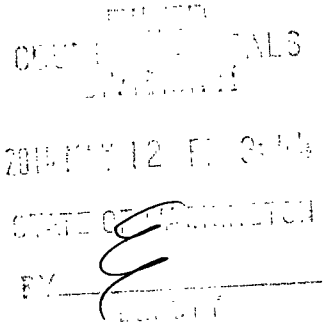

No. 45687-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

AMALGAMATED TRANSIT UNION, LOCAL 1384

Appellant,

v.

KITSAP TRANSIT and the PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

KITSAP TRANSIT'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

I. INTRODUCTION

Petitioner Amalgamated Transit Union, Local 1384 ("ATU") attempts in vain to create a legal argument that it hopes will convince a court to reverse the Public Employment Relations Commission ("PERC") and reinstate an unprecedented windfall awarded by an agency hearing examiner, valued at approximately one million dollars plus interest for 2011 alone. The award is especially worth preserving because it required Kitsap Transit to pay a penalty consisting of the savings realized by changing health plans, and to continue doing so until it could offer a comparable PPO-type health plan (which the record shows may be an impossibility) or until ATU voluntarily agreed to an alternative plan. Given that the undisputed factual findings and evidence unequivocally establish that no PPO health insurance plan was available to Kitsap Transit, ATU had a strong incentive to refuse to reach agreement on an alternative and continue pocketing windfall payments for years.

PERC remedies seek to restore the *status quo ante*, which means putting employees in the position they would have been in had the unfair labor practice not occurred. Anything beyond restoring the status quo (such as awarding interest or attorneys' fees) is considered "extraordinary," and is only imposed in response to a party's egregious misconduct, such as where a party engages in a pattern of unfair labor practices showing patent disregard of the law, or where a party advances frivolous defenses. As recognized by the PERC, the evidence does not

support an extraordinary remedy in this case. Moreover, neither PERC nor persuasive federal authority supports punitive damages like the monetary award levied by the examiner. The corrected remedy imposed by the PERC –which requires Kitsap Transit to make employees whole for actual losses suffered – is consistent with the law and well within the Commission's discretion. There is no legal or factual justification for the courts to second-guess that remedy.

II. ISSUES ON APPEAL

Kitsap Transit did not pursue an appeal of the PERC decision, and thus does not have assignments of error on appeal. However, Kitsap Transit disagrees with ATU's statement of the issues on appeal, and thus offers the following.

1. Has ATU met its burden of establishing that the remedy imposed by PERC is contrary to law, or arbitrary and capricious, where the PERC ordered the employer to make bargaining unit employees whole for any actual losses incurred?

2. Were the PERC's factual findings that Kitsap Transit's defense was not frivolous and that its conduct did not constitute a pattern of conduct showing a patent disregard for its good faith bargaining obligation supported by substantial evidence?

3. Was the PERC's conclusion that there was no basis to impose an "extraordinary" remedy consistent with the law and entitled to deference, where it found that the employer's defense was not frivolous

and that its conduct did not constitute a pattern of conduct showing a patent disregard for its good faith bargaining obligation?

4. Is the PERC's factual finding that no insurance provider was willing to offer a comparable PPO-type health plan to Kitsap Transit a verity on appeal when ATU did not assign error to it?

5. Is the PERC's factual finding that implementing a comparable PPO-type plan likely an impossibility supported by substantial evidence?

6. Was the PERC's conclusion that the Examiner's remedy was punitive consistent with the law and entitled to deference?

7. Did the superior court appropriately exercise its discretion in denying ATU's motion to supplement the record with new evidence, where ATU failed to demonstrate that (a) the evidence relates to the validity of the PERC's decision at the time it was made; and (b) the evidence is needed to decide disputed issues in a proceeding that is not required to be determined on the agency record?

8. Did the superior court appropriately exercise its discretion in denying ATU's request for a remand, where ATU failed to show that (a) the proffered new evidence relates to the validity of the PERC's decision at the time it was made; and (b) that ATU did not know and could not have reasonably discovered the evidence until after the agency action?

III. STATEMENT OF THE CASE

A. Background.

Kitsap Transit negotiates five labor contracts: a vehicle maintenance contract negotiated jointly with the Teamsters and the Machinists, a facilities-maintenance contract, a worker/driver contract negotiated with the Teamsters, and Routed and ACCESS contracts negotiated with ATU. CR 661.[1] All but the worker/driver contract contain provisions regarding health insurance. *Id.*

In 2010, Kitsap Transit employees had the choice of a preferred provider option ("PPO") health plan through Premera Blue Cross; an HMO plan provided by Group Health Cooperative; or no insurance. CR 667 at 6-17; CR 154, 436. The benefit levels of the Premera and Group Health plans were substantially equivalent, with Group Health's "a little richer." CR 439-40, 491. Of employees who opted to have insurance, the split between the two plans was about 50/50. CR 667 at 6-17. Among ATU, 55 chose Premera and 68 chose Group Health. CR 246 at 7-12; CR 1341.

In 2009, Kitsap Transit predicted dire consequences if action was not taken soon to address the agency's financial challenges. CR 661-64, 1723 *et seq.* Kitsap Transit had already implemented two rounds of service cuts. CR 666-67. Human Resources Director Jeff Cartwright

[1] The record references in this brief are generally to the original PERC record and cited as "CR."

observed that the Premera plan cost one million dollars more than the Group Health plan. *Id.*

John Witte is the Secretary/Treasurer of Teamsters Local 589, which represents service helpers and facilities maintenance employees at Kitsap Transit. *Id.*; CR 592, 600. Mr. Witte is also on the Kitsap Transit Board. CR 595. Mr. Witte told Mr. Cartwright that the Teamsters could offer a PPO plan at a lower price. CR 674 at 16-24; CR 596-97; CR 615 at 16-21. Beginning in 2010, Mr. Witte tried to identify lower-cost health insurance alternatives. *Id.; see also,* CR 618. He hoped to offer an alternative through Northwest Administrators ("NWA"). CR 597, 615.

During negotiations with the Teamsters and Machinists in September 2010, Kitsap Transit offered to pay those employees an incentive to switch to a less costly plan. CR 609. According to Mr. Witte, "[n]ot only the Teamsters, but also the Machinists were elated to see any kind of adjustment in their wages . . . ." CR 609; *see also* CR 742. The Teamsters voted in favor of the incentive and lower-cost plan. CR 609. The Machinists followed suit. CR 1759, 676-77. Mr. Cartwright understood that the parties had "an agreement in principle" that the union would try to get a Teamsters PPO plan for all Kitsap Transit employees, and Kitsap Transit would pay an incentive to those on Premera to move to the new plan. CR 747.

As of November 10, 2010, Mr. Witte was working to see if a NWA/Teamsters plan could be an option for all employees. CR 602. However, the Teamsters and Machinists ultimately decided to go with a

Machinists' plan. CR 599-600, 608-09. Unlike the NWA plan, the Machinists plan was not available to employees outside of the two units. CR 600-01.

B. Kitsap Transit Attempts to Maintain a PPO Plan for ATU.

Kitsap Transit's labor contract with ATU for the Routed Operator bargaining unit provided:

> [t]he Employer agrees to maintain medical and dental insurance for the duration of this Agreement. However, the Employer may select other carriers when it believes such selection is in its best interests, provided the benefit levels shall not be diminished.

CR 825-26 (Art. 17, § 5(A)). ATU's contract for the ACCESS bargaining unit did not specify a carrier. CR 951-52. It stated, "[t]he Employer shall pay the following premium amounts" and referenced Premera. CR 952. As the parties had not yet agreed on successor contracts, CR 150-51, these agreements established the status quo regarding medical benefits.

While Mr. Witte was exploring PPO plans, Mr. Cartwright also worked with the agency's insurance broker, John Wallen of DiMartino Associates, Inc., to see if there were comparable plans with lower premiums. CR 368, 434-36. In a March 2010 email, he wrote:

> . . . . We are interested in discussing how we can approach Premera with it, use it to get a better premium cost and, if need be, switch to KPS, Regence or some other carrier with the same plan/benefits that would cost us less (and this time every dollar counts), as we think the overall

> negotiation process and change in views necessary to make the needed changes could take up to 2 years.

CR 1035 (emphasis added); *see also*, CR 441-42. In other words, Kitsap Transit was committed to maintaining benefit levels but possibly changing carriers, in accordance with the labor contracts.

