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future newsletters.

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Frank Homan Award for 2019 Goes To Katy Hatfield, Assistant Attorney General

By William Pardee

At the August 21, 2019 meeting, the Administrative Law Section's Executive Committee voted unanimously (with one abstention – guess who) to approve the nomination of Katy Hatfield, of the Washington State Attorney General's Office, and also a member of the Section's Executive Committee, to be the 2019 recipient of the Section's Frank Homan Award.¹ Congratulations Katy! The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. The Section anticipates having a mini-CLE later in the year in Olympia coupled with a dinner to formally present Katy with the Award. See upcoming CLE information on page 3. The nomination the Section received for Katy, from attorney Lisa A. Malpass of Winston & Cashatt in Spokane, which Frank Homan Award Section Committee head Lea Dickerson provided the Committee, read as follows:

Greetings!

I am writing to nominate Katy Hatfield, Assistant Attorney General with the Washington Attorney General's Office for the Frank Homan Award. Katy has been an instrumental member of the Administrative Law Section for years. She has served in essentially every position within the Section, including as Chair of the Section. Her consistent involvement has kept the Section vibrant and relevant for all the members. Her contributions to the Section have been invaluable in its success over the years, including the Continuing Legal Education programs offered by the Section. Since our first introduction many years ago, I have been impressed with her dedication and willingness to help the Section and the practice of administrative law succeed. In addition to working with the Administrative Law Section of the state bar, she also works on various administrative law committees within the attorney general's office and is a person that others within the office go to for advice on cases and on advising their clients.

In her practice as well, Katy is incredibly generous with her time and is always willing to help out on cases, talk through issues, and mentor younger attorneys. She has represented state agencies in administrative hearings, in all stages of appeal, and by providing advice to the client. She always acts with integrity and provides only the highest level of legal advocacy for those clients while also working collegially with the opposing side. Over the last five-plus years, she has been tasked with helping the Health Care Authority and the Public Employee Benefits Board through many structural and policy changes and has worked intelligently and diligently to assist her clients during transition. Katy Hatfield is an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law, and that is why I offer her nomination.

I strongly recommend Katy Hatfield for this award as she embodies the Frank Homan spirit through her advocacy and promotion of justice on behalf of her clients, her dedication and passion for administrative law, and her selflessness in mentoring and assisting other attorneys in whatever way needed.

Lisa A. Malpass, Attorney at Law, Washington and Idaho

1 The Section did not have a recipient for the Award in 2018.

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

Send submissions to: Bill Pardee
(Bill.Pardee@bta.wa.gov).

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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2018 Administrative Law Section Grant Recipient Kenzie Legg Reflects On How the Grant Facilitated Her Study of Administrative Law

By William Pardee

Recipient in 2018 of a grant/scholarship from Administrative Law Section, Kenzie Legg, third-year law student and a J.D./LL.M. candidate for 2020 at the University of Washington School of Law, reflected on how the grant enabled her study of administrative agencies and how they operate, and provided the following summary:

This past year's scholarship recipient was Kenzie Legg, a third-year J.D./LL.M. student at the University of Washington School of Law. She has been highly involved in a variety of positions at UW Law, from being the co-president of the International Law Society; a member of the Board of Directors of the Public Interest Law Society, a nonprofit focused on raising funds for public interest work; an active member of the International Human Rights Clinic; and the executive online editor of the Washington Law Review.

Kenzie has served as an intern at a variety of institutions ranging from the Attorney General's Office in Seattle, to several small criminal defense firms in Spokane, to a variety of nonprofit organizations including Landesa, World Relief, and the Allen Institute. In her spare time, she enjoys reading and enjoying the beauty of the Pacific Northwest.

The scholarship from the WSBA Administrative Law Section was instrumental in permitting her to begin to dive into the world of administrative agencies. Because of the grant, she was able to focus on pursuing public interest work, and she spent the summer working as a volunteer law clerk at the Attorney General's Office in Seattle, in the Labor and Industries Division (LNI). The LNI division represents and advises the Department of Labor and Industries regarding the state's industrial insurance program, workers' compensation benefits, questions about fair wages and prevailing wage requirements, workplace conditions and safe work environments, contractor and building issues, crime victim claims, and other issues for workers and employers. This division handles a wide variety of cases from entry level to highly complex matters and has a robust appellate program.

