LEGAL UPDATE

MASLA Summer Conference

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NEW LAWS

Chapter 56 of the Laws of 2022

- Effective until June 30, 2023. RSS Law §211 had a new subdivision (9) added to it. This allows reemployment of retirees without any diminution in pension. According to the new law, "notwithstanding 211 or 212, or any other law, a school district or BOCES may employ a retired person in a position **without any effect on his or her status** as retired and without suspension of pension benefits or diminution of retiree earnings. This brings up some interesting questions. For example, entering a three year contract with a superintendent with a traditional salary. This is fine but what if this law does not get renewed after June 30, 2023.

Chapter 138 of the Laws of 2022

- **DHR**: Toll free hotline for complaints of workplace harassment. The new laws mandated DHR to establish a toll free number for confidential reporting of workplace harassment. The hotline will provide callers attorney advice on what their rights are and advice on specific remedies.
- Became effective July 14 (last Thursday).

Chapter 139 & 140 of the Laws of 2022

- **Chapter 139**: Includes NYS and elected officials under the purview of the NYS DHR.
- **Chapter 140** : New provision of the Human Rights Law (296(7) of Executive Law) which includes as **retaliation** the **disclosure of an employee's personnel files** because (s)he has opposed any practices forbidden by the HR law. The change clarifies disclosure of personnel records in an effort to discount victims of workplace harassment or discrimination is a retaliatory action.

Along with the DHR

- Complaints filed after 10-12-21, the Division will no longer issue Commissioner's Orders discontinuing complaints after private settlements.
- "*This change is being made in the public interest for increased transparency and good governance regarding settlements. Oftentimes, when a complainant retains private counsel and the matter settles, the parties enter into private settlements - meaning the terms of the settlement are not disclosed in a written agreement available to either the Division or the public. Nearly half of all post-probable cause settlements are private settlements without any public record of the terms of the settlement*."

DHR (con't)

- Previously, when you reached settlement you sought an order from the DHR Commissioner confirming the matter is resolved. Now for anything filed after 10-12-21 where discontinuance is requested, the complainant's attorney must submit a written statement explained the request for discontinuance. The Division is clear that a discontinuance, and Commissioner's Order, will no longer be granted for private settlements. Instead, to proceed with a settlement, the parties may either settle through a public Order after stipulation that includes the agreed upon terms or proceed through the Division's public hearing process.

Chapter 172 of the Laws of 2022

- Extends for another year the provision under New York Education Law that permits voters to use the risk of contracting COVID-19 as the basis for obtaining absentee ballots.
- Extension will be in effect until **January 1, 2023.**
- Qualified voters for the 2022 School District Elections and Budget Vote can now apply for an absentee ballot based on the risk of contracting COVID-19. Former Governor Cuomo signed a bill amending Section 2018-a by adding the following to the definition of illness: "*instances where a voter is unable to appear personally at the polling place of the school district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public*." N.Y. Educ. L. § 2018-a(2).

Chapter 201 of the Laws of 2022

- This is an extender of a law put in place in 2021-2022 for APPR and tenure appointments.
- In 2021 the Legislature limited the ability of school districts to use APPR reviews to determine tenure decision in light of Covid related issues.
- The Legislature extended that this year recognizing challenges with conducting APPR reviews of teachers and principals.

Chapter 227 of the Laws of 2022

- **Alyssa's Law**. Requires all schools in the state to consider **silent panic alarm systems** as elements of stricter school safety plans. Districts will now consider the variables involved in implementing the law. Amends Ed Law 2801-a requiring schools to CONSIDER as part of the annual review of comprehensive district wide safety plans installation of a panic alarm systems. This would be a silent alarm generated by manual activation intended to signal life-threatening or emergency situations requiring a response.

Chapter 228 of the Laws of 2022

- Amends NYS Election law to provide for **stray marks** or writings on absentee ballots are not the basis for voiding the ballot so long as the express intent of the voter is unambiguous.

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Chapter 234 of the Laws of 2022

- This extended the leave provisions in NYS Civil Service Law to December 31, 2023.
- This is the new section 159-c of the Civil Service Law which allows up to **four hours leave time** for Covid Vaccinations.
- Issues for us may be the negotiability of the leave – can we mandate it occur to the largest extent possible after hours so we don't have to accommodate and get substitutes?