Mr. Wallen focused on encouraging Group Health to offer a PPO plan to replace Premera. CR 442-53, 1053, 1055. Unfortunately, in late July, Group Health's bid "missed the mark." CR 735, 1054. Mr. Cartwright reminded Mr. Wallen that "the benefit levels had to be the same as the current Premera plan." CR 1061, 673. On September 20, DiMartino Associates wrote that it was going back to Group Health to get them "to clean up the benefits to match up better with Premera." CR 1063, 458-59.

C. No Insurer is Willing to Offer a PPO Plan to Cover the ATU Group.

When it appeared that the Machinists and Teamsters groups were going to switch to the Teamsters plan, Mr. Wallen asked if Premera would continue providing its PPO plan for the 59 ATU members on the plan. CR 461-62, 1085. Around September 29, Premera conveyed that it would not provide coverage for ATU because more than 50% of that group were in Group Health. CR 1086, 680-81, 463-64.[2] After that, Premera was never willing to cover ATU. CR 464 at 2-8.

[2] Premera later affirmed its criteria: "If the group falls under 100, we must continue to insure 50% of the eligible employees under the Premera or the plan will no longer be available as an option." CR 1120 (Oct. 21, 2010 letter from Leslie Miller). Among

While the Teamsters were exploring whether their plan could be extended to ATU, Mr. Cartwright asked Mr. Wallen to find another PPO for ATU. CR 1086-89, 680-83. Meanwhile, Mr. Cartwright shared with Mr. Wallen that Kitsap Transit was considering offering an incentive to employees to switch to Group Health. CR 1088-89, 1100-02. Mr. Wallen warned him that incentives would likely be yet another reason for Premera to decline to continue the PPO. *Id.* Still, Mr. Wallen said, "I have cashed in a few chits with KPS and they have agreed to offer a plan to ATU and the non-reps" and they "will try to replicate the current Premera plan . . . ." *Id.*[3] A Group Health PPO was a "distant second option." *Id.* Based on these communications, Kitsap Transit believed that Mr. Wallen would be able to find an alternative PPO option for ATU. CR 685-86.

On November 4, Mr. Cartwright followed up. CR 1117, 475-76. However, as of that date, KPS declined to offer a plan. CR 476, 1118-23. Mr. Wallen reported that he was out of options. *Id.*; CR 477. The reasons the carriers gave for declining to provide coverage varied:

- Premera would not provide coverage because more than 50% of the ATU employees were currently covered by Group Health. CR 1086-87, 1118-23;
- Aetna said that the employees "were not a desirable risk," and that it does not quote coverage on less than 75% of a total group. CR 1118-23;
- Group Health would not provide its "Options" plan because of incentives for employees to choose the AWC Group Health plan. CR 1118-23;

ATU-represented employees, 55 had coverage through Premera and 68 through Group Health. CR 246 at 7-12; CR 1341.

[3] "Non-reps" refers to employees who are not represented by a union. "KPS" is a health plan provider.

- KPS cited a non-compete with Group Health, CR 1118-23;
- The Teamsters plan denied coverage because the Teamsters unit elected not to participate in that plan. CR 1777-78;
- The Machinists plan did not directly offer a reason for declining, but it was understood that their plan was not available to non-Machinists or Teamsters. CR 600-01; and
- Regence stated that Kitsap Transit did not meet its underwriting guidelines, CR 465 at 16-18.

Mr. Wallen recommended that Kitsap Transit pursue coverage through the Public Employee Benefit Board ("PEBB") or the Washington Counties Insurance Pool ("WCIF").[4] CR 688-91.

D. Kitsap Transit Bargains with ATU Over the Available Carriers and Plans.

As soon as Kitsap Transit learned that it may not be able to offer a PPO plan to ATU for the upcoming year, Mr. Cartwright informed ATU. CR 691, 1124. He stated that Kitsap Transit was moving forward with applying for coverage through PEBB and WCIF but that it did not look optimistic. CR 1124.[5] ATU responded, "Please confirm that Premera will continue to be available (or another carrier at the same benefit level) if employees do not want to switch." CR 1126.

Kitsap Transit met with ATU on November 15 and 18, 2010. CR 179. ATU demanded that Kitsap Transit eliminate the Group Health HMO plan (which was in place for Machinists, Teamsters, non-represented, and ATU employees) so that Group Health would make

[4] Mr. Wallen explained that he could not recommend self-funding as an alternative. CR 1118-23, 479-81.

[5] Kitsap Transit had not initially applied to the PEBB because it was not a plan that its insurance broker could pursue, and because other employers shared negative experiences with the plan. CR 763-64.

available its Options (PPO) plan. CR 1165 (No. 3). ATU alternatively demanded that Kitsap Transit self-insure. *Id.* (No. 8). ATU rejected Kitsap Transit's offer of a financial incentive and demanded that all of the savings resulting from the elimination of the Premera plan – millions of dollars over a period of years – be converted into wages for ATU members. CR 701, 1163, 1170-71.

Kitsap Transit did not stop trying to bargain a solution with ATU. *E.g.*, CR 1181-87. However, ATU initially refused to meet unless Kitsap Transit increased the financial incentive. CR 707, 1769-70. ATU then insisted, unreasonably, that Kitsap Transit had "the ability to return to the status quo but [had] refused to do so." CR 1181. However, the Premera was no longer an option, as a result of bargaining between Kitsap Transit and other bargaining units that resulted in agreements to select different insurance. CR 1086-87, 1118-23.

On December 30, Kitsap Transit learned that the PEBB representative wanted additional historical data to evaluate Kitsap Transit's application. CR 1779-81, 714-15. Kitsap Transit tried to obtain the additional information, but it was unavailable from Premera. CR 714-15, 1782-92. Kitsap Transit apprised ATU. *Id.* In late February, WCIF informed Kitsap Transit that it could not offer a plan either. CR 1796-98, 716. WCIF ultimately denied the application because of the number of employees. CR 717-18, 1799. Despite these ongoing efforts, Kitsap Transit was never successful in obtaining another PPO plan for ATU. CR

719. Nevertheless, as of February 14, 2012, Kitsap Transit was still bargaining with ATU to find a solution. CR 773.

E. Procedural History.

On June 1, 2011, ATU filed an amended unfair labor practice complaint with the PERC. CR 41-74. ATU alleged, in part, that Kitsap Transit made an unlawful unilateral change by removing the PPO plan option without providing ATU with an opportunity to bargain. CR 41-74. Kitsap Transit denied that it unlawfully unilaterally made a change to a mandatory subject of bargaining. CR 98. Rather, it contended that it engaged in lawful actions with respect to employees not in the ATU bargaining unit (employees represented by the Machinists and Teamsters and unrepresented employees) in order to attain savings with respect to their healthcare benefits. CR 1856-59. As a result, while Kitsap Transit was fully committed to maintaining a comparable PPO plan for ATU employees, no insurer was willing to provide a plan to cover that group. CR 1859. Kitsap Transit thus raised a "business necessity defense" to the unfair labor practice charge. CR 103.

Following a hearing, the examiner rejected two of the four unfair labor practice charges[6] but found that Kitsap Transit had refused to bargain by: (1) providing employees a financial incentive to move to

[6] Specifically, the Examiner rejected the Union's charge that Kitsap Transit had engaged in direct dealing by providing an informational memorandum to bargaining unit employees, as well as the charge that Kitsap Transit unilaterally changed past practice by redacting customers' names and addresses from copies of complaints against bargaining unit employees. CR 1870.

Group Health and/or paying 100 percent of Group Health premiums for 2011 (Conclusion of Law No. 2); and (2) unilaterally discontinuing the Premera or substantially equivalent plan (Conclusion of Law No. 3). CR 1869-70, 1904. The hearing examiner rejected Kitsap Transit's business necessity defense. CR 1981. The hearing examiner imposed the following remedy:

> a. Restore the *status quo ante* by reinstating a health insurance plan with benefit levels substantially equivalent to the December 31, 2010 Premera PPO plan or implementing another plan option as agreed upon by the union.
>
> b. Make bargaining unit employees who were on the Premera PPO plan in 2010 or who documented their desire to switch to the Premera PPO plan in 2011 whole by paying these employees the premium savings (difference in cost of the 2011 Premera and Group Health plans, minus employee contribution rates as described in the collective bargaining agreement), plus interest, from the time the employer terminated the Premera PPO plan on January 1, 2011, until the time that the employer either: 1) restores a comparable PPO plan option, 2) reaches a negotiated agreement with the union on health benefit plans, or 3) implements health benefits as determined by an interest arbitration award.