Within LNI, Kenzie worked primarily with the team specifically focused on enforcing the Washington Industrial Safety and Health Act (WISHA) and other administrative regulations. Because of the grant, she gained substantial litigation experience through both preparing documents and attending proceedings. She drafted pleadings for administrative hearings and superior courts and briefing for the Court of Appeals. Her other contributions to LNI consisted of researching and briefing issues related to industrial safety, meeting with the client (the Department of Labor and Industries), preparing for hearings and depositions, and editing pleadings and drafting memoranda.

The experience of working within LNI was highly instructive as she pursued further avenues in her legal career. Most recently she has been undertaking the task of understanding export controls regulated by the Bureau of Industry and Security through the Export Administration Regulations. The experience she gained working with agencies at LNI with the help of the WSBA Administrative Law Section grant was invaluable in helping her slowly begin to understand the complexities of the administrative bodies that govern our actions.

2019 Administrative Law Section Grant Recipient Seth Alexander

By William Pardee

At the Administrative Law Section's June 8, 2019 retreat Executive Committee Member Susan Pierini announced that after reviewing ten applications for a \$5,000 grant/scholarship from the Section from students at all three law schools in the state of Washington, the Executive Committee voted to award the 2019 grant to Seth Alexander, who attends Seattle University School of Law. Seth has worked for the Unemployment Law Project and is currently working for the Northwest Justice Project as a Rule 9 intern. *Stay tuned for further information.*

Decision of the Washington Supreme Court RE: WSBA Structure

By Robert Krabill

Dear Administrative Law Section Members:

Hyperlinked here: www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/9-25-19-executive-director-and-wsba-bog-re-court-decision-on-work-group-recommendations.pdf?sfvrsn=7f3e0df1_0 are the Washington Supreme Court's formal decisions adopting all of the WSBA Structure Committee's recommendations, largely by a 5-4 margin. That includes keeping a unified Bar. It does not preclude inconsistent legislative action like we saw last session.

Public Disclosure Exemptions Update

By Richard E. Potter

The Code Reviser has updated its list of statutory exemptions to public records disclosure requirements to reflect 2019 legislation. The list is available at www.atg.wa.gov/sunshine-committee. Scroll down to the "Public Disclosure Statutes" section. In the 2019 report, enacted bills from the 2019 session are highlighted in blue font.

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 email Bill Pardee at Bill.Pardee@bfa.wa.gov.

SAVE THE DATE: Upcoming Administrative Law Section CLEs

By William Pardee

The Administrative Law Section, and most notably prior CLE Committee Chair Robert Krabill and current CLE Committee Chair Eileen Keiffer, are busy organizing and planning the following upcoming CLEs, which they hope you attend:

FRIDAY, OCTOBER 25, 2019 Oregon and Washington Administrative Law Conference SeaTac Conference Center

Please join the WSBA Administrative Law Section for a full-day CLE bringing together practitioners from both Oregon and Washington with speakers from both states. Topics include cross boarder administrative law, multistate occupational licensing, judicial review, ex parte contacts with an ALJ, view from the OAH bench, the intersection of criminal and administrative law and the new interpretation for Title IX. Lunch will be provided for in-person attendees.

CLE credits: 6.5 (5.75 Law and Legal Procedure + .75 Ethics)

MONDAY DECEMBER 9, 2019 "Faithless Electors"

Robert Krabill

The Mercato | Olympia

The Administrative Law Section plans to hold a CLE on "Faithless Electors," presented by Robert Krabill on December 9, 2019 from 6 p.m. to 7:30 p.m. at the Mercato in Olympia. The CLE will also be accompanied by the formal presentation of this year's Homan Award winner.

