Supreme Court No. 89814-6
Court of Appeals No. 43783-0-II

SUPREME COURT
OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, D/B/A COMMUNITY TRANSIT, Petitioner-Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION, Respondent-Appellee,

and

AMALGAMATED TRANSIT UNION, LOCAL 1576, Respondent - Appellee.

PETITION FOR REVIEW

Shannon E. Phillips, WSBA #25631
Sofia D. Mabee, WSBA #31679
SUMMIT LAW GROUP PLLC
315 Fifth Avenue South, Suite 1000
Seattle, Washington 98104
(206) 676-7000
Attorneys for Petitioner-Appellant
Community Transit

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

A. The Provision at Issue Has Been Part of the Parties' Labor Contract for Thirty Years. 2

B. ATU Sought to Exclude the Provision from Interest Arbitration by Characterizing It as a Non-Mandatory Subject of Bargaining. 4

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 6

A. The Decision of the Court of Appeals is in Direct Conflict with *City of Pasco.* 6

B. The Decision of the Court of Appeals Conflicts with This Court's Decision in *City of Richland.* 8

C. This Case Presents Issues of Substantial Public Interest 11

VI. CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Amalgamated Transit Union Local 1576 v. Community Transit,
No. 10647, 2010 WL 235040 (Wash. Pub. Emp't Relations Comm'n Jan. 14, 2010) 5

Amalgamated Transit Union Local 1576 v. Community Transit,
No. 10647-A, 2011 WL 6026156 (Wash. Pub. Emp't Relations Comm'n November 21, 2011) 5

Amalgamated Transit Union, Local 1576 v. Community Transit,
No. 6375, 1998 WL 1978452 (Wash. Pub. Emp't Relations Comm'n July 23, 1998) 2

Amoco Corp. v. NLRB,
217 F.3d 869 (D.C. Cir. 2000) 8

Bellevue Police Support Guild v. City of Bellevue,
No. 10830, 2010 WL 3283656 (Wash. Pub. Emp't Relations Comm'n Aug. 12, 2010) 3

Int'l Ass'n of Firefighters Local 1052 v. Public Employment Relations Commission,
113 Wn.2d 197, 778 P.2d 32 (1989) ..... passim

Int'l Union of Operating Engineers, Local 286 v. Lakehaven Utility District,
No. 8096, 2003 WL 21419644 (Wash. Pub. Emp't Relations Comm'n June 4, 2003) 3

King County v. Public Employment Relations Commission,
94 Wn. App. 431, 972 P.2d 130 (1999) 10

N.L.R.B. v. American Nat'l Ins. Co.,
343 U.S. 395, 72 S.Ct. 824, 96 L.Ed.1027 (1952) 7, 8

NLRB v. US Postal Service,
8 F.3d 832 (D.C. Cir. 1993) 8

Pasco Police Officers Ass'n v. City of Pasco,
No. 4694, 1994 WL 900086 (Wash. Pub. Emp't Relations Comm'n April 26, 1994),
aff'd, No. 4694-A, 1994 WL 900087 (Wash. Pub. Emp't Relations Comm'n Dec. 1994),
aff'd, Pasco Police Officers Assoc. v. City of Pasco,
132 Wn.2d 450, 938 P.2d 827 (1997) ..... passim

Appendix: *Snohomish County Public Transportation Benefit Area d/b/a Community Transit v. State of Washington Public Employment Relations Commission and Amalgamated Transit Union, Local 1576,* 2013 WL 6671806, (Wash.App. Div. 2, Dec. 17, 2013) (No. 43783-0-II)

I. IDENTITY OF PETITIONER

Petitioner is Snohomish County Public Transportation Benefit Area, d/b/a Community Transit, petitioner-appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

Community Transit seeks review of the decision of Division Two of the Court of Appeals, filed December 17, 2013, in *Snohomish County Public Transportation Benefit Area d/b/a Community Transit v. State of Washington Public Employment Relations Commission and Amalgamated Transit Union, Local 1576,* 2013 WL 6671806, (Wash.App. Div. 2, Dec. 17, 2013) (No. 43783-0-II). A copy of the decision is attached in the Appendix ("App.") at 1-11.

III. ISSUES PRESENTED FOR REVIEW

1. Is the Rules and Regulations provision a mandatory subject of bargaining that may be pursued to impasse?

2. Did the Court of Appeals err in ruling that the Rules and Regulations provision is a "waiver" and thus a non-mandatory subject of bargaining, when this Court in *Pasco Police Officers Assoc. v. City of Pasco*, 132 Wn.2d 450, 938 P.2d 827 (1997), held that the issue of waiver is inapposite when determining whether a subject is mandatory or

permissive; and the appropriate question is whether the provision addresses either wages, hours or working conditions?

