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7 **BEFORE THE DIRECTOR OF THE**
8 **DEPARTMENT OF LABOR AND INDUSTRIES**
9 **STATE OF WASHINGTON**

9 In the Matter of:

No. 2020-018-FCA

10 Alaska Airlines, Inc.,

DIRECTOR'S ORDER

11 Petitioner.

12 OAH Docket No. 06-2019-LI-01106

13 Infraction No. PL-13-12
14

15 Joel Sacks, Director of the Washington Department of Labor & Industries, having
16 considered the petition of administrative review filed by Alaska Airlines, Inc. (Alaska), filings
17 submitted to the Director's Office, and having reviewed the record created at the Office of
18 Administrative Hearings, issues this Director's Order.

19 The Director makes the following Findings of Fact, Conclusions of Law, and Final
20 Decision and Order.

21 **I. FINDINGS OF FACT**

- 22
- 23 1. The Department of Labor & Industries (Department) issued an infraction to Alaska on May
24 31, 2012. The infraction alleges a failure to comply with RCW 49.12.270 of the Washington
25 State Family Care Act (FCA) and imposes a civil penalty of \$200.00.
 - 26 2. Alaska timely appealed the infraction on June 20, 2012. Alaska argued the Department
27 lacked jurisdiction to issue the infraction under the Railway Labor Act (RLA), 45 U.S.C. §
151 et seq. It also objected to the Department's interpretation of the FCA.
 3. Before the issuance of the infraction, Alaska Airlines filed a lawsuit in the Western District
Court of Washington, raising its RLA preemption claim. The administrative law judge

1 dismissed Alaska's administrative appeal without prejudice to allow the parties to litigate the
2 preemption question in the federal court.

- 3 4. The Ninth Circuit Court of Appeals issued an en banc decision, concluding that RLA
4 preemption did not apply because the case involved the alleged violation of an "independent
5 state law right," requiring no interpretation of a collective bargaining agreement. *Alaska
6 Airlines, Inc. v. Schurke*, 898 F.3d 904, 926-28 (2018). Alaska Airlines appealed the Ninth
7 Circuit Court ruling, but the United States Supreme Court denied certiorari on April 1, 2019.
8
- 9 5. On June 26, 2019, the Department renewed its request for the assignment of an
10 administrative law judge to resolve the appeal of the infraction on the merits. The parties
11 agreed to a briefing schedule and each party filed a motion for summary judgment.¹

12 The record here supports the following undisputed facts for the purposes of summary
13 judgment:

- 14 5.1 In May 2011, Laura Masserant, a flight attendant for Alaska Airlines asked for time off to
15 care for her son, who was ill with bronchitis. Masserant did not have sufficient banked sick
16 leave available to cover the entire absence, so she asked to use two of her seven remaining
17 days of accrued vacation leave. Masserant had used a portion of her allotted vacation leave
18 earlier in the year and cashed out all but seven days of her leave benefit before her May 2011
19 unscheduled absence. Nonetheless, she had seven days of vacation leave in her leave bank.
- 20 5.2 Alaska denied Masserant's vacation leave request, noting that, in accordance with the
21 Collective Bargaining Agreement (CBA) between the Airline and the Association of Flight
22 Attendants, Masserant had scheduled use of her banked vacation days for December of that
23 year.
- 24 5.3 Alaska provides its flight attendants vacation leave based on the prior year's service. On
25 December 31 of each year, flight attendants become entitled to their yearly allotment of
26 vacation days based on years of service under the CBA. Under the terms of the CBA, flight
27 attendants bid or request when they may take their scheduled vacation days for each calendar
year the preceding fall. Alaska then awards and schedules vacation leave days by January 1
for the ensuing year.
- 5.4 Once scheduled, these vacation days may be "exchanged" between flight attendants, used for
personal medical leaves of absence, used for maternity-related leaves of absence, used for
extended bereavement leave, or "cashed out," with the vacation days kept on calendar, but
converted to unpaid time off. Once her vacation leave was scheduled, Masserant could
choose to receive payment of any or all of the vacation leave benefit with seven days' notice
(taking the pre-scheduled vacation time off as unpaid leave).
- 5.5 Under the CBA, Masserant could not reschedule her pre-scheduled December 2011 vacation
time to cover an unscheduled absence to care for her sick child in May 2011. The language of
the CBA does not specifically address the use of the earned vacation paid leave benefit for
unscheduled family care, but the parties agree that by past practice, Alaska did not allow
employees to reschedule vacation leave for this purpose.

¹ WAC 10-08-135 allows motions for summary for judgment under the APA. In Superior Court matters,
CR 56 governs summary judgment. Where the relevant procedural rules do not conflict with CR 56, it and the cases
interpreting it serve as persuasive authority in the management of summary judgment under WAC 10-08-135.