CR 1905-06.

Kitsap Transit appealed to the full PERC. CR 1911-14. On March 21, 2013, the PERC issued its decision on appeal. CR 1972-88. The

PERC agreed with the examiner on the merits, but found that the remedy was improper: "The remedy ordered by the Examiner is not purely remedial in nature; therefore, we modify the remedy." CR 1973. The PERC ordered that the remedy be modified subsection b as follows:

> b. Make bargaining unit employees who were formerly covered under the Premera PPO plan whole for their losses incurred as a result of the employer's unilateral elimination of the Premera PPO plan. The employer shall reimburse the employees the difference between what would have been paid under the Premera PPO plan less any payments made under the HMO plan for all medical expenses. We order the employer to make these reimbursements from the date the employer unilaterally stopped offering the PPO plan until the parties negotiate, and implement, a good faith agreement or obtain, and implement, an award from an interest arbitrator on health insurance coverage.

CR 1986. ATU filed a Petition for Review of the remedy. CP 6.[7] ATU did not assign error to any of the findings of fact. *Id.*

In conjunction with the filing of its reply brief to the superior court, ATU filed a Motion to Submit New Evidence in which it asked the court to either accept new evidence or remand the matter for the PERC to consider new evidence. CP 181-82. Specifically, ATU asked the court to consider a new alleged fact – that the employer could have found a PPO plan to offer in the spring of 2013 – which ATU says the court should use

[7] References to the Clerk's Papers Index are cited as "CP."

to second-guess the PERC's 2013 factual findings, which were based on the record established in late 2011 and early 2012. CP 186 at ¶ 7. The second piece of new evidence offered by ATU was a statement by ATU President Greg Sanders – who did not testify at the December 2011 or February 2012 evidentiary hearings – that the PPO plan later agreed to by the parties in October 2013 has "long been made available to employers extending back to before the ULP was committed." CP 187 at ¶ 10.

The court heard oral argument on November 15, 2013. CP 408. By Order dated November 15, 2013, the court denied the motion to submit new evidence. CP 409. By order dated November 21, 2013, Judge Christopher Wickham affirmed the decision of the PERC and dismissed the petition for review. CP 410-11. ATU then filed a notice of appeal challenging both orders of the superior court.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review of Agency Orders.

The Administrative Procedures Act ("APA"), RCW 34.05.510–.598, governs judicial review of challenges to agency actions. *Snohomish Cnty. Pub. Transp. Ben. Area v. State Pub. Emp't Relations Comm'n,* 173 Wn. App. 504, 512, 294 P.3d 803 (2013); *accord Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.,* 164 Wn.2d 329, 341, 190 P.3d 38 (2008). Under the APA, the "party appealing a board's decision has the burden of demonstrating [its] invalidity." *Thurston County,* 164 Wn.2d at 341; *see also* RCW 34.05.570(1)(a). In reviewing an administrative action, the Court of Appeals "sit[s] in the same position as the trial court

and applies the APA standards directly to the administrative record." *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wn. App. 291, 296, 49 P.3d 135 (2002). In relevant part, a reviewing court must grant relief from an agency's adjudicative decision if:

> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
>
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3). A court reviews an agency's "legal conclusions de novo, giving substantial weight to its interpretation of the statutes it administers" and its "findings of facts for substantial evidence." *Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 760-61, 235 P.3d 812 (2010) (citing *Manke Lumber Co., Inc. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn. App. 615, 622, 53 P.3d 1011 (2002)).

Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 54-55, 202 P.3d 334 (2009) (citing *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). Factual findings will not be overturned unless they

are "clearly erroneous." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004).

As for the PERC's legal conclusions, "PERC's decisions are accorded extraordinary judicial deference, especially in the matter of remedies." *Pasco Hous. Auth. v. State, Pub. Emp't Relations Comm'n*, 98 Wn. App. 809, 812-15, 991 P.2d 1177 (2000). Both the Washington Legislature and Supreme Court have recognized that public employee labor relations policy is best managed by creating an expert administration, giving it extensive jurisdiction to fashion equitable remedies, and "severely limiting judicial review." *Id.* (citing RCW 41.58.005(1), (3); *Arnett v. Seattle General Hospital*, 65 Wn.2d 22, 28, 395 P.2d 503 (1964) (citing *Phelps Dodge Corp. v. Nat'l Labor Relations Bd.*, 313 U.S. 177, 61 S. Ct. 845, 85 L.Ed. 1271, 133 A.L.R. 1217 (1941))); *see also, Maple Valley Prof'l Fire Fighters v. King Co. Fire Prot. Dist. No. 43*, 135 Wn. App. 749, 759, 145 P.3d 1247 (2006) (Washington courts give "great deference to PERC's expertise in interpreting labor relations law").[8] This "limited" review means that, if there was in fact an unfair labor practice, Washington appellate courts will affirm unless the remedy is clearly outside the Commission's power. *Id.* (*citing Pub. Emp't Relations Comm'n v. City of Kennewick*, 99 Wn.2d 832, 841, 664 P.2d 1240 (1983)). The reviewing court may not substitute its

[8] *See also Bellevue v. Int'l Ass'n of Fire Fighters*, 119 Wn.2d 373, 381, 831 P.2d 738 (1992) ("Because of the expertise of PERC's members in labor relations, ... the courts of this state give 'great deference' to PERC's decisions and interpretations of the collective bargaining statutes."); *City of Pasco v. PERC*, 119 Wn.2d 504, 506, 833 P.2d 381 (1992).

judgment for PERC's, contrary to the general rule. *Municipality of Metro. Seattle v. Pub. Emp't Relations Comm'n,* 118 Wn.2d 621, 634, 826 P.2d 158 (1992). "The only relevant question here is whether the Commission abused its statutory remedial power." *Pasco Hous. Auth.*, 98 Wn. App. at 812-13 (*citing Lewis County v. Pub. Emp't Relations Comm'n*, 31 Wn. App. 853, 865-66, 644 P.2d 1231 (1982)).

B. PERC Is Authorized to Impose "Make Whole" Remedies, Not Punitive Damages.

PERC derives its power to fashion appropriate remedies from the Public Employees Collective Bargaining Act, RCW 41.56 (the "Act"), and from the chapter that creates PERC, RCW 41.58. RCW 41.56.160 does not require particular remedies and gives the agency broad discretion. It is worded in general terms: "The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders. . . . RCW 41.56.160(1). Once an unfair labor practice has occurred, the agency issues an order to cease and desist and takes "such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees." RCW 41.56.160(2).

In the matter of remedies, therefore, intervention is appropriate only if the remedy exceeds the mandate of RCW 41.56.160. *Lewis County,* 31 Wn. App. at 865-66. PERC's orders will be upheld so long as they are consistent with the purposes of the Act and not otherwise unlawful. *Municipality of Metro. Seattle,* 118 Wn.2d at 634-35; *accord,*

Brown v. State, Dep't of Health, Dental Disciplinary Bd., 94 Wn. App. 7, 17, 972 P.2d 101 (1998); *State ex rel. Wash. Fed'n of State Emps.*, 93 Wn.2d at 69; *Shanlian v. Faulk*, 68 Wn. App. 320, 328, 843 P.2d 535 (1992).

PERC regulations state that if an unfair labor practice is found to have been committed, the Commission or examiner shall issue a "remedial" order. WAC 391-45-410. The purpose is to put employees back into the position they would have been in had no unfair labor practice occurred. *City of Kalama,* Decision 6853-A (PECB, 2000). Therefore, in *City of Kalama,* where the employer was found to have unlawfully removed a take-home car benefit, the employer was ordered to reimburse employees at the Internal Revenue Service mileage rate for expenses incurred because they had to drive personal vehicles. *City of Kalama,* Decision 6853-A (PECB, 2000). Similarly, in *City of Vancouver,* Decision 808-A (PECB, 1980), where the employer was found to have unlawfully contracted out bargaining unit work, the employer was ordered to make employees "whole" by compensating them for work they would have performed. Where an employer was found to have unlawfully recouped wages directly from bargaining unit members, the agency ordered the employer to return the recouped wages to the employees. *City of Tacoma,* Decision 11097-A (PECB, 2012).

