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NO. 93033-3

SUPREME COURT OF THE STATE OF WASHINGTON

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Appellants,

v.

KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD and PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

RESPONDENT PUBLIC EMPLOYMENT RELATIONS COMMISSION'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

MARK S. LYON
Assistant Attorney General
WSBA #12169
PO Box 40113
7141 Cleanwater Drive SW
Olympia, WA 98504-0113
(360) 753-6238
OID No. 91028
Attorneys for Respondent Public Employment Relations Commission

ORIGINAL

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The central issue in this case is whether Petitioner Kitsap County (County) must bargain with the Kitsap County Correctional Officers' Guild (Guild) over the layoffs of two jail employees undertaken to reduce labor costs. After two reviews by the Court of Appeals, the matter is properly resolved and does not warrant review by this Court.

The Court of Appeals held that the layoff decision was a mandatory subject of bargaining under the Public Employment Collective Bargaining Act (PECBA), RCW 41.56, as follows:

> The subject of the demand to bargain was the layoff decision, not the budget. Adopting a budget is a management prerogative. But when a public sector employer proposes to balance the budget by laying off workers who are represented by a union, the union must have the opportunity to bargain over whether the cost saving can be achieved by other means.

Kitsap Cty. v. Kitsap Cty. Corr. Officers' Guild, Inc., 193 Wn. App. 40, ¶ 1, __ P.3d __ (2016) (*Kitsap* II).[1] The court also rejected belated claims that the Guild waived its right to bargain the layoffs, finding these issues were previously resolved in an earlier appeal in this case and unsupported

[1] In this Answer, the decision of Division II in the first appeal will be referred to as *Kitsap* I. *Kitsap Cty. v. Kitsap Cty. Corr. Officers' Guild, Inc.*, 179 Wn. App. 987, 320 P.3d 70 (2014) (*Kitsap* I). The decision of Division I in the second appeal will be referenced as *Kitsap* II. *Kitsap Cty. v. Kitsap Cty. Corr. Officers' Guild, Inc.*, 193 Wn. App. 40, ___ P.3d ___ (2016) (*Kitsap* II).

The decision in *Kitsap* II has been reported in Westlaw, but has not yet been published in the Washington Reports. Citation to the Division I opinion will thus be made to the pinpoint paragraph number rather that the slip opinion "star page" number, for example *Kitsap* II, at ¶ 1. A copy of the Westlaw opinion showing paragraph numbers is attached as Exhibit A.

by the record. *Id.* at ¶ 13. These waiver issues were resolved in the first appeal and not appealed. *See Kitsap Cty. v. Kitsap Cty. Corr. Officers' Guild, Inc.*, 179 Wn. App. 987, 320 P.3d 70 (2014) (*Kitsap* I).

These holdings present no issue that warrants this Court's review. Petitioners fail to support their assertions that the recent appellate decision is in conflict with the prior decisions of this Court or federal precedent, creates an irreconcilable statutory conflict presenting a substantial public issue, or presents any conflict among the divisions of the courts of appeal. In addition, the County's effort to revive its waiver arguments rejected in *Kitsap* I are untimely. The Petition for Review should be denied.

I. ISSUES

1. Does the *Kitsap* II holding–that layoffs to reduce labor costs, as opposed to changes in the scope or nature of employer operations, are mandatory subjects of bargaining–conflict with the decisions of the Washington State Supreme Court?
2. Did the Guild's demand to bargain jail layoffs undertaken to reduce labor costs amount to a demand to bargain the County budget?
3. Is there a current substantial conflict between the duty to bargain layoffs under PECBA and the County budget statutes requiring resolution by the Washington State Supreme Court?

4. Are the County's waiver arguments rejected in *Kitsap* I and affirmed in *Kitsap* II appropriate for review under the law of the case doctrine?

II. STATEMENT OF THE CASE

This action arises from Kitsap County's decision to layoff two correctional officers to reduce labor costs. The officers' union (Guild), demanded to bargain the decision to layoff the officers. The County agreed to bargain the effects of the layoffs, but not the decision.

A. Demand to Bargain and Layoffs

Kitsap County's jail is operated by the Kitsap County Sheriff, an independently elected county officer. CP 394, 598. The Sheriff's Office is divided into a number of divisions, including the Corrections Division which operates the jail. CP 597. In 2011, the jail employed approximately 74 officers, nine sergeants and two lieutenants. *Id.* Ned Newlin is Chief of Corrections.

The size of the Sheriff Office's budget is determined through the annual County budgeting process. The timing and steps of this process is generally set out in statute RCW 36.40.010-.080. For the 2012 budget, the process was initiated in July 2011 (CP 389, 398), followed by the submission of the proposed Sheriff's budget (including the jail) in August 2011. CP 599, 603. Sometime in October, the Sheriff learned that

the as-yet unpublished preliminary County budget would contain additional cuts to the Sheriff's Office (including the jail). The final 2012 budget was not adopted until December 12, 2011. CP 434.