1 5.6 When a flight attendant calls out sick, or calls out to care for a sick child, Alaska permits the
2 time off, pending only a determination of whether the time off is paid or unpaid, and whether
3 attendance points apply. Alaska terms an employee's unscheduled absence an "emergency
4 drop" and assesses attendance points under its attendance control policy.

5 6. On March 3, 2020, the administrative law judge issued the Initial Order affirming the
6 infraction. Alaska timely filed a petition for administrative review

7 **II. CONCLUSIONS OF LAW**

8 1. Based on Alaska's timely petition for review, there is authority to review and decide this
9 matter under RCW 49.12.285 and RCW 34.05.

10 2. If an employee files a protected leave complaint alleging an employer's violation of the
11 Washington Family Care Act, RCW 49.12.270 through 49.12.295, the Department may
12 investigate. WAC 296-130-040. If the Department finds the employer violated one or more
13 protected leave requirements, it may issue an infraction and civil penalty. RCW 49.12.285.

14 3. The Department issued an infraction to Alaska, alleging Alaska violated the FCA when the
15 company denied Masserant's request to use her banked vacation leave to care for her sick
16 child. The Department assessed a penalty of \$200.00 as provided by RCW 49.12.285.

17 4. In any proceeding to contest a notice of infraction, the state has the burden of proving, by a
18 preponderance of the evidence, that the infraction was committed. WAC 296-130-060.

19 5. There is no issue of material fact to resolve. All facts necessary to resolution of this matter
20 are in the Findings of Fact above and are undisputed, based on a stipulated record and
21 undisputed declarations. The issue now is whether, applying these facts, Alaska committed
22 the infraction as a matter of law.

23 6. RCW 49.12.270 provides:

24 (1) If, under the terms of a collective bargaining agreement or employer policy
25 applicable to an employee, the employee is entitled to sick leave or other paid time off,
26 then an employer shall allow an employee to use any or all of the employee's choice of
27 sick leave or other paid time off to care for: (a) A child of the employee with a health
condition that requires treatment or supervision; or (b) a spouse, parent, parent-in-law, or
grandparent of the employee who has a serious health condition or an emergency
condition. An employee may not take advance leave until it has been earned. The
employee taking leave under the circumstances described in this section must comply
with the terms of the collective bargaining agreement or employer policy applicable to
the leave, except for any terms relating to the choice of leave.

(2) Use of leave other than sick leave or other paid time off to care for a child,
spouse, parent, parent-in-law, or grandparent under the circumstances described in this
section shall be governed by the terms of the appropriate collective bargaining agreement
or employer policy, as applicable.

7. Sick leave or other paid time off includes an employee's vacation time. It means, in pertinent
part: "time allowed under the terms of an appropriate state law, collective bargaining
agreement, or employer policy, as applicable, to an employee for illness, vacation, and
personal holiday." RCW 49.12.265(5); *see also* WAC 296-130-020(8)

- 1 8. To establish a violation of RCW 49.12.270, the Department must establish that the employee
2 was absent from work to care for a qualified individual, that the leave was for a qualified
3 purpose, that the employee had sick leave or other paid time off available, and that the
4 employer did not allow the employee to use that leave for the absence.
- 5 9. The parties agree that Masserant took an absence for a scheduled flight sequence to care for
6 her sick child. It is also undisputed that she took the absence to care for a qualified individual
7 (her child) and for a qualified purpose (an illness requiring supervision). The parties agree
8 Masserant's sick leave bank held an insufficient leave benefit to cover the absence but that
9 she had enough vacation leave to cover it. It is undisputed that Alaska did not allow
10 Masserant to reschedule her pre-scheduled vacation time to care for her child. The parties do
11 not agree about whether Masserant was entitled to the vacation leave benefit to cover this
12 unscheduled absence.
- 13 10. An employee must be "entitled" to sick leave or other paid time off under an applicable CBA
14 or employer policy in order to take that leave under the FCA. RCW 49.12.270(1). "Entitled"
15 means "having a right to certain benefits or privileges." *Merriam-Webster Dictionary*. Thus,
16 an employee is "entitled" to sick leave or other paid time off when the employee has a right
17 to that sick leave or other paid time off.
- 18 11. It is unnecessary to interpret the terms of the CBA governing the Masserant's employment to
19 determine whether Masserant was entitled to sick leave or other paid time off at the time of
20 her absence to care for her sick child.
- 21 12. Masserant was entitled to her vacation leave as of January 1, 2011. It is undisputed that, as of
22 that date, Masserant had earned and received 32 days of vacation leave. She still had a
23 balance of seven vacation days when she made her request to use vacation leave to care for
24 her sick child. The amount of vacation accrual is provided by a formula based on a flight
25 attendant's years of service. Alaska admits that Masserant could cash out her vacation leave
26 (with seven days notice) at any time after January 1, 2011. Pet. 2. Masserant could likewise
27 use her vacation benefit for personal medical leaves of absence, maternity-related leaves of
absence, and extended bereavement leaves of absence. Because Masserant had a right to her
vacation leave in May 2011, she was entitled to use it for family care.
13. Employees taking FCA leave must comply with the terms of the collective bargaining
agreement or employer policy applicable to that leave, "except for any terms relating to the
choice of leave." RCW 49.12.270(1). The advance vacation time scheduling requirement in
this case relates to the choice of leave because, when applied to Masserant and other flight
attendants, it prevents such employees from ever choosing to take leave provided by the
CBA. RCW 49.12.270(1). A term about advance scheduling is a term in a CBA "relating to
the choice of leave" and therefore cannot be applied to prevent the use of leave for a family
care purpose.
14. The plain language of the FCA provides employees the right to use vacation leave for family
care purposes, and it requires employers to permit their employees to use their choice of
"sick leave or other paid time off" to care for covered family members, regardless of any
employer restrictions that might be permissible without the FCA's choice of leave provision.
So the FCA confers on employees the non-negotiable right, independent of CBAs, to choose
to use *any* earned leave provided by a CBA to care for sick family members, irrespective of
any limitations that an employer would attempt to put on that leave—including any limitation
that Alaska might put on a flight attendant's use of leave for the flight attendant's own illness
or any advance scheduling requirements for the flight attendant's vacation. RCW
49.12.270(1); *see also* WAC 296-130-030. Although the statute is unambiguous, the

