richard Potter

The Section's Legislative Committee reviewed forty-four legislative proposals (not counting companion bills) for the 2013 session. As usual, very few were enacted. The following are of particular interest to the practice of administrative law, as well as to public records issues.

House Bill 1381 started out as a proposal to transfer workers compensation hearing officers and support staff to the Office of Administrative Hearings, but as passed it instead provides the Secretary of the Department of Health with authority to review initial decisions of administrative law judges and to issue final orders in administrative adjudicative proceedings. The Secretary may by rule provide that initial orders in specified classes of cases may become final without further agency action unless the Secretary on his own motion decides to review the order or a party files a petition for review.

House Bill 1400 amended three sections in the Administrative Procedure Act (RCW 34.05) in order to allow "electronic distribution" and service of notices and orders, with the receiving party's agreement.

House Bill 1203 amends RCW 42.56.230 of the Public Records Act to add disclosure exemptions for "personal information" regarding children in child care and other youth programs. This bill was intended plug a gap created when the Department of Early Learning was moved from the Department of Social and Health Services to independent agency status, which meant that the disclosure exemptions in the DSHS statute no longer applied to DEL records. This amendment also deletes an "including but not limited to" enumeration of types of "personal information" covered by the exemption. The Section commented – via the State Bar's legislative affairs office – that there is no general definition of "personal information" in the Public Records Act, so that this deletion makes the term's meaning less certain.

House Bill 1612 will create a firearm offenders registry. The bill creates two public records disclosure exemptions. The first concerns witness and victim information and is codified in the Public Records Act at RCW 42.56.240. The second concerns information in the new "felony firearm offense conviction database" and is not referenced in the PRA, but is set forth only in RCW 43.43 (Washington state patrol).

Senate Bill 5182 amended RCW 46.12.635 (Motor vehicles – Certificates of title) concerning notices given to vehicle owners when their information is disclosed to an attorney or private investigator. Now, in most cases the vehicle owner will not be told the identity of the person to whom his information has been provided.

The latest status of bills, full texts and other materials is available at the **Washington State Legislature website**.

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The Administrative Law Section welcomes articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Merrilee Harrell (mharrell@rtwcg.com).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

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Homan Award/ Call for Nominations

The Frank Homan Award is given annually to an individual who has demonstrated contribution to the improvement or application of administrative law. The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law.

Only AdLaw Section members can nominate, but a nominee does not have to be an attorney or a Section member. To make a nomination, send an email to John Gray: john.m.gray@comcast.net, that includes the following information:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- · Why you think this person should be recognized

The deadline for nominations is July 15, 2013.

Young Lawyer's Committee

In January 2013, the Young Lawyer Committee of the WSBA held its 3rd annual Open Section Night. For the Administrative Law Section, this night was a resounding success. The Section's liaison, Sarah Kwiatkowski, attended the event with Heidi Wachter, the chair of the Section. Over wine and cheese newly admitted lawyers and law students mingled with representatives from many of the 18 sections learning about the benefits of joining a section. After the event, many new members joined the Administrative Law Section.

The Young Lawyer Committee serves as a link between seasoned attorneys and new attorneys. The committee works to promote programs and other WSBA activities which support the professional development and satisfaction of young/new attorneys and law students. If you are interested in joining the Administrative Law Section or would like to talk about YLC activities, please contact Sarah Kwiatkowski at sarah@seattlecommlaw.org.

Administrative Law Section Listserve

The Administrative Law Section has a "closed" Listserv, which means only current subscribers of the Listserv can send an email to the Listserv. You can request to receive the listserv messages in a daily digest format by contacting the list administrator below.

Sending Messages: To send a message to everyone currently subscribed to this list, address your message to administrative-law-section@list.wsba.org. The Listserver will automatically distribute the email to all subscribers. A subject line is required on all email messages sent to the Listserv.