CLE credits: Approx. 1.5 hours

CASELAW UPDATE

Kisor v. Wilkie,
588 U.S. ___, 139 S.Ct. 2400, 204 L.Ed.2d 841 (2019)

By Eileen Keiffer

Justice Kagan delivered the opinion of the Court. Kisor, a Vietnam War veteran, sought disability benefits from the Department of Veterans Affairs (VA). The VA's evaluating psychiatrist found he did not suffer from post-traumatic stress disorder (PTSD) and the VA denied Mr. Kisor benefits. Years later, Kisor sought to reopen his claim and a different psychiatric report concluded that he did suffer from PTSD. However, the VA granted Mr. Kisor benefits only from the date of his motion to reopen, rather than his date of first application.

Upon appeal of this decision, the Board of Veterans' Appeals (a part of the VA) affirmed, based upon the VA's interpretation of its rules regarding the definition of "relevant official service department records." The Court of Appeals for Veterans Claims affirmed the Board's for the same reason. The Court of Appeals for the Federal Circuit also affirmed, but did so based on *Auer*¹ deference to the Board's interpretation of the VA rules.

In *Auer*, the Secretary of Labor was faced with determining whether police captains were subject to overtime under the Fair Labor Standards Act. According to the relevant regulations, salaried workers are exempt from overtime protections; salaried workers being those whose compensation would not be subject to reduction due to variations in the quality or quantity of the work. A police department's manual provided officers could face their pay being docked for disciplinary infractions, leading to the question in *Auer*.

In *Auer*, the Court was faced with interpreting a regulation involving a choice between (or among) more than one reasonable reading. To apply a rule to an unanticipated situation requires a court to make a judgment call. Historically, the courts have deferred to the agency's determination when there is such a judgment call to be made.

In the case at hand, the Court narrowed the *Auer* deference doctrine, explaining that agency deference is only warranted in construing truly ambiguous rules, and that courts should not reflexively apply deference. When the reasons for the presumption do not apply, or there are countervailing reasons outweighing them, courts are not to give deference to an agency's reading. A reviewing court must first "exhaust all the 'traditional tools' of construction" before finding an agency regulation ambiguous (to wit, text, structure, history, and purpose of a regulation).

Even if genuine ambiguity remains, the agency's interpretation must still be reasonable for a court to defer to it. Mincing no words, Justice Kagan cautioned agencies: "(a)nd let there be no mistake: That is a requirement that an agency can fail."

Even reasonable agency readings of genuinely ambiguous rules may still not receive *Auer* deference. Instead, the courts must only defer to an agency when Congress would have so wanted. The interpretation must be the agency's "authoritative" or "official position" rather than an ad hoc statement not reflecting the agency's views.

Further, the interpretation must implicate the agency's substantive expertise, as this expertise is the basis for the presumption of deference. Judge Kagan noted that some interpretive issues may fall more naturally to the judiciary, rather than an agency, giving the example of one requiring clarification of a simple common-law property term, or one concerning the award of attorneys' fees.

Finally, to receive deference, an agency's reading of a rule must reflect fair and considered judgment. In other words, deference will not apply to convenient litigation position or post hoc rationalizations.

Applied to the case at hand, the Court found Kisor failed to establish that *Auer* deference is wrong. First, Kisor argued that *Auer* was inconsistent with the judicial review provision of the Administrative Procedure Act, arguing that deference thwarts meaningful judicial review of agency rules. The Court rejected this argument, however, because courts must apply all traditional methods of interpretation of a rule and only after that analysis, if a regulation remains ambiguous, may a court apply deference. "Most notably, a court must consider whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties. All of that figures as 'meaningful judicial review.'" The Court further held that applying deference is consistent with the judicial review section of the APA. Looking to the purpose of the APA, the court noted that the APA was not intended to change judicial review of agency action.

Kisor next argued that *Auer* circumvented the APA's rulemaking requirements. However, the Court noted it had rejected this argument previously,² as interpretive rules, even when given deference, do not have the force of law. The Court further noted that deference may only be applied to authoritative and considered judgments. The Court thus reasoned its new deference standard reinforces the ideas of fairness and informed decision making forming the basis for the APA.

The Court also rejected Kisor's policy argument that deference creates intentionally weak rules. The

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Kisor v. Wilkie

Court rejected this argument as being inconsistent with experience, considering that precise rules are more efficient, serving both the regulator and the regulated.

Finally, the Court rejected Kisor's argument that deference violates separation of powers principles, by reiterating that the revised deference test ensures that courts retain a firm hold on its review function.

