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Inside this Issue

DOES THE PER-STUDENT CHARGE FOR FIRE PROTECTION APPLY TO HOME-SCHOOLED STUDENTS?

Under RCW 52.30.020, school districts within a fire district (or regional fire authority) are not required to enter into fire protection contracts. However, the Washington State Superintendent of Public Instruction sets per-student rates to be charged to school districts within the boundaries of a fire district or regional fire authority.[1]

The question becomes, during this time: Can this per-student charge be imposed on school districts for home-schooled children whose parents reside in the school district? We answer yes, because parents of students receiving home-based instruction generally must file annual statements related to their home-schooled child or children, with the superintendent of the school district in which the parents reside. *See* RCW 28A.200.010. To us, this provides enough of a "nexus" between the school district and the home-schooled student for the per-student charge to be imposed on school districts for home-schooled children within their boundaries.

A MAJOR CASE ON THE "SINGLE SUBJECT RULE"

[1] You may track future apportionments or sign up for alerts on the Office of Superintendent of Public Instruction's (OSPI) website at: https://www.k12.wa.us/policy-funding/school-apportionment

Sometimes the State Supreme Court decides a case with potential implications to special districts, which occasionally have to deal with the constitutionality of statutes. Just the other day, the Supremes decided a case on the doctrine requiring all legislation to deal with only one subject, and that subject must be stated in the title. This doctrine even applies to initiatives and referenda, which are examples of direct legislation by the people instead of the legislature.

In *Garfield County Transportation Authority v. State of Washington*, No. 98320-8, the Court ruled unanimously that I-976 is unconstitutional as it contains more than one subject. This initiative was enacted by the voters in 2018. It was one of many initiatives designed to reduce or eliminate motor vehicle excise taxes levied to fund Sound Transit, which is a public transit system aimed at reducing congestion in King, Pierce and Snohomish counties.

The gist of the initiative, which passed statewide at a rate of about 53%, was to limit state and local excise taxes on motor vehicles to $30 and mandating the use of the Kelley Blue Book to derive vehicle values. One section of the statute also mandates that bonds used to finance Sound Transit be refunded (refinanced).

In addition to the "two subjects" argument by the challengers, it was also alleged that the initiative violated the "subject in title" constitutional provision, which not only requires a single subject only, but also requires that the subject be expressed in the title. The title was misleading or false as it implied that voter-approved taxes would not be rolled back, when in fact that would not be the case. The campaign also repeatedly said that the maximum tax for "car tabs" would be $30, when actually the lowest possible fee would be $42.53.

The Court did not really deal with these issues; it restricted its decision to the problem of "two subjects", holding that the section requiring the refunding of bonds was a separate and distinct subject from the main point, which of course was to limit or reduce the excise tax on motor vehicles.

The trial judge found the specifying of Kelley Blue Book as the valuation method was invalid as a legislative privilege, which would violate the privileges and immunities clause of the state constitution, but the judge held that was severable and found the rest of the law constitutional.

Several petitioners appealed and there were many intervenors, including Tim Eyman, who was involved in the initiative process. The Supreme Court accepted direct review so the case skipped the Court of Appeals.

Article II, section 19 of the Washington Constitution is short and sweet: "…[n]o bill shall embrace more than one subject, and that shall be expressed in the title." Seems pretty simple, right? Well it really is when you boil this case down to its essence. But it is educational to discuss why the constitution might have such a rule or doctrine. At least partially, it is designed to prevent "logrolling" (remember that from your high school civics class?). That old tactic was used by legislatures to hide unpopular subjects in legislation with very popular ones.

The Court noted that there are two types of ballot titles for their "single subject" analysis. A ballot title is either deemed to be general or restrictive. In this case, the Court determined that the ballot title was clearly general and that it was legislation pertaining to <u>limitations</u> on taxes or fees. The question then becomes "is there rational unity between the general subject and the incidental

subdivisions of the law." Framed another way, the question is whether the matters are germane to the general subject and germane to each other.