Responding to Messages: Use "Reply" to respond only to the author of the email. Use "Reply All" to send your response to the sender and to all members of the Listserv.

If you have any questions, wish to unsubscribe, or change your email address, contact the WSBA List Administrator at sections@wsba.org.

Public Service

Apply Now for Our 2013 Public Service Grant Project – Deadline for Submission is July 11, 2013.

The Administrative Law Section provides support for various programs and projects in our state through its Public Service Grant Project. The Executive Committee is once again seeking grant proposals and applications from non-profit community groups in Washington State. Applications will be accepted from any Washington State non-profit organization operating a program which assists individuals with legal services or legal education. Priority will be given to programs that have demonstrated a close correlation with areas of administrative law. Details and applications for our 2013 Public Service Grant Project can be found on the (section website).

Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Merrilee Harrell: mharrell@rtwcg.com.

Case Summaries – Washington Supreme Court

Cornu-Labat v. Hospital District No. 2 Grant County, 86842-5 (Apr. 11, 2013)

This case concerns healthcare-related exemptions from disclosure under the Public Records Act (PRA). Dr. Gaston Cornu-Labat was the subject of several complaints. The hospital conducted two investigations that ended after the charges against Cornu-Labat were found to be unsubstantiated. The hospital nevertheless asked Cornu-Labat to be psychologically evaluated and fired him after he failed to consult the recommended provider. Cornu-Labat filed a PRA request for records related to the investigations, but the hospital argued the records were exempt under three statutory provisions: (1) RCW 4.24.250 (documents prepared for and maintained by a regularly constituted peer review committee), (2) RCW 70.44.062 (meetings or proceedings of a public hospital district board or its agents concerning the status of a healthcare provider's clinical privileges), and (3) RCW 70.41.200 (documents prepared for and maintained by a regularly constituted quality improvement committee). The trial court granted Cornu-Labat's motion for summary judgment.

The Supreme Court held documents prepared for a peer review committee that includes nonphysicians may qualify for the exemption in RCW 4.24.250. The court also held RCW 70.44.062 exempts writings created by public hospital districts, but only as to records created for a formal meeting of the board, its staff, or agents. Finally, the court affirmed the trial court's conclusion that the exemption for documents prepared by quality improvement committees, RCW 70.41.200, did not apply in this case. In a unanimous decision, the court reversed the grant of summary judgment and remanded to the trial court.

Gabriel Verdugo

Case Summaries – Washington Court of Appeals

Coy v. City of Duvall, 67737-3-1 (Apr. 1, 2013)

In May 2006, Coy submitted an application to the City of Duvall (City) for preliminary plat approval of a 32-unit residential subdivision on a 4.58-acre property, proposing to fill the entire on-site wetland. The City's outside consultant peer reviewer determined that Coy's proposed mitigation plan was deficient, thus it appeared that "the code would not allow alteration of this wetland." Coy's consultant, David Evans & Associates (Evans) maintained that the City's code allowed for the wetland fill proposed by Coy. In December 2006, the City's planning staff still could not "approve, or recommend approving, the filling of the wetland under the Sensitive Areas Regulations that Coy's project was vested in."

In January 2007, Evans and the City explored the possibility of processing Coy's application under the new City code, rather than the code in which the application had vested. Coy submitted a wetland analysis based upon the new code. Ultimately, however, in May 2007, Coy decided not to pursue permit approval pursuant to the City's new code; instead, he decided to remain vested in the prior code and ultimately the City's outside consultant determined, on July 4, 2008, that Coy had met the requirements for filling the wetland. However, an appropriate site for off-site mitigation could not be located; thus, the City allowed Coy to perform off-site mitigation by contributing to the Snohomish Basin Mitigation Bank. The hearing examiner approved Coy's preliminary plat application on December 23, 2008.