3. Did the Court of Appeals err in ruling on a scope of bargaining case without applying the balancing test required by this Court in *Int'l Ass'n of Firefighters Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 778 P.2d 32 (1989) ("*City of Richland*")?

IV. STATEMENT OF THE CASE

A. The Provision at Issue Has Been Part of the Parties' Labor Contract for Thirty Years.

Amalgamated Transit Union, Local 1576 ("ATU") and Community Transit have had a collective bargaining relationship for more than 30 years. Administrative Record ("AR") 1772. The parties' second labor contract, which went into effect in 1979, included a provision that gave Community Transit the right to make changes to its "Rules and Regulations" affecting employees in the bargaining unit. AR 192.

In 1997, the parties litigated an unfair labor practice complaint after Community Transit changed certain standard operating procedures ("SOPs"). *Amalgamated Transit Union, Local 1576 v. Community Transit*, No. 6375, 1998 WL 1978452 (Wash. Pub. Emp't Relations Comm'n July 23, 1998); AR 164. Community Transit asserted that Article 18.2 of the labor contract (then located in Article 19) operated as a

waiver of the duty to bargain changes to SOPs. AR 167. The PERC agreed and dismissed the complaint. AR 168.

According to the PERC, a "waiver" is any language in a contract that allows a party to act unilaterally during the term of the agreement:

> A contractual waiver is language in a valid collective bargaining agreement which gives a party the right to take an action without further bargaining. The general idea is that bargaining has already occurred on the subject during contract negotiations, and the binding agreement is codified in the collective bargaining agreement. If the employer's action is consistent with the waiver language in the collective bargaining agreement, no unfair labor practice will be found.

Bellevue Police Support Guild v. City of Bellevue, No. 10830, 2010 WL 3283656 at *12 (Wash. Pub. Emp't Relations Comm'n Aug. 12, 2010) (citations omitted). "A collective bargaining agreement is, essentially, a collection of documented waivers by the parties of their bargaining rights on issues that they have negotiated and agreed upon." *Int'l Union of Operating Engineers, Local 286 v. Lakehaven Utility District*, No. 8096, 2003 WL 21419644 at *6 (Wash. Pub. Emp't Relations Comm'n June 4, 2003).

The labor contract between Community Transit and ATU that led to the underlying administrative charge in this case expired on December 31, 2007. AR 109. Article 18.2 of that agreement stated:

> The Employer agrees to notify the Union of any changes in the Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except as to Employer administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor agreement.

AR 132. Community Transit proposed retaining Article 18.2. AR 159. ATU proposed changing it. AR 162-163.

B. ATU Sought to Exclude the Provision from Interest Arbitration by Characterizing It as a Non-Mandatory Subject of Bargaining.

On February 5, 2009, ATU filed an unfair labor practice complaint alleging that Article 18.2 was a non-mandatory or "permissive" subject of bargaining and therefore Community Transit could not pursue the provision to impasse. AR 1-3. On February 25, PERC certified the parties for interest arbitration. AR 186. Thereafter, pursuant to WAC 391-55-265, PERC suspended interest arbitration proceedings regarding Article 18.2 until this case is resolved. AR 186-87. If Community Transit succeeds in this appeal, it achieves the opportunity to persuade an interest arbitration panel that Article 18.2 should remain in the contract.

On January 15, 2010, a hearing examiner issued an order in *Amalgamated Transit Union Local 1576 v. Community Transit*, No. 10647, 2010 WL 235040 (Wash. Pub. Emp't Relations Comm'n Jan. 14,

2010). AR 1762. He concluded that because Article 18.2 operated as a waiver in the prior ULP, it was a non-mandatory subject of bargaining on that basis alone. Community Transit appealed. AR 1778.

The PERC affirmed the examiner. *Amalgamated Transit Union Local 1576 v. Community Transit,* No. 10647-A, 2011 WL 6026156 (Wash. Pub. Emp't Relations Comm'n November 21, 2011). CP 10-15. The PERC held, in direct conflict with its prior *City of Pasco* decision (which had been affirmed by this Court)[1] that any language that gives an employer the right to make changes without bargaining during the term of a contract is a "waiver," and thus a non-mandatory subject that cannot be pursued to impasse.