On October 24, 2011, the County met with two jail officers to inform them that they were "on the bubble" for a potential layoff on January 1, 2012. CP 644. That same day, the County sent an email to all jail employees announcing the layoffs and the reasons for them. CP 599, 603. The stated reason for the layoffs was to cut labor costs. CP 332. *See* CP 603-604.

Beginning the next day, the Guild provided several written demands to bargain the layoff "decision." CP 606, 646, 667, 669. The County took the position that it would bargain over the impacts of the layoff, but not the layoff decision itself. CP 578, 599, 600, 636.

Layoff notices were sent to the two employees on November 28, 2011, and their employment terminated on January 1, 2012, 76 days after they and the Guild were first notified of the potential layoff. CP 600, 638.

B. First Appeal (*Kitsap* I)

The County filed for declaratory judgment.[2] The parties brought cross-claims charging each other with unfair labor practices for refusal to bargain in good faith over the decision to layoff two correctional officers.[3] The trial court ruled that the decision was not a mandatory subject of bargaining. The Guild appealed.

In the first appeal, Division II held that the Guild did not waive its right to bargain layoffs by contract or by its conduct. *Kitsap* I, 179 Wn. App. at 996. It remanded for the trial court to engage in a multifactor balancing test to determine whether the jail layoffs were predominately related to employees' working conditions, so as to be a mandatory subject of bargaining, or whether the layoffs were predominately related to the County's managerial prerogatives, so as to be a permissible subject of bargaining. *Id.* at 999. The County did not appeal from this decision.

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[2] The County sought concurrent jurisdiction of the Superior Court because the County believed PERC's decisions created uncertainty about whether layoffs must be bargained. *Kitsap* II, at ¶ 10.

[3] It is an unfair labor practice to refuse to bargain a mandatory subject or to insist to impasse on a permissive subject. *Kitsap* II, at ¶ 11.

C. Remand and Second Appeal (*Kitsap* II)

Following remand, PERC intervened.[4] CP 162. After additional briefing and affidavits,[5] the superior court again granted summary judgment to the County. Both PERC and the Guild appealed.

Following the second appeal, the case was transferred from Division II to Division I for argument. Division I reversed the trial court and held: (1) that the layoffs to reduce labor costs were a mandatory subject of bargaining (*Kitsap* II, at ¶ 41), and (2) the County's belated attempts to renew its waiver claims during the second appeal were precluded by the law of the case doctrine and unsupported by the record. *Id.* at ¶ 46-47. The court held that the County's refusal to bargain the layoff decision was an unfair labor practice and remanded the case to the trial court for entry of an appropriate remedial order. *Id.* at ¶ 50-52.

The County then filed the present Petition for Review with this Court seeking review of both the Division I decision in *Kitsap* II and the earlier Division II decision in *Kitsap* I.

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[4] PERC did not learn of the case until the Court of Appeals' decision in *Kitsap* I was published.

[5] PERC argued that the record was inadequate for summary judgment but that the current record and case law suggest that the layoff was undertaken solely to reduce labor cost, a subject appropriate for mandatory bargaining. CP 143, 154-156. PERC further requested that once a determination was made on the mandatory subject of bargaining issue that the court proceed to resolve the underlying unfair labor practice claims and issue an appropriate remedy, consistent with PERC's practice. CP 157-158, 215.

III. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Holding That These Jail Layoffs–Taken to Reduce Labor Costs–Are Mandatory Subjects of Bargaining Does Not Conflict With Established Washington Labor Law

The dispute in this case involved application of established law. There is no conflict with the decisions of this Court under RAP 13.4(b)(1). First, the *Kitsap* II holding–that layoffs to reduce labor costs, as opposed to changes in the scope or nature of employer operations, are a mandatory subject of bargaining–is consistent with a large body of existing federal and PERC precedent. This approach promotes the purposes of the public employment bargaining law by ensuring that when an employer aims to reduce labor costs, employees are presented with the opportunity to negotiate concessions that reduce overall costs and thus spare jobs. Second, *Kitsap* II does not conflict with *Spokane Educ. Ass'n v. Barnes*, 83 Wn.2d 366, 517 P.2d 1362 (1974) and other established Washington case law that a public employer need not negotiate budget size or allocations. As found by the *Kitsap* II court in applying well settled precedent, the record amply demonstrates the Guild did not demand to bargain the County budget, but rather the specific layoffs proposed by the County to reduce labor costs.

1. The Court of Appeals applied the multifactor balancing test endorsed by the Washington Supreme Court in resolving this case.

The leading Washington case regarding the determination of mandatory bargaining subjects is *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Comm'n*, 113 Wn.2d 197, 203, 778 P.2d 32, 35 (1989), where this Court endorsed "PERC's policy of case-by-case adjudication of scope-of-bargaining issues [which] permits application of the balancing approach most courts and labor boards generally apply to such issues." This is the multi-factor balancing test endorsed by Division II in *Kitsap* I and applied by Division I in *Kitsap* II.