On January 22, 2009, Coy sued the City pursuant to RCW 64.40.020(1), which provides a cause of action for damages "to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law." Coy alleged that the City failed to comply with the statutorily mandated time limit for processing the permit application and acted in an arbitrary and capricious manner during the application process. The trial court granted the City's motion for partial summary judgment, dismissing Coy's claim for damages resulting from alleged arbitrary and capricious conduct. Coy appealed.

Coy contended that the City's conduct was arbitrary and capricious because it had previously approved other wetland fills under the same code language. Coy did not

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contend that the hearing examiner's ultimate approval of his preliminary plat application was itself arbitrary and capricious. Rather, he asserted that the hearing examiner's decision - the "final decision" contemplated by RCW, was the result of an "arbitrary process." However, the Appeals Court had recently decided in Birnbaum v. Pierce County that the "final decision" prong of RCW 64.40.020(1) did not provide a cause of action in similar circumstances. Here, Coy sought damages for delays resulting from the City's allegedly arbitrary conduct prior to the City's final decision. The conduct at issue was the City's conduct during the application process, not the hearing examiner's final decision. But under *Birnbaum*, damages must result from either a final decision (which Coy did not challenge) or a failure by the agency to act within the statutorily-prescribed time limit (which Coy no longer alleged). Under Birnbaum, the statute did not contemplate damages for delay that occurred prior to the final decision. Because the statute provided no cause of action in such circumstances, the Appeals Court affirmed the trial court's dismissal of Coy's claim.

Melanie deLeon

Yakima County v. Yakima County Law Enforcement Officers' Guild, 42697-8-II (Mar. 19, 2013)

This case involves an APA judicial review of a Public Employment Relations Commission (PERC) decision in an unfair labor case. Following a failed mediation over terms of a collective bargaining agreement, Yakima County filed an unfair labor practice complaint with the PERC alleging that the Yakima County Law Enforcement Officers' Guild had wrongfully argued permissive subjects of bargaining to impasse and certified those topics to interest arbitration. On summary judgment, the PERC agreed with the County, finding that the Guild's proposals regarding time release were permissive, not mandatory, subjects of bargaining. The PERC also issued an order prohibiting the Guild from bargaining to impasse in the future topics related to release time for meetings and travel. The Superior Court affirmed the PERC's summary judgment order, and the Superior Court also issued its own order adopting the PERC's order prohibiting future bargaining to impasse. The Court of Appeals reviews of an order granting summary judgment de novo, engaging in the same inquiry as the body that decided it, here the PERC. The Court of Appeals affirmed in part and reversed in part, finding that one of the Guild's time release proposals was a permissive subject of bargaining not properly certified for interest arbitration but that another of the Guild's time release proposals was properly certified for interest arbitration. The Court of Appeals also vacated the PERC's cease and desist order that prohibited the Guild from bargaining release time

proposals to impasse in the future. The Court of Appeals held that the Washington APA limits adjudicative orders to deciding the rights, duties, privileges, immunities, and other legal interests of specific persons, and therefore the PERC may not issue adjudicative orders with only a prospective effect. Furthermore, the Court of Appeals held that the APA limits a trial court's review of an agency order and prohibits the trial court from issuing orders making its own rulings regarding the substance of a dispute. Therefore the Court of Appeals also vacated the Superior Court's order adopting the PERC's cease and desist order.

Katy Hatfield

Long v. Washington State Department of Labor and Industries, 43187-4-II (Mar. 19, 2013)

The Department of Labor and Industries deined Aileen Long's request for workers' compensation benefits under the Washington Industrial Insurance Act (WIIA) after her husband died from asbestos-caused mesothelioma. Long's husband was exposed to asbestos while working for maritime employers covered by the federal Longshore and Harbor Workers' Compensation Act (LHWCA) and while working for non-maritime employers covered by the WIIA. His work for the maritime employers predated his work for the state-fund employers. Both exposures were a proximate cause of his mesothelioma. The Department denied Long's claim because some of her husband's exposure occurred while in maritime employment subject to federal jurisdiction. The Court of Appeals held Long had been entitled to benefits under the LHWCA and thus was excluded from the general provisions of the WIIA. The court concluded maritime law provided the proper avenue for Long's claim, not the WIIA's last-injurious-exposure rule. The court also held the Department was not statutorily required to pursue an LHWCA claim on Long's behalf because Long had accepted third-party settlements without the prior agreement of the liable maritime employer, and thus had lost her eligibility for LHWCA benefits.