Community Transit filed a Petition for Review in Thurston County Superior Court. CP 4. The PERC declined to participate. CP 20. The trial court dismissed the Petition, concluding that there was no Washington authority addressing the issue of waiver and that the PERC's decision was entitled to deference. CP 105. The Court of Appeals affirmed, deferring to the PERC's view that all waiver provisions are permissive subjects of bargaining.

---

[1] *Pasco Police Officers Ass'n v. City of Pasco*, No. 4694, 1994 WL 900086 (Wash. Pub. Emp't Relations Comm'n April 26, 1994), *aff'd*, No. 4694-A, 1994 WL 900087 (Wash. Pub. Emp't Relations Comm'n Dec. 1994), *aff'd, Pasco Police Officers Assoc. v. City of Pasco*, 132 Wn.2d 450, 938 P.2d 827 (1997).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Decision of the Court of Appeals is in Direct Conflict with *City of Pasco.*

City of Pasco was a PERC case presenting the same question presented here: whether waivers are mandatory subjects of bargaining. Like Respondent ATU, the union in *City of Pasco* argued that the provisions were waivers and therefore non-mandatory subjects of bargaining. *City of Pasco*, 132 Wn.2d 462-63 ("The Association claims waivers of the right to collective bargaining are permissive subjects of bargaining because they are not themselves wages, hours, or conditions of employment.")

The PERC agreed with the Pasco union that the provisions were waivers: the PERC's administrative order included a finding of fact that the provisions contained waivers. *See* Finding of Fact No. 4, *City of Pasco*, No. 4694, 1994 WL 900086 at *17; *aff'd,* No. 4694-A, 1994 WL 900087 at *10.

Despite finding that the provisions were waivers, the PERC ruled that the provisions were mandatory subjects of bargaining because they were "directly related to" terms and conditions of employment. *City of Pasco*, No. 4694-A, 1994 WL 900087 at *9.

This Court affirmed the PERC's decision in its entirety, holding that *N.L.R.B. v. American Nat'l Ins. Co.*, 343 U.S. 395, 72 S.Ct. 824, 832,

96 L.Ed.1027 (1952), and its progeny apply to Washington State collective bargaining law. *City of Pasco*, 132 Wn.2d 467. In *American Nat'l Co.*, an employer insisted to impasse on a clause that allowed it to determine work schedules. Recognizing that schedules are conditions of employment, the U.S. Supreme Court held, "whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board." *American Nat'l Co.*, 343 U.S. 409.

Not only did this Court affirm the PERC's decision that the provisions (which PERC found were waivers) were mandatory subjects of bargaining, this Court went further. This Court held that the notion of "waiver" has no place in scope of bargaining cases (*i.e.,* cases determining whether a particular proposal is a mandatory or permissive subject of bargaining). *City of Pasco,* 132 Wn.2d 464. "Procedurally, the Association cannot claim in this case that the proposal waives its collective bargaining rights because it has already exercised these rights." *Id.* Thus, this Court distinguished between "impasse" cases (such as this case, where the parties dispute whether a subject is mandatory, such that it can be bargained to impasse) from "waiver" cases (where during the term of the contract, an employer asserts the affirmative defense of waiver

based on a provision in the contract.) *Id.* This Court ruled that the concept of a "waiver" was misplaced in impasse cases because collective bargaining is the exercise of the right to bargain, not a waiver of that right. *Id.* This Court's approach is consistent with federal law. *See BP Amoco Corp. v. NLRB*, 217 F.3d 869, 873 (D.C. Cir. 2000) ("A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.") (emphasis in original), *quoting, NLRB v. US Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993).

The Court of Appeals' decision, deferring to the PERC, presents a direct conflict with this Court's decision in *City of Pasco*. The Court of Appeals repeated the PERC's error in treating this as a "waiver" case instead of an "impasse" case, and its holding modifies this Court's ruling that *American Nat'l Ins. Co.*, 343 U.S. 395, allows parties to bargain for contract language giving them the right to more flexible treatment of matters such as work schedules and other working conditions.