Applying the new deference standard to the facts of the case at hand, the U.S. Supreme Court found that the Federal Circuit erred in declaring the regulation ambiguous without using all of its interpretive tools and that the Federal Circuit also erred by assuming too quickly that deference should apply. The Court vacated the judgment below and remanded for further proceedings consistent with the new test laid out by the court.

Justices Roberts, Gorsuch, and Kavanaugh issued concurring opinions.

¹ Auer v. Robbins, 519 U.S. 452 (1997).

² Perez v. Mortgage Bankers Ass'n, 575 U.S. ___, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015).

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

By William Pardee

In 1988, petitioner (Fields) pleaded guilty to attempted second degree robbery for trying to snatch a woman's purse to help pay for her drug habit. Fields led a troubled life until 2006 when she turned her life around by successfully completing a drug program, and has been clean and sober ever since. As a result of her second degree robbery conviction, Fields was permanently disqualified from working at any licensed childcare facility in Washington pursuant to regulations promulgated by respondent Department of Early Learning (DEL).

In February 2013, Fields submitted a portable background check to DEL. Based on the information Fields provided, DEL cleared Fields to work at a child care facility. She worked in that child care facility for six months after she received her background clearance. A local news report on child care centers brought Fields' undisclosed criminal history to DEL's attention.

The licensing supervisor for DEL sent a notice of disqualification to Fields. The notice informed Fields that she was permanently disqualified, effective immediately, "meaning that you cannot work with or have unsupervised access to child care children." Fields appealed to the Office of Administrative

Hearings (OAH). Fields also requested reconsideration by the licensing supervisor, pointing to both factual inaccuracies in the notice of disqualification and evidence of her rehabilitation. The court noted that it does not appear from the record that Fields' request for reconsideration had been considered on its merits.

On appeal, DEL moved for summary judgment, arguing that in accordance with former WAC 170-06-0120(1) (2015), Fields must be disqualified from having unsupervised access to children or obtaining a childcare license under former WAC 170-06-0070(1) (2015) due to her 1988 conviction. Fields did not challenge the fact of her 1988 conviction but contended that the disqualification regulations violated her constitutional right to due process of law, both facially and as applied. OAH determined that such questions were beyond the scope of its review and therefore granted summary judgment to DEL.

Fields petitioned for review in superior court, again arguing that the disqualification regulations violated her state and federal rights to procedural and substantive due process, both facially and as applied. The superior court dismissed the petition for review, and determined that Fields had not met her burden of proving that the disqualification regulations were unconstitutional. The Court of Appeals affirmed. The Washington Supreme Court then granted Fields' petition for review.

4-member lead opinion by Justice Yu

The court observed that DEL's regulations provide that a subject individual who has a background containing any of the permanent convictions on the director's list (former WAC 170-06-0210), 50 in all, including robbery, will be permanently disqualified from providing licensed child care. A person with a permanently disqualifying conviction has no recourse at the administrative level. DEL regulations prohibit any administrative decision-maker from finding any regulation invalid or unenforceable and further prohibit reconsideration of permanent disqualifications on a case-by-case basis.

The court observed that Fields is claiming that her permanent disqualification based solely on her 30-year old robbery conviction constitutes an arbitrary deprivation of her protected interest in pursuing lawful employment in her chosen field. The court emphasized that Fields has a procedural due process right to have this claim heard at meaningful time and in a meaningful manner. Since DEL's regulations prohibit any consideration of Fields' claim at the administrative level, the only procedural mechanism available to her is judicial review pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW. To resolve Fields' as-applied procedural due process claim, the

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court noted it must determine whether APA review is sufficient to protect against an erroneous deprivation of Fields' protected interest in light of the specific circumstances presented.