Gabriel Verdugo

Bartz v. State, Department of Correction Public Disclosure Unit, 42478-9-II, 42485-1-II (Feb. 12, 2013)

Between June 12 and October 22,2009, George Bartz, an inmate in DOC custody, filed three public records requests with DOC. On October 19, 2010, Bartz filed a motion for judicial review under the Public Records Act (PRA), asking court to require DOC to (1) show cause why it had "refused to provide" full responses to his first and third public records requests in a timely manner and why it had sent duplicates, blank pages, and unrelated information; and (2) pay him for each day it had failed to comply with the PRA. On January 19, 2011, Bartz filed a complaint in Thurston County Superior Court, alleging that DOC had violated the PRA in responding to his first and third PRA requests. On March

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24, Bartz filed a second complaint, alleging that DOC had violated the PRA in responding to his second request. The superior court ruled that DOC had complied with Bartz's requests and that the statute of limitations barred his second complaint. Bartz appealed arguing that superior court erred in ruling that (1) DOC complied with his public records requests, (2) his second complaint was unnecessary to obtain the information requested, (3) the PRA's statute of limitations barred his second complaint, and (4) his second complaint was a "frivolous" action under RCW 4.24.430. He further argued that the superior court erred in dismissing with prejudice his second complaint.

The PRA's statute of limitations requires a plaintiff to file an action within one year of either an agency's claim of exemption from the PRA's disclosure requirements or an agency's last production of a record on a partial or installment basis. Bartz argued that the superior court erred in ruling that his second complaint was unnecessary to obtain the records requested and that the statute of limitations barred his second complaint. The court agreed with Bartz that the second complaint was necessary to obtain the records requested, but disagreed that the superior court erred in ruling the statute of limitations barred his complaint. Thus, they affirmed the superior court's dismissal of his second complaint as time barred and, alternatively, for failure to state a claim under CR 12(b)(6). Bartz argued that the superior court's dismissal of his second complaint contravened the holding in Neighborhood Alliance of Spokane County v. Spokane County. DOC conceded that Bartz was correct. The Appeals Court held that as Neighborhood Alliance made clear, it is an agency's failure to produce records properly that violated the PRA, regardless of what documents the requester possesses. However, the Appeals Court had already held that DOC did not fail to produce requested records and that the record indicated that DOC made multiple attempts to produce the requested records and responded promptly to every letter Bartz sent involving this PRA request. Bartz did not establish that DOC withheld any responsive records. Therefore, Neighborhood Alliance did not require reversal and remand.

The Appeals Court also held that the superior court's second basis for dismissal was proper. Because Bartz failed to show that DOC had inadequately responded to his PRA request, he failed to establish a controversy in issue, making dismissal by the superior court with prejudice proper under CR 12(b)(6). Finally, Bartz argued, and DOC conceded, that the superior court erred when it found his second complaint "frivolous." The Appeals Court accepted DOC's concession, reversed the superior court's ruling that Bartz's second complaint was frivolous and held that it did not count as a frivolous complaint for RCW 4.24.430 purposes.