Because of the "make whole" purpose behind the PERC's remedies, the agency has refused to award monetary damages that exceed employees' actual damages. For example, in *Southwest Snohomish Cnty.*

Public Safety Communications Agency, Decision 11149-B (PECB, 2012), the agency rejected the union's request that it order the employer to pay travel expenses an employee *would have incurred* to teach courses she would have taught but for the employer's unlawful act:

> The purpose of the back pay remedy is to make Basim whole and put her in the same economic position she would have been in absent unlawful discrimination by the employer. The travel costs are not a separate source of income. Rather, travel costs are reimbursements for actual expenses incurred. Basim did not travel to teach courses for the CJTC between March 23, 2010, and December 17, 2010, and did not accrue travel expenses that would require reimbursement during that time period.

Id.

Although it has broad discretion, the PERC acknowledges that it is not authorized to issue remedies that are punitive. *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce Cnty.*, Decision 1840-A (PECB, 1985); *see also, Pierce Cnty.*, Decision 1840-A *et seq.* (PECB, 1985) ("Unfair labor practice remedies should be remedial and not punitive in nature."). The Commission expressly recognized that in this case:

> Some creativity might be appropriate in a case that otherwise meets the criteria for an "extraordinary" remedy, but extraordinary remedies are used sparingly, and ordered only when a defense is frivolous, or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. *Seattle*

> *School District*, Decision 5542-C (PECB, 1997). Chapter 41.56 RCW does not authorize the Commission to issue remedies that are punitive. *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce Cnty.*, Decision 1840-A (PECB, 1985); RCW 41.56.160.

Decision 11098-B and 11099-B at 8 (emphasis added); *accord Wash. Fed'n of State Emps. v. State–Corrections*, Decision 11060-A (PRSA), 2012 WL 3792611, 6 ("These remedies should be used sparingly to effectuate the purposes of the Act.")

"Any remedial order needs to fit the violation found, and extraordinary remedies are still granted sparingly." *Skagit Cnty.*, Decision 8746-A (PECB, 2006). Extraordinary remedies are generally only permitted in cases where an employer's conduct constitutes a deliberate attempt to undermine the lawful exercise of employee rights under RCW 41.56. *Snohomish Cnty.*, Decision 9834-B (PECB, 2008). The Commission is not authorized to award excessive remedies that border on a penalty. *City of Burlington*, Decision 5841-A (PECB, 1997). Instead, "remedial orders issued by the Commission are designed to put the employee(s) affected by unfair labor practices back to the same position they would have enjoyed if no labor practice had been committed." *Central Wash. Univ.*, Decision 10967 (PECB, 2011) (*citing City of Kalama*, Decision 6739-A (PECB, 2001)).

C. The Remedy Imposed by the PERC is Within the Scope of its Authority and Consistent with State and Federal Law.

PERC correctly stated and applied the legal standard applicable to the question of a remedy:

> When the Legislature created the Commission, it expressed its intent: to provide uniform and impartial adjustment and settlement of complaints, grievances, and disputes arising from employer-employee relations. RCW 41.56.005. The authority of the Commission to prevent and remedy unfair labor practices is set forth in RCW 41.56.160. . . .
>
> When interpreting the Commission's remedial authority under Chapter 41.56 RCW, the Supreme Court of the State of Washington approved a liberal construction of the statute to accomplish that purpose. *METRO v. PERC*, 118 Wn.2d 621 (1992) . With that purpose in mind, the Supreme Court interpreted the statutory phrase "appropriate remedial orders" to be those necessary to effectuate the purposes of the collective bargaining statute to make the Commission's lawful orders effective. *METRO v. PERC*, 118 Wn.2d at 633.
>
> Some creativity might be appropriate in a case that otherwise meets the criteria for an "extraordinary" remedy, but extraordinary remedies are used sparingly, and ordered only when a defense is frivolous, or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. *Seattle School District*, Decision 5542-C (PECB, 1997). Chapter 41.56 RCW does not authorize the Commission to issue remedies

> that are punitive. *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce Cnty.*, Decision 1840-A (PECB, 1985); RCW 41.56.160.
>
> The standard remedy for a unilateral change violation includes ordering the offending party to cease and desist and, if necessary, to restore the status quo; make employees whole; post notice of the violation; publicly read the notice; and order the parties to bargain from the status quo. *City of Anacortes*, Decision 6863-B (PECB, 2001).

CR 1982-83.

Applying these standards, PERC imposed a remedy that seeks, as much as is possible, to make employees whole. Specifically, in addition to affirming the traditional unfair labor practice remedies imposed by the examiner (*e.g.*, posting copies of the notice, reading the notice at a regular Board meeting, etc., CR at 1905-06, 1986), the PERC required Kitsap Transit to take the following action:

> Make bargaining unit employees who were formerly covered under the Premera PPO plan whole for their losses incurred as a result of the employer's unilateral elimination of the Premera PPO plan. The employer shall reimburse employees the difference between what would have been paid under the Premera PPO plan less any payments made under the HMO plan for all medical expenses. We order the employer to make those reimbursements from the date the employer unilaterally stopped offering the PPO plan until the parties negotiate, and implement, a good faith agreement or

> obtain, and implement an award from an interest arbitrator on health insurance coverage.

CR 1986. That remedy is consistent with "make whole remedies" in other unilateral change cases. *See, e.g., City of Kalama,* Decision 6853-A (PECB, 2000) (where the employer was found to have unlawfully removed a take-home car benefit, the employer was ordered to reimburse employees at the federal Internal Revenue Service mileage rate for having to drive their personal vehicles); *Keystone Steel & Wire,* 248 NLRB No. 40, at 283-84 (1980) (requiring employer to reimburse employees for expenses incurred as a result of the change to Metropolitan Life).

PERC's remedy is also consistent with evidence about the "harm" caused by the elimination of Premera. As noted above, the benefit levels of the two plans were substantially equivalent, with Group Health's "a little richer." CR 439-40, 491. In fact, the evidence in the record establishes that employees likely had lower out-of-pocket expenditures with the Group Health plan. CR 671-72. There is little evidence about any measurable negative impact on employees. ATU had only two employees testify about their experiences in transitioning from Premera to Group Health. CR 379-80. One testified that his adult daughter in Oregon could not get a primary care physician that accepts Group Health; however, Group Health has a reciprocal agreement with Kaiser in Oregon. CR 395 at 1-22; CR 1409-61, 345. The same employee also testified that his wife had to have a gynecological exam done by a different practitioner and the new doctor lacked knowledge about a prior procedure she had.

CR 396-97. Nevertheless, the same employee testified that he was "very happy" that Group Health provided full coverage when he had inpatient treatment and that he received "good care," agreeing that he benefitted from the change. CR 397-98. His testimony did not establish actual "damage" meriting the windfall awarded by the examiner.

The second employee testified that she would have preferred to spend the night in the hospital for a procedure rather than have it performed on an outpatient basis as recommended by her Group Health doctor. CR 385-86. She also had a subjective belief that treatment by the neurosurgery department was less preferable than by an "orthopedic back specialist." CR 386-87. Because she had originally been scheduled to have the surgery in January 2011, she had to wait until April. CR 385 at 9-10; CR 387 at 16-25. This employee also was not happy with a drug prescribed by her Group Health doctor so she bought it out-of-pocket for $200. CR 389-90. Again, to the extent that this employee had measurable losses as a result of the switch, such as the non-covered drug expense, it is appropriate for PERC to remedy that through reimbursement.

Given this scant and mixed evidence on "actual harm," the PERC was justified in limiting compensation to actual out-of-pocket losses incurred by employees who actually moved from Premera to Group Health. Generalized opinion testimony from ATU's "expert" about the advantages of a PPO-type plan over an HMO network plan, *see* CR 343-47, provides no basis for PERC to determine which employees were unhappy with the switch and which were not. Moreover, as even the

hearing examiner realized, PERC does not have authority to compensate employees for "pain and suffering that resulted from being forced to change health plans," *see* CR 1898, which is all this opinion testimony would be relevant to.