The court reasoned that using Fields' 1988 robbery conviction as the sole basis for her permanent disqualification with no opportunity for an individualized determination presented an unusually high risk of arbitrary, erroneous deprivation. In light of this unusually high risk, the court concluded that the additional procedure of an individualized determination at the administrative level would be "extremely valuable," because it would mitigate the risk of erroneous deprivation. Further, the court concluded that because DEL regulations explicitly prohibit such an individualized determination of a person with a permanently disqualifying conviction, in such circumstances, "APA review does not provide sufficient procedural protections given the high risk of erroneous deprivation." The court reasoned that an individualized determination at the administrative level would drastically reduce the risk of erroneous deprivation in Fields' case, and properly and fairly conducted, an individualized determination will ensure that even if Fields is ultimately disqualified, "it will not be arbitrary, but, instead, based on her character, suitability, and competence to provide child care and early learning services to children."

The court noted that the procedure on remand "need not be unusual or burdensome," noting that DEL already has regulations governing individual determinations of those with troubling past behavior but without any disqualifying convictions. The court also stressed that "Fields is only entitled to be heard in accordance with existing procedures, where her attempted second degree robbery conviction is considered along with the rest of her history, both favorable and unfavorable." The court recognized that DEL "also has a legitimate interest in easing administrative burdens that would come with requiring a case-by-case evaluation of every person who seeks qualification to work in licensed childcare facilities." That said, the court emphasized that DEL's "interest is extremely minimal given the as-applied nature of this challenge."

The court stated that it does not hold that every person with a permanently disqualifying conviction must be given an individualized administrative hearing, but only holds that in light of the unusually high risk of erroneous deprivation in Fields' particular case, the additional protection of an individualized determination of her qualifications is required as a matter of procedural due process. The court therefore remanded back to DEL for further administrative

proceedings, at which Fields' entire history and the totality of her circumstances must be considered on an individualized basis.

Justice McCloud concurrence

The concurrence believed that DEL violated Fields' federal right to substantive due process. While it disagreed with the lead opinion's reasoning, it concurred in the result. The concurrence noted that should DEL want to disqualify Fields for other reasons, it must go through additional administrative proceedings and comply with procedural and substantive due process. "But DEL may not permanently disqualify Fields based solely on her 1988 conviction because doing so violates substantive due process."

The concurrence reasoned that because the right to pursue a trade or profession is a protected right but not a fundamental right, we apply a rational basis test. Under this test, we determine whether the challenged regulations are rationally related to a legitimate state interest. The concurrence concluded that the challenged regulation, as applied to Fields, was not rationally related to any legitimate state interest.

The concurrence agreed with the dissent that the lead opinion conflated procedural and substantive due process, noting that procedural due process only guarantees that individuals have notice and an opportunity to be heard to contest whether the rule does not apply to them, not whether it should. Noting that everyone agrees that the regulation at issue bars Fields from working at a licensed childcare facility, the concurrence views the issue as whether barring Fields because of her conviction is rationally related to a legitimate state interest, which is a question of substantive due process.

While recognizing that DEL has a legitimate interest in avoiding the administrative burden of holding an individualized inquiry in every case, the concurrence states that DEL is not required to hold an individualized inquiry in every case, but if DEL can write a bright-line regulation that seldom, if ever, violates substantive due process as applied, it can avoid individualized inquiries in most, if not all, cases. The concurrence further states that in drafting a rule that is less likely to violate a person's substantive due process rights, DEL might consider how old the person was when she or he committed the crime and the amount of time that has elapsed since the crime was committed.

In sum, the concurrence held that the challenged regulation, as applied to Fields, was not rationally related to a legitimate state interest, and therefore amounts to arbitrary and capricious government action and violates Fields' federal right to substantive due process.

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Fields v. Dep't of Early Learning

4-member dissenting opinion by Chief Justice Fairhurst

The dissent states that in arguing that procedural due process requires DEL to give her an individualized hearing, both Fields and the lead opinion conflate procedural and substantive due process. The dissent views Fields' argument as that DEL's rule is over inclusive and therefore there is a risk that Fields will be deprived of the right to provide childcare even though she may not pose a risk to children. The dissent observes that Fields' true claim is one of substantive due process, and that she fails to meet the heavy burden of showing that the decision to permanently disqualify her from providing childcare services based on her conviction is not rationally related to the legitimate government interest in protecting children.

The dissent observes that although procedural due process sets limitations on the process the government must provide before depriving an individual of liberty or property interests, substantive due process limits the rules the government may adopt governing those deprivations.