NYS Social Services Law §367-w

- **Nurses Bonuses**: Provides for bonuses to certain healthcare and mental hygiene workers in P-12 schools (public and non-public), preschool programs, higher education, etc., as part of 2023 Fiscal Year Budget. The goal is to recruit, retain and rewarded health care and mental health workers.
- Employed continuously for six (6) months between 10-1-21 through 3-31-24. Bonuses will begin 2023. Bonuses cannot offset wages already due.

Nurses Bonuses (con't)

- Bonuses will range from around $500 to $1,500 per vesting period, based on the average number of weekly work hours during the vesting period.
- Use of leave time and accruals, including unpaid leave under the Family and Medical Leave Act, must be credited toward and included in the calculation of the average number of hours worked per week over the course of the vesting period.
- 2 Vesting periods: There will be a $500 bonus per vesting period for employees working 20-30 hours per week, a $1,000 bonus for employees working 30-35 hours per week, and a $1,500 bonus for employees working 35 hours or more per week. An employee may not receive more than a total of $3,000 in bonus payments across all employers.

COMMISSIONER DECISIONS

SED Formal Opinion of Counsel 240 (July 11, 2022)

- Ed Law 3023 requires all school districts & BOCES to **insure** student teachers and not rely on higher education institutions to do so.
- This came up because some school districts insisted that the higher education institutions insure student teachers. SED said this is contrary to the plain language of the statute which it says, "*the duty ... to save harmless and protect" candidates on school districts alone. School districts have no authority to impose a requirement in excess of statute. And even if they did, an insurance requirement for high education institutions is an unnecessary impediment to the prompt placement of student teachers*."

Incidental Teaching

- In December the BOR made permanent the regulatory amendments to allow for incidental teaching.
- The temporary measure allowed incidental teaching to increase from 5 classroom hours a week to 10.
- This allows teachers to teach in an area they are not certified in when no certified or qualified teachers are available after extensive and documented recruitment. In December 2020, the Board allowed a district or BOCES to employ certain substitutes to be employed more than 40 days during the 2020-2021 school year. This allowed them to be employed up to an additional 50 days (90 total) after good faith effort to find a certified person. There were also provisions made for employment beyond 90. At the October 2021 meeting the Board permanently adopted this flexibility for 2021-2022.
- **They now did it for 2022-2023.**

Appeal of D.S. (Holland Patent Central School District), Decision No. 18,072 (January 24, 2022)

- Petitioner challenged the district's decision to impose discipline on his daughter. The Commissioner sustained the appeal, finding that both the short-term and long-term suspensions must be expunged.
- The petitioner's daughter is a high school student who consumed a gummy in school. Later that day, while doing schoolwork, her heart began beating very fast, her arm became numb and she "couldn't really talk." She went to the nurse and the nurse saw some signs consistent with cannabis use.
- The high school principal investigated and learned from the distributor that the gummies were infused with THC. The student claimed she didn't know the gummies were infused with THC.
- The student was charged with the following narrative description: "[*L.B.] took an edible that was infused with THC. [L.B.] got the edible from another student and took it in the hallway. It was reported by the student that handed it to her, that she told [L.B.] what it was before she ate it*."

Appeal of D.S. (Holland Patent Central School District), Decision No. 18,072 (con't)

- The Commissioner admonished the district to carefully consider the language of student disciplinary charges before charging students with misconduct.
- The Commissioner also could not discern from the record whether or not there was competent and substantial evidence that the student engaged in the conduct as charged, as the hearing officer set forth only summary findings and did not include any reasoning or findings of fact in his recommendation.
- Different witnesses described the gummies inconsistently, ranging from edibles, to gummies to infused gummies. Because the hearing officer did not determine on the record which witnesses were credible, the Commissioner couldn't find any response to be of more probative value than the others. The testimony regarding the smell of the gummies was also inconsistent.
- The Commissioner admonished the district to ensure that the trier of fact in student discipline proceedings judges the demeanor and character of witnesses before him or her and makes credibility determinations as necessary.