B. The Decision of the Court of Appeals Conflicts with This Court's Decision in *City of Richland.*

The PERC is required by this Court to adjudicate questions regarding the mandatory nature of a subject of bargaining on a case-by-case basis. *Int'l Ass'n of Firefighters Local 1052 v. Public Employment*

Relations Commission, 113 Wn.2d 197, 203, 778 P.2d 32 (1989) ("*City of Richland*"). This process ensures that the PERC balances two competing interests: (1) wages, hours, and working conditions, which are a "direct concern to employees" and constitute mandatory subjects; and (2) subjects lying at the core of entrepreneurial control/management prerogatives, which are reserved to the employer's exclusive control and are non-mandatory subjects of bargaining. *See, id.* "Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates." *Id.*

In *City of Richland*, this Court reversed the PERC's decision that firefighting staffing levels were a non-mandatory subject of bargaining and remanded the case back to the PERC. *City of Richland*, 113 Wn.2d at 204. This Court held that the PERC's "summary disposition" of a scope of bargaining question did not reflect the "particularity and sensitivity" the task requires. *Id.* at 203. This Court admonished the PERC for neglecting to balance the employer's need for managerial control with employees' concerns with working conditions:

> PERC's facile characterization of the substance of Local 1052's contract proposal as "a subject that has previously been held to be a permissive subject of bargaining", is inappropriate under the law. Scope-of-bargaining questions cannot be resolved so summarily. Every case presents unique circumstances, in which the relative

> strengths of the public employer's need for managerial control on the one hand, and the employees' concern with working conditions on the other, will vary.

Id. at 207 (citation omitted); *accord, King County v. Public Employment Relations Commission*, 94 Wn. App. 431, 439, 972 P.2d 130 (1999).

In its decision below, the PERC completely failed to balance Community Transit's interests in an ability to efficiently change operational rules with union members' interests in those rules that impact working conditions. Just as it did in *City of Richland*, the PERC resolved the case "summarily" holding that since it found a waiver to be permissive in a prior case, Article 18.2 must be permissive. CP 14. The PERC's decision is devoid of any discussion whatsoever of the parties' competing interests regarding Article 18.2. CP 10-15. Indeed, the Examiner's decision contains no findings of fact regarding the employer's need for Article 18.2 or the union's concerns with the impact on working conditions if the employer retains the right to unilaterally change operational rules. AR 1771-1772. The PERC's "facile characterization" of Article 18.2 as a waiver and, therefore, a subject previously held to be non-mandatory, is "inappropriate under the law" and requires reversal of the PERC. *See City of Richland* at 207.

The Court of Appeals held that the PERC's failure to apply the balancing test was proper. The Court of Appeals reasoned that the Rules

and Regulations provision (Section 18.2) does not address any mandatory subjects; therefore, the balancing test was not necessary. That conclusion conflicts with the PERC's own determination in *International Ass'n of Firefighters v. City of Bellevue,* 2013 WL 3784086, Dec. 11435-A at *4, 6 (Wash.Pub.Emp.Rel.Com., July 12, 2013) that a provision that gives management the right "[t]o make and modify rules and regulations for the operation of the department and conduct of its employees" addresses mandatory subjects, and thus is a mandatory subject of bargaining. However, this Court's explicit direction in *City of Richland* could not be clearer: the PERC must consider the unique circumstances that each case presents, and apply the balancing test to determine whether the provision is a mandatory subject of bargaining or not. The Court of Appeals' ruling conflicts with *City of Richland* in two ways: by affirming the PERC's "summary disposition" of a scope of bargaining question and by ruling that the PERC should *first* determine if a provision addresses mandatory subjects and *then* apply the balancing test.

C. This Case Presents Issues of Substantial Public Interest.

This case presents issues of substantial statewide significance regarding the scope of the duty to bargain.

The Washington Association of Municipal Attorneys ("WSAMA") filed an Amicus Curiae Brief with the Court of Appeals precisely because

this matter presents issues of substantial public interest. WSAMA explained that the PERC's ruling has a "potentially devastating impact" on cities around Washington State because they rely on contract language like the language at issue in this case to operate public services. Amicus Curiae Brief of WSAMA at 3.

Decisions regarding the scope of the duty to bargain are critical to the ongoing relationship between public employers and labor unions. The PERC's ruling that an employer can change a contract provision from a mandatory subject of bargaining to a non-mandatory subject of bargaining by relying on the language in defense of an unfair labor practice charge reflects a fundamental misinterpretation of the "waiver" concept and its relationship to the bargaining obligation, and dramatically alters the landscape of the scope of the duty to bargain. The Court of Appeals erroneously deferred to the PERC's ruling and incorporated the PERC's misinterpretation in its decision. This was not a harmonization of PERC case law. It was an improper attempt to modify *City of Pasco*.