The dissent notes that procedural due process only guarantees that individuals have notice and an opportunity to be heard to contest whether the rules apply to them, not whether they should. Moreover, the dissent states that the fact that Fields was not able to challenge the constitutionality of the DEL rule within the administrative process itself is not a procedural due process violation. Along those lines, the dissent states: "Procedural due process does not require an agency to hear a constitutional challenge with the administrative process." (Citing *Dixon v. Love*, 431 U.S. 105, 113-114, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977)).

The dissent observes that, as in *Dixon*, the decision to disqualify Fields is automatic under DEL rules once she admitted that she had a prior conviction. The dissent notes that Fields is arguing for the right to appear in person in the administrative process to argue that DEL should show leniency and depart from its own rules. In response, the dissent states that in *Dixon* the U.S. Supreme Court rejected the argument that procedural due process grants this right, and it would reject it here also. (Citing *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) in which the court unanimously rejected a due process claim because the law at issue did not allow for individualized considerations of dangerousness – stating "plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme.") In applying *Doe*, the dissent reasoned that Fields is not entitled to an individualized administrative hearing because she

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cannot show that the facts she seeks to establish in that hearing are relevant under the statutory scheme. Regardless, the dissent also emphasized that Fields did have the opportunity to obtain review of her claim that the DEL rule was unconstitutional as applied to her by filing in the superior court. The dissent stated that just because she could not make this challenge, or any other constitutional challenge, during the administrative process did not violate Fields' rights to procedural due process. Along those lines, the dissent stated: "Procedural due process does not require that administrative hearings consider all possible claims, such as whether a rule violates substantive due process as applied in a particular case." The dissent concludes that because "Fields had the opportunity to make her substantive due process claims in superior court, she was not denied procedural due process."

The dissent indicates that the lead opinion fails to acknowledge the extent of the increase in the administrative burden on DEL based on its ruling, which it believes will be great. DEL explained that it receives 21,000 applications each year. The dissent believes that it is inevitable with that number of applications that others, like Fields, will also argue they are rehabilitated despite their convictions for disqualifying crimes. As such, the DEL will be forced to make a choice each time a person claims to be rehabilitated: It can provide individualized hearings to everyone who makes this claim, including people with disqualifying convictions for child molestation and child rape, as Fields advocated for at oral argument; or it can deny individualized hearings to other applicants, in which case this court may decide that this violates their procedural due process rights. Furthermore, the dissent reasons that by holding that Fields was denied procedural due process in this case, the lead opinion will require the agency to consider the argument that its own rule is unconstitutional as applied. But DEL's regulations do not allow parties to make constitutional claims in the administrative process for good reason: questions of constitutionality are best left to the courts. The dissent believes that by expanding the bounds of procedural due process, the lead opinion "invites a flood of litigation." Some applicants who are clearly disqualified will file suit, and a superior court will have to determine whether or not the applicant is in the same situation as Fields, or a sufficiently similar situation, to demand the same relief. The dissent notes that even if these decision could be easily made, having to hear these new challenges would impose a large burden on DEL and the court system. The dissent believes that although DEL's disqualification rule may be both under and over inclusive in certain instances, it provides the

clear advantage of avoiding the time and expense of individualized hearings in each of these cases. In sum, the dissent would find that Fields' procedural due process claim fails because, as the lead opinion admits, there is no risk of erroneously applying the law at issue here, and the burden on the state of granting individualized hearings would be great.

As for Fields' substantive due process claim, the dissent notes that when applying the rational basis test, the courts do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have a legitimate reason for acting as it did. The dissent continues stating that if it is at least fairly debatable that the government's conduct is rationally related to a legitimate government interest, then there has been no violating of substantive due process. The dissent states that in this case the question is whether there could be a rational basis for permanently disqualifying Fields based on her robbery conviction without giving her an individualized hearing. The dissent reasons that although it is not a guarantee that a robbery conviction means a person will pose a danger to children and it may be true that Fields in fact does not pose a danger to children today, under the rational basis test, the court need only find that DEL could have a rational basis for acting as it did. The dissent concludes that DEL's disqualification regulations are a reasonable means to advance the state's legitimate interests. The dissent believes that it is not irrational for DEL to conclude that because Fields has committed a violent crime that she has demonstrated an impulsivity and a willingness to hurt another human such that she should be categorically barred from work in childcare facilities. The dissent observes that Fields "has failed to meet her heavy burden under the rational basis test to show that DEL's decision to permanently disqualify her based on her robbery conviction is not even rationally related to the State's strong interest in protecting children and avoiding the administrative expense of holding an individualized hearing." Based upon this, the dissent states that it would hold that Fields has failed to show that the DEL rule is an unconstitutional violation of her substantive due process rights.