Melanie deLeon

Snohomish County Public Transp. Ben. Area v. State Public Employment Relations Com'n, 294 P.3d 803 (Feb. 12, 2013)

The Public Employees Relations Commission ("PERC") adjudicated a dispute between the Amalgamated Transit Union ("the union") and the Snohomish County Public Transportation Benefit Area, d/b/a Community Transit ("Community Transit"). The union complained that Community Transit improperly failed to arbitrate employee grievances under the provisions of an expired collective bargaining agreement. When PERC issued its decision, it dismissed an unfair labor practice complaint brought by the union against Community Transit. The union had alleged that Community Transit improperly failed to arbitrate employee grievances under the provisions of an expired collective bargaining agreement. PERC's order recognized the rule that, for employees eligible for interest arbitration, grievance arbitration provisions do not survive the expiration of a collective bargaining agreement. However, PERC's order also provided that "in the future," grievance arbitration provisions would survive a collective bargaining agreement's expiration. Community Transit petitioned for review of PERC's decision. The issue was whether the Administrative Procedure Act ("APA") limits the scope of an adjudicative order to one that determines the rights, duties, privileges, or other legal interests of specific persons, and cannot be used to promulgate a new, purely prospective rule or policy.

The court quickly disposed of a standing issue, concluding that Community Transit showed an "injury-in-fact" and established standing to pursue its petition for judicial review, despite having prevailed on the merits at PERC.

The major part of the decision analyzed whether PERC could issue a prospective rule in an adjudicative order under the Washington State APA or under case law arising under the Federal APA. Regarding the Washington State APA, the court concluded that the plain text of the state APA precludes purely prospective adjudicative orders, noting that PERC's authority is limited to that which the legislature has granted. The court noted that Washington agencies have two types of proceedings: adjudication and rulemaking. Adjudicative proceedings do not require notice to the public for public comment. Rulemaking proceedings do. The court also noted the definition of "order," " a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." RCW 34.05.010(11) (a). The court renewed its statement that agencies have only those powers granted to them by the legislature, and that the APA limits adjudicative orders "to those determining the rights, duties, privileges, or other legal interests of specific persons(.)" The court said that "a purely prospective adjudicative order is beyond the authority granted by statute. Analogizing to the federal APA did not help the parties. The court noted differences between the federal (continued on next page)

APA and Washington State's APA and concluded the cases cited by the parties were "inapposite." The Court said that the Federal APA defines adjudication broadly, unlike the State APA, to mean essentially "anything that is not rulemaking."The court noted that the U.S. Supreme Court gave Federal agencies the discretion to choose whether to use adjudication or rulemaking in resolving disputes between parties and announcing purely prospective policies or rules. The court said that Washington State's APA's narrower language defining "adjudication" shows that Washington agencies lack authority to issue prospective adjudicative orders. The court concluded that PERC exceeded its authority by deciding the case with an order "that purported to determine the legal rights of every union and employer except the specific persons before the agency." (emphasis in original.) The court's relief was to remand to PERC with instructions to strike the prospective change in precedent from its order.

John Gray

Schlotfeldt v. Benton County, 292 P.3d 807 (Jan. 22, 2013)

The Schlotfeldts applied for a special use permit to construct and operate an RV park in Benton County. Benton County's Board of Adjustment (Board) conditionally approved their application, but held that recreational vehicles could not remain in the RV park for more than 180 days in any calendar year. The site proposed by the Schlotfeldts was zoned as light industrial with surrounding properties zoned for agriculture. The proposed RV park had 182 sites and a clubhouse. Their application did not address the RV's length of stay. Several of the surrounding property owners were concerned about RVs staying year around. The Board conditionally approved the Schlotfeldts' application, partly requiring that no RV remain in the park for more than 180 days in any calendar year. The Schlotfeldts appealed.