The Court of Appeals, in fashioning a new interpretation of how subjects of bargaining are evaluated to determine whether they are mandatory or non-mandatory subjects of bargaining, created substantial confusion about how parties should approach the duty to bargain. Review by the Supreme Court is required to correct the Court's erroneous

interpretation of *City of Pasco* and *City of Richland* as well as to provide guidance to the PERC and to public employers and labor unions on an issue of substantial statewide significance.

VI. CONCLUSION

For the foregoing reasons, Community Transit respectfully requests that the Washington Supreme Court grant this Petition for Review and reverse the PERC's decision that the provision at issue is a non-mandatory subject of bargaining.

DATED this 16th day of January, 2014.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By: _____
Shannon E. Phillips, WSBA #25631
Sofia D. Mabee, WSBA #31679
Attorneys for Petitioner-Appellant
Community Transit

CERTIFICATE OF SERVICE

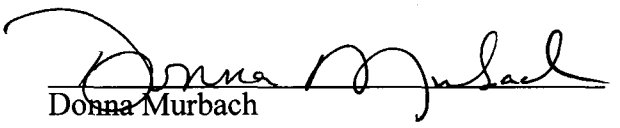
I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Petition for Review to be served by hand delivery, addressed to the following:

Beth Barrett Bloom
Frank Freed Subit & Thomas, LLP
705 Second Ave., Suite 1200
Seattle, WA 98104

Office of the Attorney General
State of Washington
1125 Washington Street SE
Olympia, WA 98504-0100

Michael P. Sellars, Executive Director
Marilyn Glenn Sayan, Chairperson
Public Employment Relations Commission
112 Henry Street NE, Suite 300
Olympia, WA 98506

DATED January 16, 2014, at Seattle, Washington.



Donna Murbach

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA d/b/a COMMUNITY TRANSIT, Appellant, v. STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION and AMALGAMATED TRANSIT UNION, LOCAL 1576, Respondents.	No. 43783-0-II UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Snohomish County Public Transportation Benefit Area d/b/a Community Transit appeals from the superior court's order affirming an administrative order issued by the Public Employment Relations Commission ("PERC"). In the administrative order, PERC ruled that Community Transit committed an unfair labor practice when it insisted to bargaining to impasse a permissive subject of collective bargaining. Community Transit argues that PERC's order is invalid for three reasons: (1) PERC misinterpreted or misapplied the law, (2) PERC exceeded its statutory authority, and (3) PERC's order was arbitrary and capricious. Based on PERC's earlier, unchallenged conclusion that the provision at issue was a waiver clause, PERC properly concluded that the provision was a permissive subject of bargaining and

Community Transit committed an unfair labor practice by insisting to impasse on a permissive subject of bargaining. Accordingly, we affirm.

FACTS AND LEGAL BACKGROUND

Amalgamated Transit Union, Local 1576 (Amalgamated), represents bus drivers and other transit workers employed by Community Transit.[1] From 1979 to 2007, Community Transit and Amalgamated executed a series of collective bargaining agreements. Among their provisions, the parties' collective bargaining agreements have included (1) a management rights clause,[2] (2) procedures for grievances filed either by the union or by an individual employee, and (3) a provision known as "Section 18.2." Section 18.2 applies when, during the life of the collective bargaining agreement, Community Transit changes the employee rules, including standard operating procedures and the performance code.

In 1997, Amalgamated brought an unfair labor practices complaint against Community Transit alleging that Community Transit unilaterally made changes to mandatory subjects of bargaining.[3] *Amalgamated Transit Union, Local 1576 v. Cmty. Transit*, No. 13219-U-97-3216, 1998 WL 1978452, at *1 (Wash. Pub. Emp't Relations Comm'n July 23, 1998). In a 1998 order dismissing the complaint, PERC ruled that under Section 18.2, Amalgamated waived its right to bargain Community Transit's changes to the employee rules during the life of the contract.

---

[1] The bargaining unit includes the following job classifications: coach operators, dispatchers, instructors, customer information specialists, sales and distribution specialists, facility maintenance leads, workers, journey workers, and internal security officers.

[2] A management rights clause is generally a clause that allows management to maintain control over decisions with respect to the operation and management of the organization. *See Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 455-56, 938 P.2d 827 (1997).

[3] In the predecessor agreement considered by PERC in 1998, the Section 18.2 language was found in Section 19.2. Otherwise, the language is exactly the same.

Amalgamated, 1998 WL 1978452, at *6. Therefore, the 1998 PERC decision defined Section 18.2 as a waiver clause. Neither party appealed PERC's 1998 decision interpreting the identical language at issue here.