1 legislative history and the Department's longstanding interpretations of the FCA also support
2 this conclusion.

3 15. Alaska's alternative interpretation would defeat the Legislature's intent to provide employees
4 with access to earned leave for family care purposes. Under the company's interpretation,
5 employers could sidestep the choice of leave provision simply by requiring advance notice
6 for the use of all leave days. This is contrary to the FCA's purpose to promote family
7 stability and economic security.

8 16. Under the FCA, Masserant was entitled to use her earned vacation leave to care for her sick
9 child without disciplinary consequences (such as points under Alaska's attendance control
10 policy). Alaska's refusal to allow Masserant to use her earned vacation leave benefit while on
11 a permitted absence to care for a sick child—and the company's subsequent assessment of
12 disciplinary points—is a violation of the FCA's choice of leave provision.

13 17. An employer found to have committed an infraction under RCW 49.12.270 through
14 49.12.295 may be assessed the maximum penalty of a fine of two hundred dollars for the first
15 noncompliance violation. RCW 49.12.285. An employer that repeatedly violates the terms of
16 the statute may be subject to a fine not to exceed one thousand dollars for each violation.
17 RCW 49.12.285. Alaska has not had a prior final and binding infraction for the same
18 violation. The civil penalty of \$200.00 assessed in the Notice of Infraction is proper.

19 **III. ORDER**

20 Consistent with the above Findings of Fact and Conclusions of Law, the Infraction No.
21 PL-13-12 is affirmed.

22 Dated at Tumwater, Washington this 23 day of December 2020.

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28 JOEL SACKS
29 Director

1 **SERVICE**

2 This Order was served on you the day it was deposited in the United States mail. RCW
3 34.05.010(19).

4 **APPEAL RIGHTS**

5 **Reconsideration.** Any party may file a petition for reconsideration. RCW 34.05.470. Any
6 petition for reconsideration must be filed within 10 days of service of this Order and must state the
7 specific grounds on which relief is requested. No matter will be reconsidered unless it clearly
8 appears from the petition for reconsideration that (a) there is material clerical error in the order **or**
9 (b) there is specific material error of fact or law. A petition for reconsideration, together with any
10 argument in support thereof, should be filed by mailing, or by emailing to
DirectorAppeal@LNI.WA.GOV, or delivering it directly to Joel Sacks, Director of the Department
of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all
other parties of record and their representatives. Filing means actual receipt of the document at the
Director's Office. RCW 34.05.010(6).

11 **NOTE: A petition for reconsideration is not required before seeking judicial review.** If
12 a petition for reconsideration is filed, however, the 30-day period will begin to run upon the
13 resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if,
14 within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the
15 petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the
16 petition. RCW 34.05.470(3).

17 **Judicial Review.** Any petition for judicial review must be filed with the appropriate court
18 and served within 30 days after service of this Order. RCW 34.05.542. Proceedings for judicial
19 review may be instituted by filing a petition in superior court according to the procedures specified
20 in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.
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1 **DECLARATION OF MAILING**

2 I, Lisa Deck hereby declare under penalty of perjury under the laws of the State of
3 Washington, that the AMENDED DIRECTOR’S ORDER was mailed on the 23 day of
4 December 2020 via E-mail and U.S. Mail, postage prepaid, to the following:

5 John Hodges-Howell
6 Mark Hutcheson
7 Davis Wright Tremaine, LLP
8 920 Fifth Avenue, Suite 3300
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9 DATED this 23 day of December 2020 Tumwater, Washington.

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11 
12 _____
13 Lisa Deck