The PERC's remedy is also appropriate in terms of what it *did not* include. ATU accused Kitsap Transit of unlawfully paying employees who transitioned to Group Health an "incentive" (in the form of a lump sum payment and coverage of Group Health premiums for 2011). CR 41-74. The record reflects that Kitsap Transit's objective was merely to provide a transition allowance to minimize or eliminate the impact on employees of Kitsap Transit's inability to offer the PPO plan. CR 712. Put differently, Kitsap Transit was attempting to approximate the status quo pending further negotiations with the ATU.

The PERC and hearing examiner both noted that neither PERC nor the NLRB typically order revocation of an unlawfully granted wage increase, unless revocation is requested by the union. CR 1897 (*citing Herman Sausage Co.,* 122 NLRB 168 (1958); *Lewis Cnty.,* Decision 10571-A (PECB, 2011)); CR 1984. That is because the union is in the best position to know whether elimination of a benefit that an employer unilaterally granted will cause greater harm than the original change. CR 1984. As a result, neither the examiner nor PERC ordered the employees to reimburse Kitsap Transit for the incentive payment. *See* CR 1904-06; CR 1985-86.

D. The PERC's Finding That Kitsap Transit Did Not Engage In Conduct Warranting an Extraordinary Remedy Is Supported by Substantial Evidence.

As PERC recognized, "extraordinary remedies" are used sparingly and warranted only when a defense is frivolous, or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. CR 1983 (*citing Seattle School District,* Decision 5542-C (PECB, 1997)). There is no evidence to support a contention that Kitsap Transit engaged in a pattern of bad-faith bargaining. Substantial evidence supports the PERC's findings that Kitsap Transit's defense to the unilateral change charge was not frivolous.

PERC found that "[t]he employer unilaterally changed the insurance plan options available to employees, knowing it was required to maintain benefit levels. The employer failed to meet that requirement." CR 1984. This is not a "pattern of bad-faith bargaining." Rather, the unfair labor practice charge addressed a discrete situation, in which the employer was trying to find an alternative health insurance plan for its different employee groups, and its lawful efforts to do so affected the willingness of Premera to offer a PPO plan to the ATU group. While PERC ultimately decided that Kitsap Transit should have engaged in bargaining with ATU earlier than it did, CR 1978-79, that is not the type of situation that PERC has concluded merits an extraordinary remedy. *See, e.g., Lewis Cnty. v. PERC,* 31 Wn. App. 853 (Div. 2, 1982) (affirming imposition of extraordinary remedy of attorneys fees where employer sought to evade its legal duty to bargain over a period of two years and

tardily asserted defense of "separate employers" only after a second unfair labor practice had been filed against it).

The record also supports the PERC's finding that Kitsap Transit's defense to the charge was not "frivolous." CR 1984. PERC has defined that term to mean "meritless." *Pasco Housing Authority*, Decision 5927-A (PECB, 1997) ("The term 'meritless' has been defined as meaning groundless or without foundation.") (citing *State ex rel. Wash. Federation of State Emps. v. Central Washington Univ.*, 93 Wn.2d 60, 69 (1980)). Accordingly, it has approved an extraordinary remedy, such as requiring the employer to pay the claimant's attorneys fees, when the employer knew or could easily have discovered the former *employer* negotiator would controvert its assertions about the intent of the language at issue, and where each of the waiver defenses asserted by the employer was contrary to established precedent. *Spokane Cnty.*, Decision 5698 (PECB, 1996), *aff'd, Spokane Cnty.*, Decision 5698-A (PECB, 1996).

In this case, Kitsap Transit asserted a "business necessity defense" to the unilateral change charge. CR 103. An employer can raise a business necessity defense when "compelling practical or legal circumstances necessitate a unilateral change of employee wages, hours or working conditions" (although the employer is still obligated to bargain the effects of the unilateral change). *Id.* (*quoting Skagit Cnty.*, Decision 8746-A (PECB, 2006)). For example, in *Skagit Cnty.*, Decision 8886-A (PECB, 2006), the Washington State Legislature changed the statute governing when employers were required to deduct industrial insurance

premiums from employees' paychecks. *Id.* Skagit County was excused from bargaining the decision, but not the effects, because a third party instituted a change that was beyond the employer's control. *Id.*

To establish a business necessity defense, an employer must demonstrate that:

> (1) a business necessity existed,
>
> (2) adequate notice of the proposed change was provided, and
>
> (3) bargaining over the effects did occur or the union waived bargaining.

King Cnty., Decision Nos. 10576, -77, -78 (PECB, 2009). "The Commission examines all of the relevant facts and circumstances surrounding the particular event before ruling on the legality of a decision to implement a unilateral change without satisfying the collective bargaining obligation." *Id.* (*quoting Skagit Cnty.*, Decision 8746-A (PECB, 2006)).

In asserting its defense, Kitsap Transit relied on PERC authority, such as *Cowlitz Cnty.*, Decision 7007-A (2000). There, employees participated in a Teamsters-sponsored plan. *Id.* On July 8, a new bargaining representative was certified, which meant employees would be ineligible for the Teamsters plan as of August 1. *Id.* The employer made various efforts during the month to notify the union of the necessary change in health plans and offered to bargain. *Id.* The PERC affirmed the examiner's conclusion that the employer's actions in implementing a new

were justified by business necessity, and that the union was given adequate notice and an opportunity to bargain regarding the effects. *Id.*

Kitsap Transit argued that the change in the availability of the PPO plan similarly resulted from decisions of third parties outside of its control, such that PERC authority supported a business necessity defense. CR 103, 1856-59. As recognized by the PERC, Kitsap Transit had a right to bargain independently with the Teamsters and Machinists about lower-cost health insurance options. CR 1980-81. John Witte, the Teamsters agent and a Kitsap Transit Board labor representative, first suggested to Kitsap Transit that he could help find a lower-cost alternative. CP 137. On September 29, 2010, Kitsap Transit's insurance broker informed the employer that Premera's underwriters would not agree to insure only ATU bargaining unit employees, because the group was too small and in light of the Group Health HMO option that was also offered. CP 123 (FF 17). Kitsap Transit directed the broker to continue to look for comparable alternatives, and did not engage ATU in bargaining regarding alternatives until after the broker informed the employer that he could not find an insurer that would offer a PPO plan comparable to the Premera PPO plan for the ATU group. CP 123-24 (FF 19, 22, 23).

PERC rejected Kitsap Transit's business necessity defense on the grounds that the necessity for the change resulted from the employer's actions and because the employer did not provide adequate notice to the union of the impending change. CR 1981. Given the totality of the circumstances in this complex area of health insurance benefits –

especially when the actions by the employer that led third parties to make the change were lawful and arguably required by its good-faith bargaining obligation to other unions – PERC did not err when it found that the employer's business necessity defense was not frivolous. CR 1984.

E. PERC Recognized that the Remedy Imposed by the Examiner was Contrary to PERC Authority and an Impossibility.

Because the remedy imposed by the PERC is within the broad discretion granted to it by statute, there is no reason for the Court to revisit the original remedy imposed by the hearing examiner. In other words, once the Court has determined that the PERC's remedy is within the scope of authority granted to it by the statute, the Court should defer to the PERC's judgment about appropriate remedies and not second-guess whether another remedy (such as the examiner's) would be preferable. However, if the Court chooses to evaluate the examiner's remedy, it will find that the PERC correctly concluded the examiner's remedy was improper.

1. PERC's factual finding that Kitsap Transit could not reinstate a Premera or similar PPO plan is a verity on appeal.

The relevant factual findings upon judicial review are those made by the agency as part of its final agency action. *City of Federal Way v. Pub. Emp't Relations Comm'n*, 93 Wn. App. 509, 970 P.2d 752 (1998). Thus, the relevant findings of fact are those made by the hearing examiner in Decision 11098-A and 11099-A, as adopted by the PERC. CR 1986.

ATU did not assign error to any findings of fact. Rather, ATU's sole challenge is to the remedy. CP 6. Because ATU did not assign error to the Commission's findings, they are verities for purposes of this appeal. *Eidson v. State*, 108 Wn. App. 712, 32 P.3d 1039 (2001); *McEntyre v. Emp't Sec. Dep't*, 114 Wn. App. 1074, 2002 WL 31863476 (2002). Thus, the following relevant Findings of Fact are verities:

> On September 29, 2010, Wallen forwarded the employer a rejection from Premera and explained that Premera's underwriters would not agree to insure only ATU bargaining unit employees, because the group was too small and in light of the Group Health HMO option that was also offered.
>
> On November 4, 2010, Wallen informed the employer by e-mail that he could not find an insurance plan that would offer a PPO plan comparable to the Premero PPO for a group comprised solely of ATU bargaining unit employees.