Years later, Community Transit and Amalgamated attempted to negotiate a successor to the collective bargaining agreement that expired December 31, 2007. During negotiations, Amalgamated sought to revise Section 18.2. For its part, Community Transit sought to retain the Section 18.2 language without amendments. A mediator ultimately found the parties reached an impasse on Section 18.2 and certified the issue to interest arbitration.

Amalgamated filed an unfair labor practice complaint, alleging that Section 18.2 is a permissive subject of bargaining and that Community Transit committed an unfair labor practice because it insisted to impasse on a permissive subject of bargaining. After convening a hearing on the complaint, a hearing examiner entered findings of fact and conclusions of law relying on the earlier interpretation of Section 18.2 and, thus, determining that Section 18.2 was a permissive subject of bargaining. Accordingly, the hearing examiner decided that Community Transit committed an unfair labor practice by insisting to impasse on a permissive subject of bargaining.

Community Transit appealed the hearing examiner's decision to PERC. PERC affirmed, adopting the hearing examiner's findings of fact and conclusions of law. In affirming and adopting the hearing examiner's order, PERC explained that Community Transit was bound by the previous interpretation of Section 18.2 as a waiver provision and that it could not now argue it was a managerial rights provision. Therefore, an earlier decision, *Whatcom County Deputy Sheriff's Guild v. Whatcom County*, No. 15383-U-00-3889, 2004 WL 725698 (Wash. Pub. Emp't Relations Comm'n Feb. 11, 2004), controlled the outcome rather than the balancing test in

International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission, 113 Wn.2d 197, 203, 778 P.2d 32 (1989), which is used to determine whether a hybrid provision is primarily concerned with mandatory or permissive subjects of bargaining. Because waiver provisions are permissive subjects of bargaining under *Whatcom County*, PERC concluded that the hearing examiner properly decided that Community Transit committed an unfair labor practice by insisting to impasse on a permissive subject of bargaining.

Community Transit then petitioned for judicial review of PERC's order.[4] The superior court denied Community Transit's petition and affirmed PERC's order. Community Transit now appeals to this court.[5]

ANALYSIS

Community Transit argues that PERC's order is invalid. First, Community Transit argues that PERC misapplied the law by (1) failing to engage in the balancing test set out in *Fire Fighters*, 113 Wn.2d at 203; and (2) determining that Section 18.2 is a permissive subject of bargaining. Second, Community Transit argues that PERC exceeded its statutory authority by creating a novel unfair labor practice. Third, Community Transit argues that PERC's order was arbitrary and capricious because it summarily determined that Section 18.2 was a permissive subject of bargaining. We disagree.

The Administrative Procedure Act (APA), ch. 34.05 RCW, governs this court's review of PERC's order in an unfair labor practice case. RCW 41.56.165; *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997). Under the APA, the party challenging

[4] PERC chose not to appear in the superior court or defend its order on judicial review.

[5] In support of Community Transit's argument, the Washington State Association of Municipal Attorneys filed a brief as amicus curiae.

the agency's action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a). There are nine circumstances under which we may grant relief from an agency order, including (1) the order is outside the agency's statutory authority, (2) the agency has erroneously interpreted or applied the law, and (3) the order is arbitrary and capricious. RCW 34.05.570(3)(b), (d), (i). When reviewing agency action under the APA, we sit in the same position as the superior court and apply the APA standards to the record before the agency. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003). Accordingly, we review PERC's order, not the decision of the superior court or the hearing examiner. *City of Vancouver v. Pub. Emp't Relations Comm'n*, 107 Wn. App. 694, 703, 33 P.3d 74 (2001), *review denied*, 145 Wn.2d 1021 (2002).

We review PERC's conclusions of law de novo and may substitute our interpretation of the law for that of PERC. *Pasco Police*, 132 Wn.2d at 458. At the same time, we give "due deference" to an administrative agency on matters falling within its area of expertise. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 595, 90 P.3d 659 (2004). PERC has expertise in labor relations. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 319, 96 P.3d 957 (2004). Therefore, PERC's expertise in labor relations deserves the due deference of a reviewing court. *See Pub. Emp't Relations Comm'n v. City of Kennewick*, 99 Wn.2d 832, 842, 664 P.2d 1240 (1983).