Appeal of J.R. (Lyons Central School District), Decision No. 18,091 (February 17, 2022)

- The petitioner appealed the district's decision to impose discipline on her child. The Commissioner sustained the appeal.
- The student was charged with possession of a vaping pen/vaping substance; attempted sale of drugs and subsequent retaliatory behaviors. The student admitted possession of the vaping pen/substance, but denied the other two charges.
- The hearing officer found the student guilty of possessing the vape pen/vaping substance based on his admission and found him guilty of the attempted sale of drugs charge based on the principal's testimony. (He was not found guilty of retaliatory behaviors).
- The Commissioner determined that the district improperly denied the petitioner's request to subpoena certain witnesses (i.e., the drug buyer's parent and the police officers who investigated the alleged attempted sale of drugs) and that the charge of attempted sale of drugs accordingly had to be expunged from the record, as the testimony of the parent and police officers, if sufficiently probative, could have led a reasonable factfinder to find the student not guilty of the charges.

Appeal of J.R. (Lyons Central School District), Decision No. 18,091 (con't)

- Because the record supported a finding of guilt only on the charge of possession of a vaping pen/vaping substance, the Commissioner found the approximately 7-month suspension to be shocking to her sense of fairness. Given that the student had already served the entire suspension, the Commissioner found that retroactive amendment to reflect a lesser penalty would be inaccurate. She accordingly found that due to the passage of time, the possession of the vaping pen/vaping substance charge should also be expunged from the student's record.
- The Commissioner interestingly noted that this appeal was **one of several recent appeals resulting in the expungement of long-term suspensions based upon inadequate proof**. She cautioned that school districts should carefully consider the nature and quality of proof against students before pursuing long-term suspensions.
- Notably, the Commissioner failed to find that the district's timeline in resolving petitioner's appeal was unreasonable. The district took 68 days to render a decision on her appeal. There was no district rule or policy, however dictating when a decision resolving an appeal to the board must be rendered.

From the Commissioner

- *"This is one of several recent appeals resulting in the expungement of long-term suspensions based upon inadequate proof [internal cites omitted] or procedural violations [internal cites omitted)]. While the parents ultimately prevailed on appeal, these are pyrrhic victories for parents whose children were improperly suspended for weeks or months. School districts should carefully consider the nature and quality of proof against students before pursuing long-term suspensions. Should they choose to proceed, school districts must ensure the assiduous protection of students' due process rights."*

COMMISSIONER ON DIGNITY FOR ALL STUDENT ACT

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Appeal of I.I. (Washingtonville Central School District), Decision No. 18,082 (January 31, 2022)

- Petitioner appealed the district's determination that her child was not subjected to bullying or harassment in violation of DASA. The Commissioner dismissed the appeal.
- Her son was cut from varsity soccer as a junior and as a senior and the petitioner alleged it was due to bullying, harassment, and racial discrimination. One of her claims was that the coach did not acknowledge her son when crossing paths in the hallways and on the soccer fields.
- The District's DASA coordinator investigated the complaint, interviewing numerous individuals—including petitioner, the student, and three coaches (one of whom was the coach about whom petitioner complained).
- Concluding that there was no evidence to support a finding of bullying, harassment, or discrimination. The Commissioner noted that a district's DASA determination will only be reversed upon a showing that it was arbitrary or capricious.

Appeal of John and Jane Doe (Boquet Valley Central School District), Decision No. 18,088 (February 15, 2022)

- An eighth grade student made a comment about self harm. Another student suggested the comment was attention seeking. The student's parents filed a complaint stating that the other student had bullied the student since fifth grade.
- The petitioners challenged the district's determination that no violation of DASA occurred.
- The Commissioner dismissed the appeal, finding that the parents did not meet their burden of demonstrating that the district's DASA determination was arbitrary or capricious. School officials immediately responded to petitioners' DASA complaint and investigated. In the course of its investigation, the district interviewed over a dozen witnesses, including the student, student who allegedly made the comment, the parents, teachers, and staff members. These interviews did not yield any evidence of bullying, harassment, or discrimination. Moreover, the interviews with alleged offender and other student witnesses did not support the student's account of the exchange. Notwithstanding these conclusions, the district voluntarily developed a **safety plan** for the student, encouraged separation of the student from the alleged offender, and encouraged the student to continue to visit her school counselor for support.
- Notably, the Commissioner stated that if the parents or the student is dissatisfied with the current safety plan, she encouraged the parties to work collaboratively and develop a safety plan that promotes the best interests of the student.