Findings of Fact nos. 17 and 22 (CR 1901-02). Thus, the Court must accept as true the facts that (1) Premera would not offer a PPO plan to cover the ATU bargaining unit members in 2011; and (2) Kitsap Transit was informed that no other insurer was willing to offer a PPO plan to cover those employees in 2011.

2. PERC's finding that restoring a PPO plan could be an impossibility is supported by substantial evidence.

The hearing examiner ordered Kitsap Transit to restore the *status quo ante* "by reinstating a health insurance plan with benefit levels

substantially equivalent to the December 31, 2010 Premera PPO plan" (or implementing another plan option as agreed upon by the union). CR 1904-06. While reinstating Premera would return the employees to the *status quo ante*, the PERC recognized that it is not appropriate to order a party to take action that may be impossible to perform or pay a massive penalty to the other side. This finding is supported by the record in this case, which establishes that Kitsap Transit did not have the ability to offer the Premera – or any other PPO plan – in 2011 or any time up to the hearing date.

ATU's contention that it would have been possible for Kitsap Transit to implement an equivalent PPO plan is not supported by any competent evidence. First, ATU offers unsubstantiated speculation that "Premera was more than willing to re-bid the same basic plan in the following calendar year." App. Br. at 30. There is no citation to any evidence in the record to support that conclusion, and there is no evidence. The only evidence is what the examiner found in Finding of Fact 17: that Premera was unwilling to offer a PPO plan to cover the ATU group. CR 1901-02. And although Kitsap Transit continued its efforts to find a PPO plan, it was never able to find an insurance carrier willing to offer one to the PPO group through the date of the PERC hearing. CR 719, 1901-02.

In support of its challenge to the PERC's impossibility finding, ATU offers a theory that if Kitsap Transit had only unwound the various

lawful steps[9] it took with respect to non-ATU employees, "there is no rational reason to conclude the Premera plan would be 'impossible' to secure since it would have remained in place but for the unlawful actions taken by Kitsap Transit." App. Br. at 30. A challenge to an agency's factual findings must be based on a demonstration that the finding is not supported by substantial evidence in the record, not an party's speculation about the future. In fact, the evidentiary record does not support ATU's speculation. The original effort to find a less costly PPO plan was driven in part by John Witte, the Secretary/Treasurer of the Teamsters, Local 589, which represents service helpers and facilities maintenance employees at Kitsap Transit. CR 661, 592, 600. Service helpers work with Kitsap Transit mechanics, who are represented by the Machinists. CR 593. Mr. Witte also serves as the labor representative on the Kitsap Transit Board. CR 595. Beginning in the Spring of 2010, Mr. Witte tried to identify health insurance alternatives that would provide coverage for his bargaining unit members at a lower premium cost than the existing Premera PPO. CR 596. He hoped to offer all Kitsap Transit employees a Teamsters PPO alternative through Northwest Administrators ("NWA"). CR 597, 615. Ultimately, the Teamsters and Machinists decided to go

[9] The hearing examiner recognized that Kitsap Transit had a *right* to bargain with the Teamsters and Machinists with respect to the healthcare benefits it would provide for those bargaining units. CR 1887. The PERC agreed, explaining: The employer was not required to continue to offer the same insurance options to all bargaining units. One union cannot dictate what an employer will offer to another unit." CR 1981 (*citing Western Wash. Univ.*, Decision 9309-A (PSRA, 2008)).

with a plan proposed by the Machinists. CR 599-600. However, that plan was not available to Kitsap Transit employees other than those represented by the Teamsters and Machinists. CR 600-01. There is no evidence in the record to support the argument that the Teamsters and Machinists subsequently would have had any interest in reverting back to a Premera plan in order to make it available to the ATU-represented employees. On the contrary, Mr. Witte testified that the Machinists and Teamsters "were elated to see any kind of adjustment in their wages" because they found a lower-cost health plan. CR 609. ATU's argument that Kitsap Transit could have recreated a situation in which its employee groups would be attractive to Premera is based on multiple levels of speculation about the interests and future actions of entities not controlled by Kitsap Transit.

The final basis for ATU's challenge to the impossibility finding rests on the testimony of its "expert." App. Br. at 31. The evidence from ATU's "expert" did not establish that it would have been possible for Kitsap Transit to offer an equivalent PPO plan, at the end of 2010, at the time of the PERC hearing, or ever. First, the expert did not testify that Kitsap Transit could have obtained a comparable PPO plan; rather, he testified that he thought that Kitsap Transit should have explored self-funding its employees' medical expenses. CR 1339, 456. Self-funding is not a "health insurance plan with benefit levels equivalent to the December 31, 2010 Premera PPO Plan," such that it would have satisfied

the examiner's order. CR 1905.[10] Moreover, even the ATU expert's opinion that Kitsap Transit might have been able to find an insurer to issue a stop-loss policy to ensure that self-funding was not fiscal suicide was based on contacts with potential providers in 2011, in which he admitted that he "was basically asking them to pretend that we were back in 2010 or 2009." CR 458, 1339. In testimony it was revealed that his opinion was based on inaccurate information about the number of employees, he knew nothing about the cost, and did not know whether the requisite State approval could have been obtained by January 2011. CR 355-57. ATU cannot show that the PERC's finding of impossibility was "clearly erroneous" based on such faulty speculation, especially when the actual record before PERC firmly establishes that no insurer was willing to offer a PPO plan to cover the ATU employees. Moreover, ATU did not assign error to that factual finding.

3. The Examiner erred in characterizing a windfall as a "make-whole" remedy.

As the PERC recognized, the requirement that Kitsap Transit pay ATU members who were on, or had "expressed interest" in being on, the Premera plan all the premiums it would have otherwise paid to Premera can in no way be described as a "make whole" remedy, such that it is within the authority of PERC.

[10] In fact, Kitsap Transit's broker testified that it would have been malpractice to recommend that Kitsap Transit pursue self-funding, given its experience. CR 479-81.

The savings realized by Kitsap Transit came from a reduction in premiums Kitsap Transit pays to a third party to provide health insurance coverage for ATU members. As employees never received the amount Kitsap Transit paid to Premera, requiring Kitsap Transit to pay them the difference between the cost of Premera and Group Health premiums is not a return to the status quo. The fact that Kitsap Transit was paying less money to an insurance company has no correlation with any impact of the change on any individual ATU member.

ATU spends pages spinning an argument about how the hearing examiner's order requiring that Kitsap Transit take the total savings it realized and write equal checks to a portion of the ATU bargaining unit "does the best job of monetizing the value [of invaluable benefits that cannot be easily monetized] and comes closest to assessing the appropriate level of damages." CP 49. Notably absent is a citation to a single case under Washington or federal law in which any agency or court concluded that it was appropriate under labor law to require an employer to transfer to employees the amount of savings realized by the employer as a "make-whole remedy."

At least one PERC hearing examiner has contemplated a union's proposal to order the employer to pay employees the cost savings realized by a unilateral action. *N. Franklin Sch. Dist.*, Decision 3980 (PECB, 1992). In *North Franklin School District*, the employer unlawfully hired an outside consultant to perform work historically performed by bargaining unit members. *Id.* at 4. The hearing examiner ruled the

employer unlawfully implemented a unilateral change and noted that the customary remedial order would require the employer to restore the status quo and provide back pay to any employees who lost wages as a result of the outside consultant working or reducing their shifts. *Id.* at 9. The examiner declined to implement a remedy requiring the employer to compensate affected employees for the money it saved by implementing the unilateral change, stating that the amount of money the employer saved did "not reflect a carefully construed technical analysis of wages not paid to members of the bargaining unit." *Id.* Likewise, in this case, the examiner's order requiring Kitsap Transit to pay affected employees the savings it realized does not reflect "a carefully construed technical analysis" of the actual impact of any diminution of health benefits experienced by any individual bargaining unit member.