Community Transit argues that PERC erroneously interpreted or applied the law because (1) PERC failed to conduct the balancing test adopted in *Fire Fighters*, and (2) PERC concluded that Section 18.2 was a permissive subject of bargaining. We disagree. Here, the *Fire Fighters* balancing test would be necessary if Section 18.2 were a management rights clause; however, because PERC already determined that Section 18.2 is a waiver clause, PERC appropriately

applied its earlier decision in *Whatcom County* to conclude that Section 18.2 is a permissive subject of bargaining.

Washington law distinguishes between mandatory and permissive subjects of collective bargaining. *See, e.g., Yakima County v. Yakima County Law Enforcement Officers' Guild*, 174 Wn. App. 171, 181, 297 P.3d 745, *review denied*, 178 Wn.2d 1012 (2013). On mandatory subjects, the parties must bargain in good faith; if they reach an impasse on a mandatory subject, their dispute will be resolved through interest arbitration. *Pasco Police*, 132 Wn.2d at 460-61. In contrast, the parties may bargain on permissive subjects, but they are not required to do so. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342, 728 P.2d 1044 (1986). Insisting to impasse on a provision addressing a permissive subject is an unfair labor practice. *Klauder*, 107 Wn.2d at 342. The distinction between mandatory and permissive subjects of collective bargaining derives from the definition of "collective bargaining" in RCW 41.56.030(4). *See Fire Fighters*, 113 Wn.2d at 200. That definition imposes a mutual obligation on a public employer and a union to execute a collective bargaining agreement that governs "grievance procedures and . . . personnel matters, including wages, hours and working conditions." RCW 41.56.030(4).

Accordingly, grievance procedures and "matters of direct concern to employees," such as wages, hours, and working conditions, are categorized as mandatory subjects of collective bargaining. *Fire Fighters*, 113 Wn.2d at 200; *City of Pasco*, 119 Wn.2d at 512. In contrast, other subjects are permissive subjects on which the parties are not required to bargain. *Klauder*, 107 Wn.2d at 341-42; *see* RCW 41.56.030(4). Permissive subjects may include managerial decisions with attenuated effects on personnel matters; the exercise of managerial or union prerogatives; and the procedures used to establish contract terms on wages, hours, and working

conditions. *Fire Fighters*, 113 Wn.2d at 200; *Klauder*, 107 Wn.2d at 341-42. Whether a proposed contractual provision addresses a mandatory or permissive subject of bargaining depends on the facts of each case. *Fire Fighters*, 113 Wn.2d at 203.

As an initial matter, Community Transit argues that PERC misapplied the law because *Fire Fighters* has created a balancing test that must be used whenever PERC determines whether a provision is a mandatory or permissive subject of bargaining. However, *Fire Fighters* requires that PERC engage in a case-by-case analysis to determine whether a proposed contractual provision addresses a mandatory or permissive subject of bargaining. 113 Wn.2d at 203. But PERC is not required to engage in the balancing test every time it is tasked with determining whether an issue is a mandatory or permissive subject of bargaining. *See Pasco Police*, 132 Wn.2d at 459-68 (making no mention of the balancing test and deciding that a provision's subject was mandatory, not permissive). Specifically, there are some issues that are mandatory or permissive as a matter of law; for example, employee wages, hours, and working conditions are mandatory subjects of bargaining. PERC would not be required to apply the *Fire Fighters* balancing test to a provision that deals exclusively with employee wages, hours, or working conditions because that provision must be a mandatory subject of bargaining. The balancing test is meant to be used when a provision addresses both a mandatory subject of bargaining (e.g., wages, hours, and working conditions) and permissive subjects of bargaining (i.e., managerial prerogatives). *See Fire Fighters*, 113 Wn.2d at 203. Section 18.2 is exclusively a waiver provision and does not address *both* mandatory and permissive subjects, so there is nothing to balance and the balancing test is not appropriate. Accordingly, PERC did not misapply the law when it did not conduct the *Fire Fighters* balancing test.

The parties also dispute whether Section 18.2 addresses a mandatory or permissive subject of bargaining. Section 18.2 states,

> [Community Transit] agrees to notify [Amalgamated] of any changes in the Employee's Rule and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure [established in Article 14] shall not apply to any matters covered by this section, except as to [Community Transit's] administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor Agreement.

Administrative Record at 132.

As explained above, PERC had already characterized Section 18.2 as a waiver provision. *Amalgamated*, 1998 WL 1978452, at *6. As PERC correctly noted in its decision here, its earlier decision governs the characterization of Section 18.2 as a waiver provision. PERC's 1998 decision did not directly address whether Section 18.2 was a mandatory or permissive subject of bargaining. Therefore, here, PERC was required to determine whether the waiver provision in Section 18.2 was a mandatory or permissive subject of bargaining.