COMMISSIONER & RECALL RIGHTS

Appeal of Blitz (Watkins Glen Central School District), Decision No. 18,112 (April 25, 2022)

- Former assistant principal/coordinator of special education (who was in the tenure area of school district administrator) who was laid off, challenged decision of district not to recall her to a high school principal position.
- The Commissioner dismissed the appeal, finding that that the two positions were not in the same tenure area and were not sufficiently similar, as required by the Education Law – i.e., that more than 50% of the duties of the new position are those which were performed by the petitioner in his/her old position.
- The district's former high school principal outlined in substantial detail how most of the duties of the high school principal were not required or performed by petitioner in her former position. Petitioner did not respond or prove otherwise.

Appeal of Wheeler (Fairport Central School District), Decision No. 18,083 (January 31, 2022)

- Former Assistant Superintendent for Instruction who was laid off challenged the district's decision not to recall her to the new Deputy Superintendent for School Improvement and Community Engagement position.
- The Commissioner dismissed the appeal, finding that that the two positions were **not in the same tenure area and were not sufficiently similar**, as required by the Education Law – i.e., she found there was **no proof that more than 50%** of the duties of the new position were those which were performed by the petitioner in his/her old position.
- District submitted affidavits demonstrating that the deputy role is a higher-level administrative position with a broader scope of duties than the assistant superintendent position. The Commissioner agreed that while both positions have at least some district-wide responsibilities for educational programming, the deputy superintendent has numerous additional duties related to fiscal sustainability and facilities planning. Moreover, the scope of community engagement required by the deputy superintendent position is much broader than the community engagement of the former ASI position.

BOARD MEMBER REMOVAL

Appeal of Williams (Greenburgh Central School District), Decision No. 18,116 (May 2, 2022)

- Board member served on the board from July 2002 until he was removed on June 29, 2021.
- On March 25, 2021, the board brought five charges against him for official misconduct pursuant to Education Law § 1709 (18). The charges alleged:
  - unauthorized exercise of power by deliberately obstructing the board's recruitment of a superintendent;
  - disclosure of confidential information from executive session;
  - disclosure of a student's personally identifiable information;
  - a pattern and practice of attacking board colleagues and disrupting board meetings; and
  - violations of the code of conduct and rules for board members.
- A hearing commenced before a duly appointed hearing officer on April 27, 2021 and concluded on May 17, 2021. Petitioner was not reelected to his seat during the annual school board election that took place on May 18, 2021.

Appeal of Williams (Greenburgh Central School District), Decision No. 18,116 (con't)

- The hearing officer issued a report sustaining all five charges against the board member and recommending his removal from the board. The board adopted the findings and removed the board member from office.
- The former board member challenged the removal and the commissioner dismissed the appeal. The Commissioner found that the district presented sufficient evidence to support the board member's removal based on his engagement in a pattern and practice of attacking board colleagues and disrupting board operations. The hearing officer also found that "such behaviors ... interfered with and compromised the [b]oard's effectiveness and ability to function."
- The Commissioner stated that the former board member's conduct is "**emblematic of the incivility that has roiled school communities as of late. His colleagues, district staff, and the students and families deserve better**."
- The Commissioner stated that "Amidst the struggles and difficulties of the pandemic, we cannot lose sight of the fact that our children are watching and learning from our behavior. For the sake of generations to come, we must all look inward, reflect on our own actions, and ask ourselves whether we are setting the example we want our children to follow."

Appeal of Corbia (Port Chester-Rye Union Free School District), Decision No. 18,092 (February 28, 2022)

- Board member was elected to the board in June 2020 to serve a three-year term. In September 2020, two posts appeared on Facebook belonging to petitioner.
- The first, which was posted by another individual but "shared" by the board member, referenced "illegal immigrants." The second, which the board member commented on in approval, made reference to a "white privilege card."
- The board member claimed that his Facebook account was hacked, but then he refused to cooperate with the board's investigation.
- The board charged the board member with 5 counts of official misconduct and sought his removal from office. These counts centered on two acts of misconduct: (1) refusing to participate in, and actively thwarting, the board's investigation; and (2) disclosing confidential information in the form of the unredacted ethics committee report to his attorney.