The Court found that almost all of the sections were germane or supplementary to the overall theme of limiting the vehicle registration fees. However, there was one section of the initiative bill—Section 12—that provides for a very distinct subject that could well stand alone as legislation. That section provided that Sound Transit would be required to retire, defease, or refinance bonds issued to support its mission. That section was probably included in I-976 to avoid another problem encountered by a prior attempt to accomplish pretty much the same object: the impairment of the obligation of contracts! Nonetheless, regardless of the motive or intent of including that section, the Court found (unanimously) that the bill therefore contained two distinct subjects.

CASE NOTE ON DEFAMATION

This is just a reminder that public officials have a much heavier burden of proof to demonstrate defamation than a private citizen. The Washington Supreme Court recently reiterated that in *Reykdal v. Espinoza*, 98731-9 (2020).[2] This case was unique in that it involved two candidates running against one another for the office of Superintendent of Public Instruction.

The defendant in *Reykdal* contended in her candidate statement, included in the voter's pamphlet, that "[T]he incumbent (Reykdal) ignored parents and educators by championing a policy that teaches sexual positions to 4th graders!"

The plaintiff, Reykdal, when he received the above candidate statement, filed an action in Thurston County Superior Court under RCW 29A.32.090. This law permits a person to petition the court for a judicial determination that a candidate statement "may be rejected for publication or edited to delete the defamatory statement."

The Court found that, under First Amendment precedent, Reykdal could not show a substantial likelihood that he would prevail in a defamation lawsuit—because Reykdal could not prove, as a matter of law, that the defendant acted with "actual malice" when publishing the candidate statement. Therefore, the Court found, the offending statement could not be removed from the voter's pamphlet.

What does the *Reykdal* case stand for? This case represents how contentious politics can be, and is a reminder of the heavy burden that public figures carry when they seek to prove that they have been defamed. In this somewhat irregular context (candidacy statements), the burden of proof would remain the same.

CASE NOTE ON RECALL IN COVID TIMES

Much controversy remains over the constitutionality of Jay Inslee's "Stay Home, Stay Healthy" order (hereinafter "Proc 20-25"), so much so that even public officials have made their disagreements known. The Washington Supreme Court, in *In Re Recall of White*, No. 98663-1 (2020),[3] recently decided a case involving a recall

[2] http://www.courts.wa.gov/opinions/pdf/987319.pdf

[3] http://www.courts.wa.gov/opinions/pdf/986631.pdf

petition of a Yakima City councilmember. Joe Quinn spent many years litigating recall petitions, from the side of the recall "target"—the elected official. Therefore, this case piqued his interest.

We will begin with a basic outline of the standard of review in a recall case. Under the Washington Constitution, Article 33, an elected official may be recalled after any legal voter in the state or residing in the political subdivision in which the official was elected successfully petitions for recall—upon a successful recall petition, a special election will be held as the final step in the process. A recall petition must establish, factually and legally, a breach of the oath of office, or misfeasance or malfeasance while in office. *See Id.* As the Supreme Court reminded us in *White*, "[C]ourts are obligated to review recall petitions to ensure they allege a recallable offense and not merely an unpopular decision or an unpopular stance. See RCW 29A.56.110, .140; *See Also* Chandler v. Otto, 103 Wn.2d 268, 270-71, 693 P.2d 71 (1984)."

The petition must articulate the "'standard, law, or rule that would make the officer's conduct wrongful, improper, or unlawful.'" *In re Recall of Inslee*, 194 Wn.2d 563, 568, 451 P.3d 305 (2019)) (quoting *In re Recall of Pepper*, 189 Wn.2d 546, 554-55, 403 P.3d 839 (2017)).[4]

In *White*, a recall petition was filed alleging that the Yakima City Councilmember, White, engaged in malfeasance for "undermining" public health officials in the county—presumably in protest of Proc 20-25. The superior court dismissed the petition on the grounds that (1) White has a "right to criticize other elected officials' actions" and (2) the petitioners did not set forth a law that White violated by voicing disagreement with Proc 20-25 and its implementing regulations.