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**Matter of Kittitas Cty. for a Declaratory Order v. Washington State Liquor and Cannabis Bd.,
8 Wn. App. 2d 585, 438 P.3d 1199 (2019)**

By William Pardee

In December 2013, Kittitas County (the County) notified the Washington State Liquor and Cannabis Board (the Board) of its objection to a license application for a marijuana producer/processor operation. The objection was based solely on the location of the operation. Marijuana production and processing is permitted in the County only “in certain land use zoning designations” and “under strict conditions.” The Board granted the license over the County’s objection. In correspondence to the County, the Board indicated that it could not base its denial of an application on local zoning laws.

In response, the County petitioned the Board under RCW 34.05.240 for a declaratory order. The County argued that the site-specific nature of marijuana licenses means that licensing decisions are subject to local zoning regulations. In response, after issuing a notice of proceedings and receiving input from numerous cities and counties which generally supported the County’s position, the Board determined that neither the marijuana licensing statute nor the Growth Management Act (GMA), chapter 36.70A RCW, required its adherence to “all local zoning laws and land use ordinances prior to granting a license.”

The County successfully appealed the Board’s decision to the Kittitas County Superior Court. In reversing the Board’s decision, the superior court ordered the Board to “only approve those licenses which are in compliance with local zoning.”

On appeal, the County argued that the GMA requires the Board to deny marijuana licenses to marijuana producers, processors, and retailers whose site locations are in areas with local zoning restrictions. The County reasoned that, because the Board is a state agency, RCW 36.70A.103 requires it to adhere to local zoning restrictions when it issues site-specific marijuana licenses. In response, the Board stated that RCW 36.70A.103 applies only to actions taken by a state agency acting in its proprietary capacity as the developer or operator of a public facility site. Based upon this, the Board reasoned that because licensing decisions, even if site specific, do not involve a state agency acting in its proprietary capacity, RCW 36.70A.103 is inapplicable.

The court concluded that the plain language of RCW 36.70A.103 favored the Board’s approach, because that statute is concerned with governmental agencies involved with siting public facilities, a view supported by WAC 365-196-530(2), a Department of Commerce regulation. But, the court noted, nothing in that statute suggests state agencies must be concerned with local zoning restrictions when

engaged in purely governmental functions, such as determining the appropriateness of a state license. The court noted that the GMA merely “implies” that governmental agencies “should take into account” growth management programs when engaged in “discretionary decision making.” WAC 365-196-530(4).

As to the Board’s decision to issue marijuana licenses, the court concluded this was not a siting activity, and even though such licenses are location-specific, they do not confer final authority to actually open a marijuana site. The Board’s regulations specify that a license holder must comply with local laws—including zoning requirements—before going into business. WAC 314-55-020(15). The court observed that zoning laws remain in full force regardless of whether a license is issued, the Board’s decision to license a business in a zoning-restricted area may mean the license will have little utility, and nothing in the limited nature of the Board’s license changes local development plans or undermines the GMA’s policy of coordinated development.

In response to the County’s claim that the state marijuana laws (RCW 69.50.331(7) and (10)) themselves require the Board to adhere to local zoning rules in issuing licenses, the court concluded that the County’s reliance on those laws was misplaced. The court stated this statute only requires communication with local governments, but not compliance with local zoning laws. The court observed that if the legislature intended to require the Board to adhere to local zoning laws, it would have done so directly (citing RCW 69.50.331(8)(c)). Moreover, the marijuana licensing statutes sets forth numerous circumstances requiring license denial, but noncompliance with local zoning standards is not among them. RCW 69.50.331(1)(b), (2)(b), and (8).