No Washington court has decided whether a provision waiving a party's statutory bargaining rights is mandatory or permissive. *See Pasco Police*, 132 Wn.2d at 463. But in 2004, PERC concluded that "a broad waiver of statutory [bargaining] rights" is a permissive subject of bargaining. *Whatcom County*, 2004 WL 725698, at *7; *accord Int'l Ass'n of Fire Fighters, Local 1604 v. City of Bellevue*, No. 23828-U-11-6082, 2013 WL 3784086, at *6 (Wash. Pub. Emp't Relations Comm'n July 12, 2013) (submitted as additional authority by Amalgamated). In light of PERC's prior decision that Section 18.2 waived Amalgamated's statutory right to bargain changes to the employee rules to impasse, it follows that Section 18.2 is a broad waiver and therefore a permissive subject of bargaining. *See Whatcom County*, 2004 WL 725698, at *7.

Attempting to distinguish Section 18.2 from the broad waiver in *Whatcom County*, Community Transit argues on two grounds that Section 18.2 is not broad. First, the scope of Section 18.2 is broad. In *Whatcom County*, a broad waiver allowed the employer to adopt new rules on any subject on which the parties' collective bargaining agreement was silent. 2004 WL 725698, at *10-11. Community Transit asserts that, in contrast, Section 18.2 merely waives Amalgamated's right to bargain "subjects specifically listed in [Section] 18.2," i.e., changes to the employee rules, standard operating procedures, and performance code. Br. of Appellant at 40. But Community Transit's assertion belies the parties' history and the record. In the course of 123 pages, the standard operating procedures govern practically every aspect of working conditions. Section 18.2 is unquestionably broad.

Second, Community Transit attempts to distinguish Section 18.2 from the broad "procedural" waiver in *Whatcom County*. This contention is also unpersuasive. Even the broad waiver in *Whatcom County* preserved an opportunity for the union to contest the employer's changes to working conditions during the life of the contract by allowing the union to object to the changes and providing for arbitration of any unresolved objections. 2004 WL 725698, at *10. But Section 18.2 excludes Amalgamated from the process to an even greater degree: it eliminates any real opportunity for Amalgamated to contest Community Transit's changes to the employee rules. Like the waiver in *Whatcom County*, Section 18.2 allows Community Transit to make changes to rules and procedures without having to deal with the union.

Although it undoubtedly has an indirect impact, a broad waiver of Amalgamated's right to bargain over changes to the employee rules is not a matter of direct concern to employees. Instead, as PERC explained in *Whatcom County*, this broad waiver addresses "the relationship between the employer and union, by enabling the employer to change work rules without having

to deal with the union." 2004 WL 725698, at *4. Because this broad waiver of Amalgamated's right to bargain does not *directly* concern working conditions, Section 18.2 addresses a permissive, rather than a mandatory, subject of bargaining. *Whatcom County*, 2004 WL 725698, at *4; *see Fire Fighters*, 113 Wn.2d at 200. Therefore, PERC's order is not based on an erroneous application of the law.

Community Transit's remaining arguments rest on assumptions which we have already held meritless. Community Transit argues that PERC exceeded its statutory authority by creating a new unfair labor practice; namely, insisting to impasse over a mandatory subject of bargaining. *See* RCW 41.56.140; *Pasco Police*, 132 Wn.2d at 460-61. However, for the reasons explained above, PERC correctly determined that Section 18.2 is a permissive subject of bargaining. Accordingly, Community Transit's argument must fail.

Community Transit also argues that PERC's order was arbitrary and capricious because PERC failed to apply the *Fire Fighters* balancing test. However, the *Fire Fighters* balancing test was superfluous in this case. PERC made a well reasoned decision to apply its earlier decision dealing with the subject matter. Therefore, it also follows that PERC's order is not arbitrary and capricious. *Port of Seattle*, 151 Wn.2d at 589 (An agency order is not arbitrary and capricious if the agency acted honestly and upon due consideration.).

Community Transit has not met its burden to show that PERC misinterpreted or misapplied the law, PERC acted outside its statutory authority, or PERC's order was arbitrary and capricious. RCW 34.05.570(1)(a), (3). Accordingly, we affirm PERC's order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

WORSWICK, C.J.

MAXA, J.