Appeal of Corbia (Port Chester-Rye Union Free School District), Decision No. 18,092 (con't)

- The board member contended that his social media postings were protected by the First Amendment and could not serve as grounds for his removal.
- He further alleged that he had "no obligation whatsoever to provide evidence against himself" by cooperating with respondent's investigation or providing his personal cellphone for analysis and that he did not disclose confidential information by forwarding the ethics committee report to his attorney.
- The Commissioner affirmed the board's determination on the charge that the board member failed to cooperate with, and thwarted the aims of, its investigation.
- She agreed with the hearing officer's analysis of this course of action, which he characterized as "willfully, intentionally, and wrongfully imped[ing] an investigation directed and authorized by the Board of Education ...."
- The Commissioner found that removal was warranted, as the board member **intentionally exercised his powers to the detriment of the school district**.

PERB DECISIONS

Matter of Improper Practice Proceeding between *Social Service Employees Union and NYC* (15 OCB2d 18) (June 1, 2022)

- Union claimed the City violated the Act when it unilaterally implemented staffing and scheduling changes affecting the City Youth Development Specialist employees assigned to the Family Court detention rooms.
- PERB found the staffing and scheduling changes could be made and are not mandatory topics. Notably, the Union made no specific factual allegations of the practical impact. This persuaded the Board.

Matter of Improper Practice Proceeding between Social Service Employees Union and NYC (15 OCB2d 18) (June 1, 2022)

- Scheduling work is not a mandatory subject of bargaining
- Management has the right to assign work in a way that it deems necessary to maintain the efficiency of government operations
- Hours are mandatory and must bargain total number of hours employees work per day or per week.
- Absent a limit in a CBA the City may take unilateral action in these areas.
- Here the start and end times were altered but total hours were not. Nothing in the CBA limited managements right to alter start and end times.

Matter of Scherer v East Ramapo Teachers Association and East Ramapo CSD (Case U-37067 (11-10-21)

- Scherer, a summer school PE teacher filed IP against the union claiming it failed to represent her when the District hired her but then terminated her after realizing the summer school position was owed to a teacher on PEL. The PEL teacher was called after Scherer was hired. He accepted so Scherer was terminated. She actually resigned prior to being let go.
- Scherer claimed the union failed to assist her in filing a grievance or improper practice charge. She filed a duty of fair representation charge.

Matter of Scherer v East Ramapo Teachers Association and East Ramapo CSD (Case U-37067)

- Sustaining the charge, Judge Strauss the union did owe a DFR to Scherer even though she was a summer school teacher and later resigned.
- Judge Strauss did not dispute that the union could decide not to file a grievance for Scherer. BUT, found it failed its duty under the Act for failing to inform Scherer of that decision. PERB has found unions must respond to reasonable inquiries from bargaining unit members.
- Also found the DFR flows to one who was a union member at the time the act giving rise to a possible grievance occurred. Even if the person is no longer a member.

CASELAW

Forman v. New York City Dep't of Educ., 2022 U.S. Dist. LEXIS 57739 (S.D.N.Y. 2022).

- Forman was hired as a teacher in a school in NYC back in 2014. Soon after he started comment was made to him by an assistant principal that he spent too much time on union activity. A year later he was told by a different AP that something might happen to him if he ran for Chapter leader of the union. A year later he decides to run for UFT chapter leader. He was elected. Three months later he was working on a grievance for a member. Then formulates a group of students to file a safety complaint. His APPR in 2015-16 comes back with some developing on it.

Forman v. New York City Dep't of Educ., 2022 U.S. Dist. LEXIS 57739 (S.D.N.Y. 2022).

- Forman claims the APPR is retaliatory and sues under 1983.
- He alleges:
  1. He was not hired to teach at [*27] DOE after the 2017-2018 school year, [Provided NO evidence]
  2. Deactivated school email account after he went on voluntary leave in August 2016, [NOT adverse employment action. This would not dissuade a reasonable employee from exercising constitutional rights]
  3. He received a "developing" rating in his annual review for the 2015-2016 school year. [Even if timely, bad observations cannot be viewed as retaliatory. And they are not adverse. Without more there is no impact on salary, benefits etc. So, this is not retaliatory.]
  4. NYC created a hostile work environment that forced him to resign after reaching the limit on years of voluntary leave. [A constructive discharge occurs "when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. He fails to do this.]

Forman Take-Aways

- APPR bad observation is not alone retaliatory or even negative employment action
- Restricting employee access to school or email is not negative employment action.
- Hostile work environment is more than just taking an employee to task for what we perceive as improper conduct.

Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville CSD (2022 NY APP Div LEXIS 3460; Slip 03566 (June 2, 2022)

- Petitioner United Jewish Community of Blooming Grove, Inc. is a not-for-profit corporation that provides services to Jewish families in Orange County. Petitioners Joel Stern and Yitzchok Ekstein reside within respondent Washingtonville Central School District and send their children to nonpublic schools in the Village of Kiryas Joel.
- Although the District provides school bus transportation to resident students who are enrolled in nonpublic schools, it does so only on days when public schools are in session. Given that nonpublic schools, at times, observe different holidays and school breaks than public schools, there are days throughout the school year when the District does not provide transportation to nonpublic school students even though their schools are in session.
- The District's policy on this issue is consistent with guidance posted by SED), specifically, an online handbook on transportation of students enrolled in nonpublic schools

Matter of United Jewish Community of Blooming Grove, Inc

- On two occasions during the 2020-2021 school year, counsel for petitioners wrote to the District, requesting that it provide bus transportation for students of nonpublic schools in Kiryas Joel on days when those schools were in session but the public schools were closed.
- Washingtonville denied. Petitioners sued seeking declaration that school districts are required to transport nonpublic school students on **all days that their schools are open** and that SED's guidance to the contrary is invalid, together with a permanent injunction preventing the District from denying transportation to nonpublic school students on those days.

Matter of United Jewish Community of Blooming Grove, Inc

- Supreme Court granted summary judgment and awarded to the petitioners.
- Appellate Division **REVERSED**!
  - Education Law § 3635(1)(a) permitted, but did not require, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools were closed
  - The Legislature could not have intended to require school districts to transport nonpublic school students in the summer, on weekends, on state or federal holidays, or on days when public schools are closed for weather-related or other emergency reasons, none of which would be foreclosed by Supreme Court's interpretation.
  - HELD: Education Law § 3635 (1)(a) permits, but does **not require**, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools are closed.

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

CONCISE FACTS: Joseph Kennedy, a high school football coach, engaged in prayer with a number of students during and after school games. His employer, the Bremerton School District, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause. Kennedy refused and instead rallied local and national television, print media, and social media to support him.

Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964. The district court held that because the school district suspended him solely because of the risk of constitutional liability associated with his religious conduct, its actions were justified. Kennedy appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

- **ISSUE**: Is a public school employee's prayer during school sports activities protected speech, and if so, can the public school employer prohibit it to avoid violating the Establishment Clause?
- **HELD**: Yes. No. The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. Justice Gorsuch authored the majority opinion of the Court.

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

- **RATIONALE**

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

- **Rationale**
  - Merger of free speech, free exercise and establishment.
  - Eschews the lemon test: (1) must have a secular purpose, (2) must have a principal or primary effect that does not advance or inhibit religion, and (3) cannot foster an excessive government entanglement with religion.
  - Applies strict scrutiny in assessing Kennedy's free exercise and speech rights and finds the government rationale for restricting them is not sufficient.

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

- A policy can fail this test if it "discriminate[s] on its face," or if a religious exercise is otherwise its "object." *Lukumi*, 508 U. S., at 533; see also *Smith*, 494 U. S., at 878. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions."

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

- "*In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character*."
- Noted that the religion and free speech clauses are in the same sentence of the 1st Amendment so they must be intertwined. Applying *Garcetti* and *Pickering* it was agreed his was private speech. The question then was did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

- They decide it is private speech. They rely on the fact that post-game coaches can attend to other personal matters so how then could his presence on the field be anything but private. "*We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech*."
- Court reverts to a strict scrutiny test and even says it does not matter if this is an Establishment or Free Exercise case. Same analysis applies and fails.

Kennedy v Bremerton 2022 U.S. Lexis 3218 (2022)

Take-Aways

1) Lemon Test is dead.
2) Look at establishment and free exercise together. Analyze if what an employee is doing is:
    i. Coercive
    ii. Involves free speech
    iii. Has a history or long standing underpinning
    iv. With (iii) consider if it was known or in the shadows.
3) What is next? Satanists on the field? teacher davening and shuckling before class? dress codes?

Glimmers of Hope

- First Amendment
- Inflation
- SED Appeals

Questions? Comments?

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