The court also pointed that although normally a licensee’s failure to begin operations within 24 months of licensure will result in license forfeiture (RCW 69.50.325(3)(c)(ii)(B)), under a 2017 amendment a licensee who is unable to open a business due to zoning restrictions is protected from the forfeiture rule. RCW 69.50.325(3)(c)(v). The court reasoned that by adopting such protections for those who cannot begin operations because of zoning restrictions, “the legislature recognized that the Board’s licensing decisions are not dependent on zoning regulations,” but rather “the legislature’s action indicates an understanding that a licensing decision is separate and apart from zoning compliance.”

In conclusion, the court stated while there appeared to be broad support for imposing zoning restrictions on the Board’s licensing authority, “this is a matter that must

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be taken up by the legislative or rule-making process. It is not a matter to be resolved by the judiciary.”

Kunath v. City of Seattle,
___ Wn. App. 2d ___, 444 P.3d 1235 (2019)

By William Pardee

In July 2017 Seattle enacted an ordinance imposing an income tax on high-income residents. Individual taxpayers earning more than \$250,000, and married taxpayers earning more than \$500,000, were required to pay 2.25 percent of all income over those thresholds.

Four separate lawsuits were brought to enjoin enforcement of the ordinance. The superior court granted summary judgment for the tax opponents, concluding that no statute gave Seattle the authority to levy an income tax, and even if it had the authority, RCW 36.65.030 prohibited it from levying a net income tax. Seattle and the Economic Opportunity Institute (EOI) appealed the court’s grant of summary judgment.

The court noted that after 1930, article VII, section 1 of the state constitution required that “all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word ‘property’ as used herein shall mean and include everything, whether tangible or intangible, subject to ownership.”

The court stated that beginning in *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), as to the comprehensive definition of property in the constitution, the court classified income as intangible property under article VII, section 1, and that a tax upon income is a tax upon property. The court noted that given *Culliton* and its progeny, it is no longer subject to question that income is property.

The court observed that RCW 35.22.280(2) explicitly grants first-class cities, like Seattle, the authority to levy a property tax on real or personal property for municipal needs. Because income is property, Seattle possessed valid statutory authority to levy a property tax on income. But the tax opponents argued that legislature constrained its grant of taxing authority to Seattle by enacting RCW 36.65.030, which prohibits any “county, city, or city-county” from levying “a tax on net income.” Seattle and EOI insisted that the statute was inapplicable because Seattle’s ordinance taxed “total” income rather than “net” income.

The court stated that because RCW 36.65.030 does not define “net income,” it looks to the dictionary. Because Seattle’s net income tax measured a city resident’s taxable income based on the sum of net

calculations, it was a net income tax for purposes of RCW 36.65.030, and therefore fell within its prohibition.

But the court concluded that the prohibition in RCW36.65.030 was irrelevant, however, because that statute itself was unconstitutional, because the legislation that enacted it, Substitute Senate Bill (SSB) 4313, violated article II, section 19 of the state constitution. Article II, section 19, states that “no bill shall embrace more than one subject, and that shall be expressed in the title.” After reviewing extensive case law, the court stated that the several subjects of SSB 4313 lacked a unifying theme and because it was impossible to assess whether the broad prohibition on net income taxes would have passed without the bill’s unrelated provisions, the court held that SSB 4313 violated the single subject rule in article II, section 19. Accordingly, the court held that chapter 36.65 RCW, which was enacted in its entirety by SSB 4313, is unconstitutional.

That said, having addressed the statutory questions surrounding Seattle’s authority to levy a net income tax, it then considered whether its tax was unconstitutional. The court reiterated that article VII, section 1 contains a comprehensive definition of “property” and requires that all taxes be uniform on the same classes of property. Under Seattle’s graduated taxing scheme, income is broken into two classes and taxed at different rates depending on its classification. For example, the court reasoned, all individual income above \$250,000 is taxed at a rate of 2.25 percent, and all income at or below \$250,000 is not taxed at all. The court held that this is nonuniform taxation levied upon income, a single class of property. Whether authorized by RCW 35.22.280(2) or not, the court held that Seattle’s graduated income tax violated the uniformity clause in article VII, section 1 of the state constitution, and is unconstitutional.

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