White stated the following on his *personal Facebook page*:

Only avoid getting out if you are sick..and most American's are extremely unhealthy and sick. For the rest of us with healthy immune systems and that keep them that way, this won't effect us, just like all the other viruses in the environment. I spend my entire day in and out of grocery stores. Be healthy and wise to what is actually going on. The CDC and WHO are just the feel good branch of big pharma and Bill Gates and friends that want mandatory immunizations.

He also reposted, on his Facebook page, an article from YakTriNews.com headlined "Face coverings required in Yakima County starting June 3," he titled his post, "I will not comply!" He then announced that he would no longer attend council meetings, in protest of Proc 20-25.

Then a recall petition was filed, setting forth what the Yakima County prosecutor distilled to five charges, only *three* of which were before the Supreme Court:

Charge One: White "used his position as an elected official to wrongfully encourage citizens to disobey state and local COVID-19 emergency proclamations that ordered everyone to stay home unless they need to pursue an essential activity."

Charge Two: White "'violated his oath of office pursuant to RCW 29A.56.110(1)(b) by encouraging the public to disobey emergency orders imposed by the State of Washington and the Yakima County Health District.'"

[4] We wrote about *Pepper* in this article: https://firehouselawyer.com/Newsletters/November2017FINAL.pdf

Charge Three: White "refused to attend Yakima City Council meetings which interfered with the performance of his official duties, and unreasonably denied his constituents representation at Council meetings."

The trial court found that "[n]one of the conduct alleged was actually unlawful. It was either expressive conduct and therefore lawful, or legal conduct compliant with the order." The trial court also found that White had no duty to enforce Proc 20-25 and the local implementing regulations and therefore did not violate his oath of office by failing to enforce those regulations, but openly criticizing them. Finally, the trial court found that the City's business had not been interrupted in any manner by White failing to attend multiple council meetings, and therefore he could not be recalled for failure to attend the meetings.

The matter proceeded to the Supreme Court, where the Court found as follows:

On Charge One: The Court found nothing in Proc 20-25 that "demands the allegiance of local legislators, and such a requirement would raise immediate constitutional concerns." The Court noted that "[I]n our system of divided government, legislators do not have a general duty to enforce public health orders or to abstain from criticizing the actions of other public officials." Consequently, Charge One was not factually and legally sufficient to support recall.

On Charge Two: The Court underlined that "'Violation of the oath of office' means the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law," quoting RCW 29A.56.110(2). And again, the petitioner did not underline a specific law or duty imposed on White as a councilmember. Of course, the petitioner was arguing that as a public official, White took an oath to "to uphold the law." The Court found that although Proc 20-25 has "the force of law," it did not—and truly could not—impose "an obligation not to criticize the law." Consequently, Charge Two was not factually and legally sufficient to support recall.

On Charge Three: The Court, citing *Pepper,* found that the failure to attend council meetings "could be the basis for recall if it prevented an official council meeting from occurring or, perhaps, had some other ascertainable consequence for the city's business." But the trial court found below that White's failure to attend council meetings did not interrupt the city's business in any manner. Consequently, Charge Three was not factually and legally sufficient to support recall.

What does *White* stand for? First, this case illustrates the prevalence of *social media*. Second, *White* reminds us that, as in the case of the *Inslee* and *Pepper* cases, the petitioner must cite a specific law or duty that has been violated to support recall. Criticizing other government officials, or voicing general displeasure with public-health regulations, is not sufficient.

Perhaps we should consider a hypothetical: What if White was not the recall target? What if, instead, the recall target was a fire commissioner? Would the result have been different? And if it would have been different, why should that be? We do not voice our opinion on that here.