The Land Use Petition Act (LUPA) governs judicial review of Washington land use decisions. Relief from a land use decision may be granted if the petitioner establishes one of six standards of relief; three were relevant here: (1) the land use decision is an erroneous interpretation of the law; (2) the land use decision is not supported by substantial evidence; or (3) the land use decision is clearly erroneous. The Schlotfeldts contended that the Board had no authority to impose a length of stay limitation. However, Benton County Code allows the Board to impose conditions on proposed use to ensure the use is compatible with other uses in the surrounding area or is no more incompatible than are any other outright permitted uses in the applicable zoning district. The Appeals Court held that that a conditional use permit was appropriate because the Board could impose reasonable conditions necessary for

the issuance of the permit since special permits to accommodate uses are "permitted, not prohibited and subject to the right of the municipality to impose conditions or to disapprove." Further, restricting the time RVs could stay in one area would also relate to protecting the compatibility of uses in the surrounding area. The Schlotfeldts argued that there was no evidence to justify a length of stay limitation. Benton County Code defines an RV as a motorized or nonmotorized vehicle for recreational use. A county planner observed that recreational vehicles were not permanent dwellings and should not be allowed to stay in the RV park year round. The court held that substantial evidence supported the Board's decision to conditionally limit the length of stay in the proposed RV park.

The Schlotfeldts also asserted that the Board's decision was an erroneous interpretation of law because the Board lacked the inherent authority to impose a length of stay limitation. The court held that reasonably calculated conditions to protect adjacent land and to achieve legitimate zoning goals were permitted under Benton County Code. Further, the Board had inherent authority to impose conditions ensuring the use met the county's zoning goals as set forth in their county codes.

As to whether the Board's condition was random and arbitrary, the court held that RCW 36.70C.130(1) was the exclusive means of review of land use decisions. The Schlotfeldts' contention that the length of stay limitation was random, arbitrary, and absurd was not one of the reviewing factors, so the court held that the Schlotfeldts' argument would best be categorized as a challenge as to whether substantial evidence supported the limitation, and substantial evidence did exist to support the Board's limitation.

Melanie deLeon

Shoffner v. State, 294 P.3d 739 (Jan. 16, 2013)

In this maritime case, Leigh Ann Shoffner sought benefits under the Jones Act after she twisted her knee while walking down a public sidewalk between her car and the vessel where she was on temporary assignment as an ablebodied seaman with the Washington State Ferries (WSF). The court affirmed the trial court's dismissal of Shoffner's claim, concluding that Shoffner was not acting under the course of her employment at the time of injury. The court noted that determining whether a seaman is acting in the "course of employment" depends on whether s/he is acting as a "blue-water"seaman or "brown-water"seaman. Blue-water seamen generally live aboard the vessel due to assignments offshore or in distant waters, and are considered on duty even while on shore leave. Brown-water seamen, however, are not required to live aboard, but instead commute to work (they are also known as "commuter seamen.") The court enumerated the following factors to be considered in determining whether a brown-water seaman was in the (continued on next page)

course of employment at the time of injury: "whether (1) the employee was on a direct route to her vessel, (2) the employee would have been subject to discipline if she did not arrive, (3) her return to the vessel was for the benefit of both the employee and the shipowner, (4) the employee was under the direct supervision of the ship owner when injured, (5) the ship owner had control over the premises where the injury occurred, and (6) the employee received a travel stipend." In affirming the trial court's decision, the court concluded that the evidence presented did not show that Shoffner would have been subject to discipline, that WSF had control over the public sidewalk where the injury occurred, or that Shoffner received a travel stipend.

Merrilee Harrell

Town of Woodway v. Snohomish County, 291 P.3d 278 (Jan. 7, 2013)

This case concerns vesting of development rights if a permit application is filed while a local jurisdiction's actions are being reviewed by a Growth Management Hearings Board (Board). BSRE sought to redesignate a 61-acre site on Puget Sound from industrial designation on the Snohomish County comprehensive plan map to allow the land to be used for commercial and residential purposes. The county council granted the request, and neighboring jurisdictions and a neighborhood group petitioned the Board for review of the plan amendments and of the county's SEPA review. Meanwhile, the county council rezoned the site to an "urban center" and adopted development regulations accommodating mixed-use development. After the Board held a hearing—but before it issued its final decision—BSRE applied to the county for development permits. The Board later issued its decision, concluding some of the county's actions violated the Growth Management Act (GMA) and the State Environmental Policy Act (SEPA).