Rather, as the PERC recognized, an award that is not correlated to any actual loss suffered by any employee, and is intended to create an "incentive for employers to comply with the law and negotiate changes to benefits," can only be described as "punitive." CR 1898, 1984. Because the PERC does not have authority to issue remedies that are punitive, the PERC appropriately modified this part of the examiner's order. CR 1983 (citing *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce Cnty.*, Decision 1840-A (PECB, 1985); RCW 41.56.160).

As the award of savings was improper, the award of interest was also defective. Remedies available in unfair labor practice disputes are governed by WAC 391-45, which only references interest with respect to

back pay orders. WAC 391-45-410. Other PERC hearing examiners have interpreted this section of the administrative code to permit interest only when back pay awards are at issue: "WAC 391-45-410(3) only allows interest to be awarded on back pay calculations." *Pierce Cnty.*, Decision 1840-A *et seq.* (PECB, 1985) ("make whole" remedy requiring union to repay late fees unlawfully charged to members for outstanding dues did not include interest award because repayment was unrelated to back pay); *see also, Snohomish Cnty. Pub. Safety Commc'ns*, Decision 11149-B (PECB 2012) (interest permitted only when remedy clearly related to back pay owed to aggrieved employee); *see also Univ. of Wash.*, Decision 10726-A (PSRA, 2012) ("The Legislature could have exempted the employer from the requirement to pay interest on back pay awards from the date of the violation, but it did not.").

Accordingly, PERC has reversed other hearing examiners who have improperly included interest payments in remedial orders when the underlying monetary award is unrelated to back pay. *City of Anacortes*, Decision 1493-C (PECB 1983). In *City of Anacortes*, the hearing examiner found that the employer committed an unfair labor practice by unilaterally changing the schedule of paydays for bargaining unit employees and issued a remedial order requiring interest on wage payments delayed by the schedule change. *Id.* at 1. PERC reversed the interest award, ruling that WAC 391-45-410 only permitted interest for back pay awards: "There were no back pay orders in the instant case so the subsection is inapplicable." *Id.* at 2. PERC also ruled that an award of

interest would be punitive, rather than remedial, because no employees actually suffered a financial detriment following rescheduling of paydays. *Id.* "The city did not retain money the employees had earned for its own advantage .... The Commission has no power to enter a punitive order. Thus, in the absence of proof of actual, not merely theoretical, loss or financial detriment to a party or employee no interest may be awarded." *Id.* PERC's elimination of the hearing examiner's interest award was consistent with its long-standing interpretation of its legal authority.

4. The hearing examiner's punitive award was inconsistent with persuasive federal law.

RCW 41.56 is substantially similar to the National Labor Relations Act. *Wash. Fed'n of State Emp., AFL-CIO v. Bd. of Trustees of Cent. Wash. Univ.*, 93 Wn.2d 60, 67, 605 P.2d 1252 (1980). As a result, Washington courts consider National Labor Relations Board ("NLRB") decisions persuasive authority in interpreting Washington law. *Nucleonics Alliance, Local 1369 v. WPPSS*, 101 Wn.2d 24, 33, 677 P.2d 108 (1984); *see also, Pub. Sch. Emps. of Quincy v. Pub. Emp't Relations Comm'n*, 77 Wn. App. 741, 745, 893 P.2d 1132 (1995). Under persuasive federal authority, punitive remedies are not appropriate – nor does the NLRB order employers to take action outside of their control.

As under Washington law, the United States Supreme Court scrupulously defers to the NLRB in matters within the Board's discretion. "Congress has invested the Board, not the courts, with broad discretion to order a violator to take such affirmative action . . . . as will effectuate the

policies of (the Act)." *Nat'l Labor Relations Bd. v. Food Store Emps. Union, Local 347,* 417 U.S. 1, 8, 94 S. Ct. 2074, 40 L.Ed.2d 612 (1974) (quoting 29 U.S.C.A. § 160(c)). This includes the fashioning of remedies. *Id.* at 9-10.

Under the NLRA, "any monetary remedy ordered by the Board must be tailored to the actual, compensable injuries suffered." *In re Miramar Hotel Corp.*, 336 NLRB No. 1203, 1243 (2001) (internal quotation omitted). "To cure unfair labor practices, the Board may fashion a 'make whole' remedy which awards the employees monetary damages for money they lost during the period of the violations. . . . This remedy is not punitive. It merely compensates the employees for the money they lost as a result of the unfair labor practices. . . ." *N. Star Steel Co. v. NLRB,* 974 F.2d 68, 71 (8th Cir. 1992). "The National Labor Relations Act is not a penal statute, and windfall remedies – remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong – are penal." *Starcon Int'l v. NLRB,* 450 F.3d 276, 277-78 (7th Cir. 2006).

The facts and remedial order of *Keystone Steel & Wire v. NLRB,* 606 F.2d 171 (7th Cir. 1979), are instructive. There, the Seventh Circuit upheld an NLRB determination that the employer unlawfully changed its employees' health benefits administrator from Blue Cross to Metropolitan Life, but overturned the proposed remedy requiring reversion back to Blue Cross as "heavy handed, disruptive and overly broad." *Id.* at 180. The employer's move to Metropolitan Life reduced certain benefits but also

offered superior coverage in other aspects. *Id.* at 179. Reverting back represented a significant cost and administrative burden to the employer because Blue Cross was not available to all its employee groups. The court, recognizing these obstacles and lack of bad faith by the employer, held that the proposed remedy exceeded the employer's culpability:

> Keystone sought the change from Blue Cross to Metropolitan as part of a nationwide effort to centralize the administration of about 30 employee benefits plans and thereby cut costs, a motive hardly deserving of criticism. It is conceded that Blue Cross is unable to supply this same service for all of Keystone's companies across the country. The Board gives no justification whatsoever for the disruptive order which requires Keystone to dismiss Metropolitan and reinstate Blue Cross upon the Union's request. Keystone as an alternative seeks an order requiring it only to correct any existing detrimental differences. We agree that a more rational and reasonable solution is worthy of the Board's further consideration.

Id. at 180. On remand, the NLRB adopted a less extreme remedy, requiring the employer to restore services and benefits lost after Blue Cross was cancelled and reimburse employees for any expenses incurred as a result of the change. *Keystone Steel & Wire,* 248 NLRB No. 40, at 283-84 (1980). The NLRB did not contemplate, or even mention, a punitive remedy requiring the employer to pay employees any premium payments that otherwise would have gone to Blue Cross.

Keystone Steel & Wire demonstrates that the NLRB has not, and will not, impose a remedial order requiring an employer to compensate employees for money the employer *may have saved* by implementing a change because such remuneration bears no relationship to "actual, compensable injuries suffered." *In re Miramar Hotel Corp.*, 336 NLRB No. 123, 1243 (2001). PERC recognized that the hearing examiner's award was far afield of any legal authority.

F. Standard of Review of Superior Court's Denial of Motion to Submit New Evidence.

The superior court denied ATU's request – made in conjunction with a reply brief – to reopen the administrative record created over the course of three full hearing days in order to try to bolster its case after-the-fact. A court's denial of a motion to supplement the record of the administrative agency on appeal is reviewed under an abuse of discretion standard. *E.g., Samson v. City of Bainbridge Island,* 149 Wn. App. 33, 54-55, 65-66, 202 P.3d 334 (2009); *see also, Okamoto v. Emp't Sec. Dep't,* 107 Wn. App. 490, 494-95, 27 P.3d 1203 (2001) ("We reverse a denial to supplement the record only if it determines that there was manifest abuse of discretion.").

G. The Superior Court Did Not Abuse its Discretion in Denying the Motion to Supplement the Agency Record.

1. The factual record on appeal.

ATU filed its unfair labor complaint in this matter on April 25, 2011, based on alleged actions occurring in late 2010. (CR 1-36). The hearing before the PERC examiner that established the factual record for

this appeal occurred on December 14 and 15, 2011, and February 14, 2012. (CR 1869-1910). That is the factual record upon which the PERC hearing examiner issued her July 23, 2012 decision. (CR 1869-1910). That is the factual record upon which the full Commission issued its decision on March 21, 2013, which ATU now appeals under the Administrative Procedures Act. (CR 1972-1988). It is based on this factual record, established in December 2011 and February 2012 that the Commission determined that the hearing examiner's remedy should be modified. The Commission explained:

> . . . . In this case it is not possible to make the employees whole by requiring the employer to reinstate the PPO plan. The evidence demonstrates that the employer would be unable to reinstate a health insurance plan with benefit levels substantially equivalent to the Premera PPO plan it ceased offering on December 31, because of the reduced number of employee to be covered. Four insurance carriers declined to even offer a quote for such coverage.
>
> The evidence demonstrates that the number of employees the employer would seek to insure in the ATU bargaining unit would necessitate another plan being offered, if the employer were able to secure a bid from another insurance carrier. On these facts, we decline to order the employer to reinstate a health insurance plan with benefit levels substantially equivalent to those the employer unilaterally ceased offering, because compliance could be an impossibility. . . .