The court held that under the GMA a landowner's development permit application vests to a local jurisdiction's land use comprehensive plan provisions and development regulations at the time a complete application is filed, despite a Board's later determination that the local jurisdiction did not fully comply with SEPA's procedural requirements in its enactment of those plan provisions and regulations.

Gabriel Verdugo

Marcum v. Department of Social and Health Services, 290 P.3d 1045 (Dec. 26, 2012)

Melinda Marcum operates a day care center. On December 10, 2008, she had to leave to pick up some children at a nearby Head Start program. At that moment, she was the only person working at the day care. She had procedures in place to ensure constant supervision of the children in her care. Nonetheless, when she left to pick up the children at the Head Start program, she forgot "John," a two-year-old. While running the errand, Ms. Forrester, a former employee, and her friend, Ms. Rhodes, arrived at the day care. When Ms. Marcum and the van load of children returned a few minutes later, there was so much activity that Ms. Forrester failed to mention that she found John locked in the building. Ms. Rhodes called CPS to complain. Ms. Marcum did not learn of her failure until the following day when CPS contacted her. CPS made a founded finding of neglect. Consequently, based on the CPS founded finding, the Department of Early Learning concluded that Ms. Marcum was disqualified as a child-care worker and revoked the day care's child-care license. Ms. Marcum requested an administrative hearing. The administrative law judge ruled against her. She appealed to the DSHS Board of Appeals, which also ruled against her. She then sought judicial review in superior court, which affirmed the Board of Appeals. The Court of Appeals reversed, and the basis of the decision lies in the distinction between an interpretive rule and a legislative rule.

The administrative rule that concerned the Court is WAC 388-15-009(5). The Court cited RCW 26.44.020(14), which, in pertinent part, defines "negligent treatment or maltreatment" as "an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100." The compared this statute with WAC 388-15-009 (5), which defines "negligent treatment or maltreatment" as "an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, on the part of a child's parent, legal custodian, guardian, or caregiver that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, or safety. A child does not have to suffer actual damage or physical or emotional harm to be in circumstances which create a clear and present danger to the child's health, welfare, or safety. Negligent treatment or maltreatment includes, but is not limited, to: (a) Failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety. Poverty and/or homelessness do not constitute negligent treatment or maltreatment in and of themselves; (b) Actions, failures to act, or omissions that result in injury (continued on next page)

to or which create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child(.)

The court concluded that the statute speaks of a finding of neglect, while the rule treats some abuse as a "per se" violation. The court said that how DSHS treated the rule (that is, as an interpretive or legislative rule) as applied to Marcum's case, determined whether DSHS's decision conflicted with the statute that DSHS interpreted. Interpretive and legislative administrative rules are defined in the APA at RCW 34.05.328(5)(c)(ii) and (iii), respectively. The court concluded that DSHS treated the rule as a legislative rule, based upon one of the Board of Appeals' conclusions of law. The court rejected arguments that the Superior Court decision was arbitrary and capricious and also rejected the argument that the administrative rule was beyond the scope of DSHS's authority. The court upheld the validity of DSHS's rule, but said that DSHS lacked authority to adopt a rule that shifted the standard required to make a founded finding of neglect. Then, considering that the Court remanded the case to DSHS, the court told DSHS what it would have to do to reach the same result in the case consistent with the court's holding: Unless the legislature decides otherwise, DSHS must find that a caregiver's actions have "evidence(d) a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety," before entering or affirming a founded neglect finding. (sic). The Court said the Board's imposition of a "strict liability regime" in relation to the negligent treatment of children exceeded its statutory authority. The court also said it would have given substantial weight to a Board conclusion if it had complied with the statute and found that Marcum's actions "evidence(d) a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety (.)" The court vacated the negligence finding and remanded to the Board of Appeals for further proceedings.

John Gray

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