CR 1984-85 (emphasis added).

Because the unchallenged evidence in the record establishes that no insurer was willing to offer a PPO plan to cover the ATU employees in 2011, and that evidence supports the PERC's decision that ordering the reinstatement *could* require Kitsap Transit to achieve an impossibility, ATU tried to offer new, after-the-fact evidence in an effort to resuscitate its argument. The first piece evidence ATU attempted to insert into the record did not even exist at the time of the evidentiary hearings in December 2011 and February 2012. Rather, ATU asked the superior court to reopen the record to consider events that happened in spring 2013.

2. Under the APA, judicial review is limited to the agency record.

Under the Administrative Procedure Act, judicial review generally is limited to the agency record. *Hardee v. State, Dep't of Soc. & Health Servs., Dep't Early Learning,* 152 Wn. App. 48, 57, 215 P.3d 214 (2009), *aff'd,* 172 Wn.2d 1, 256 P.3d 339 (2011) (citing RCW 34.05.558). The Act provides for the introduction of new evidence in very limited circumstances. RCW 34.05.562. New evidence may only be considered when the proponent can establish that one of the following circumstances exists:

> only if it relates to the validity of the agency action at the time it was taken and it is needed to decide disputed issues regarding: (a) improper constitution of the decision-making body; (b) the unlawfulness of the procedure; or (c) [m]aterial facts in rule

> making, brief adjudications, or other proceedings not required to be determined on the agency record.

Id. (emphasis added). As the Court of Appeals explained:

> If the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate, jurisdiction and the purpose behind the administrative hearing would be squandered.

Motley-Motley, Inc. v. State, 127 Wn. App. 62, 76-77, 110 P.3d 812 (2005) *(citing Ault v. Wash. State Highway Comm'n,* 77 Wn.2d 376, 378, 462 P.2d 546 (1969) *(quoting Ins. Co. of N. Am. v. Kueckelhan,* 70 Wn.2d 822, 835, 425 P.2d 669 (1967)).

Courts have accordingly approved the introduction of new evidence on appeal to the superior court only under highly limited circumstances. For example, new evidence is admissible when *no evidence* was presented at the administrative hearing. *Purse Seine Vessel Owners Ass'n v. State,* 92 Wn. App. 381, 388, 966 P.2d 928 (1998). Or, where the agency record consists of two letters. *Children's Hosp. & Med. Ctr. v. Dep't of Health,* 95 Wn. App. 858, 863 n.9, 975 P.2d 567 (1999). Or, when no administrative hearing occurred. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council,* 129 Wn.2d 787, 798-99, 920 P.2d 581 (1996).

3. ATU's proposed evidence meets none of the criteria for post-hearing admission.

ATU made no effort to argue that its proposed evidence meets any of the criteria. It merely asserted that its proposed evidence is "material." CP 180. But materiality is not enough, when the review is one, like this one, that is "required to be determined on the agency record." RCW 34.05.562. As one Court of Appeals explained, "A superior court may not allow additional evidence where the proponent of the evidence alleges only that the record is incomplete." *Herman v. State of Wash. Shorelines Hearings Bd.*, 149 Wn. App. 444, 454-55, 204 P.3d 928 (2009) (citing *Lewis Cnty. v. Pub. Emp't Relations Comm'n*, 31 Wn. App. 853, 861 (1982)).

This is not one of the limited circumstances in which the superior court effectively has no administrative record upon which to reach a decision. Unlike the situation in *Purse Seine Vessel Owners Ass'n v. State*, 92 Wn. App. 381, 388, 966 P.2d 928 (1998), in which the agency conducted no administrative hearing, here the PERC took testimony and other evidence over the course of *three hearing days*. Rather, it is clear that, in the case of the proffered opinion by Mr. Sanders about the availability of alternative health plans, ATU is dissatisfied with the quality of the evidence it offered over the course of the three-day hearing. Mr. Sanders, who has been ATU's President since July 1, 2011, did not testify at the December 2011 or February 2012 hearing. CP 375 at ¶ 3; CR 1869-1910. This type of effort to improve one side's evidence on appeal to the superior court is antithetical to the purpose and language of the APA. As

the Washington Supreme Court advised long ago in *Ault v. Wash. State Highway Comm'n*, 77 Wn.2d 376, 378 (1969), allowing a party to re-open the record to introduce new evidence on appeal would, in effect, transform the appeal process into an opportunity for a second evidentiary hearing.[11]

ATU's effort to introduce evidence about negotiations between the parties in 2013 is also highly improper under the APA. As indicated in the statute, new evidence may only be considered if it meets one of the three criteria and it relates to the agency action "at the time it was taken." RCW 34.05.562. Evidence about events occurring years after the events that are the subject of the unfair labor practice, after the dates on which the evidentiary occurred, and after the PERC issued its decision cannot be used as a basis to reverse the agency's decision on appeal. Again, if the introduction of subsequent events on appeal were allowed, every APA case would involve a new evidentiary hearing at the superior court (and court of appeals and Washington Supreme Court), in which the party challenging the agency tried to show that history has now proven the agency's action wrong or imprudent. The Commission had to make its decision about an appropriate remedy based on the *unchallenged* factual record before it. It is inappropriate under the APA for a superior court to take new evidence about events occurring years later, in order to second-

[11] The attempt to introduce testimony from Mr. Sanders about health insurance options allegedly available in 2010 is particularly inappropriate because, by introducing the evidence in conjunction with an appeal brief almost two years after the opening of the evidentiary hearing, ATU attempts to shield Mr. Sanders from cross examination with respect to his vague, unsubstantiated assertions.

guess the PERC's past decision about an appropriate remedy. In other words, the Court must decide whether it is appropriate to defer to the Commission's judgment that the hearing examiner's remedy was inappropriate because compliance "could be impossibility" based on the factual record the Commission *at the time the decision was made,* not based on whether *future events* proved that prediction right or wrong.

4. ATU's request to re-open the record through remand is not supported by the APA.

Having failed to convince the PERC to retain the windfall remedy imposed by the hearing examiner, and apparently fearful that the appellate courts will defer to the PERC on review, the ATU asks in the alternative that the Court remand this case to the PERC with an order to re-open the record to new evidence. This request, too, is wholly inconsistent with the APA.

As with requests to introduce new evidence on appeal, remands for new evidence are allowed only in extremely limited circumstances. Specifically, the APA only allows such actions when:

> (b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

RCW 34.05.562 (emphasis added).

As with its request that the Court accepts its new evidence, ATU could not satisfy the standards for the extremely limited remedy of a remand to take new evidence. ATU could not demonstrate why, if "AWC Health First options have long been available to employers extending back to the time this ULP was committed," CP 187 at ¶ 10, ATU could not reasonably have discovered that information in time to present the evidence at the three days of hearings. The evidence about health insurance plans the parties have considered and agreed to years after the evidentiary hearing are not relevant to the decision of the PERC's action "at the time it was taken." RCW 34.05.562(b). Again, the PERC's decision regarding the appropriate remedy must be judged based on the evidence that existed *at the time of the decision.* The reviewing court must evaluate the decision made based on evidence existing *at that time,* with appropriate deference. *See Maple Valley Prof'l Fire Fighters,* 135 Wn. App. at 759.

V. CONCLUSION

Based on a review of the entire record before the Court, it is easy to understand why PERC modified the examiner's remedy. It was not possible for Kitsap Transit reinstate the Premera health plan and it would have been a punitive remedy to require Kitsap Transit to pay ATU employees money that, under the status quo, would have gone to Premera. Therefore, Kitsap Transit respectfully urges this Court to affirm the PERC's decision about what is an appropriate remedy.

DATED this 12th day of May, 2014.

Respectfully submitted,

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I hereby certify that on this day I caused the foregoing to be served, as indicated, upon the following:

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