In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees, and (2) the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative.[6] *Int'l Ass'n of Fire Fighters,* 113 Wn.2d at 203. The inquiry focuses on which characteristic predominates. *Id.* This Court in *Fire Fighters, Local Union 1052* held that "[t]he scope of mandatory bargaining thus is limited to matters of direct concern to

[6] Mandatory bargaining subjects include "personnel matters, including wages, hours, and working conditions." RCW 41.56.030(4). Permissive bargaining subjects include "[m]anagerial decisions that only remotely affect 'personnel matters,' and decisions that are predominantly 'managerial prerogatives.'" *Kitsap* I, 179 Wn. App. at 998.

employees" and that "[m]anagerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives', are classified as nonmandatory subjects." *Id.* at 200.

Stating the test in this binary manner can obscure the nuance in application, however. It is more useful to think of a continuum or spectrum between "personnel matters, including wages, hours and working conditions" and "core . . . entrepreneurial control[] or . . . management prerogative." *Id.* Some subjects will clearly fall at one end of the spectrum or the other. Other matters fall in between and must be weighed based upon the specific facts of the case. Where a particular matter does not clearly fall at either end, federal courts and PERC consider a number of factors.[7] The list of relevant factors will vary,

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[7] In its briefing to the Court of Appeals, PERC outlined seven non-exclusive questions or factors used by PERC and the courts to conduct this balancing analysis. These non-exclusive factors are:

a. Would bargaining over this sort of decision advance the process of resolving conflicts between labor and management and advance the purposes of the bargaining law?
b. What are the employer's reasons or motives for the layoff? Was the employer's motivation for the layoff primarily or solely economic?
c. To what extent does the layoff decision involve a fundamental change in the employers' operation or scope of services?
d. What control does the union or the employer have over the cause of the decision?
e. Would bargaining about the matter significantly abridge the employer's freedom to manage the public's business?
f. Does the layoff involve a substantial impact or significant detriment to bargaining unit members (i.e., by changing conditions of employment or significantly impairing reasonably anticipated work opportunities)?
g. Are there general understandings (prior case law or industrial practice) which can inform the legal analysis?

and different factors may predominate as required by the case-by-case analysis of the specific facts.

2. The decision of the Court of Appeals that the County jail layoffs are mandatory subjects of bargaining is consistent with federal case law.

The balancing test adopted by PERC and Washington courts has its foundations in federal case law under the National Labor Relations Act (NLRA), especially the decisions in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964) and *First Nat'l Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 680, 101 S. Ct. 2573, 2581, 69 L. Ed. 2d 318 (1981).[8] In *Fibreboard*, the employer contracted out work previously performed by its bargaining unit employees in order to reduce labor costs. The contract employees continued to perform the same duties as the previous bargaining unit employees at the direction of the employer in the same location. The court concluded that collective bargaining over contracting out under such circumstances, motivated by an employer desire to reduce labor costs, was a mandatory subject of bargaining. 379 U.S. at 213-214. In *First National Maintenance Corp.*, the employer provided maintenance services to a third-party nursing

[8] Decisions construing the National Labor Relations Act (NLRA), while not controlling, are persuasive in interpreting state labor acts which are similar or based upon the NLRA. *Nucleonics All., Local Union No. 1-369, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Washington Pub. Power Supply Sys. (WPPSS)*, 101 Wn.2d 24, 32, 677 P.2d 108, 112 (1984).

home. The employer laid off workers after the employer terminated operations at the nursing home over a long-standing fee dispute which rendered the nursing home contract unprofitable. 452 U.S. at 668-669. In contrast to *Fibreboard*, the *First National Maintenance Corp.* court found the decision to terminate operations due to a financial dispute with a third party was not a mandatory subject of bargaining. 452 U.S. at 686.

In a somewhat confusing and misleading analysis, the County suggests that a layoff would only be a mandatory subject of bargaining where the employer seeks to contract out the work. Petition for Review (Pet.) at 12-13. This somewhat bizarre conclusion is not supported by the language of either *Fibreboard* or *First National Maintenance Corp.* and the County fails to cite any federal cases supporting its strained interpretation.

In contrast, the core holding in *Kitsap* II is completely consistent with subsequent federal opinions applying *Fibreboard* and *First National Maintenance Corp. Compare Kitsap* II, ¶ 1, *with Pan Am. Grain Co., Inc. v. N.L.R.B.*, 558 F.3d 22, 26-27, 28 (1st Cir. 2009) ("Because labor costs were a motivating factor for the layoffs . . . the company had a duty to bargain with the Union over the layoffs."); *N.L.R.B. v. 1199, Nat. Union of Hosp. & Health Care Emp., AFL-CIO*, 824 F.2d 318, 321-22 (4th Cir. 1987) (NLRB applying *First National Maintenance* "has distinguished

such fundamental managerial decisions . . . from those intended to reduce labor costs, concluding that a reduction of labor costs must be pursued through the collective bargaining process.")[9]; *Contemporary Cars, Inc. v. N.L.R.B.*, 814 F.3d 859, 880 (7th Cir. 2016) ("Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining."); *N.L.R.B. v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987) (same).[10]

Where layoffs are the result of programmatic or scope of service changes resulting from the employer's managerial rights to determine the level of public services, the consequential decision to layoff is not subject to bargaining. On the other hand, layoffs to lower labor costs are particularly appropriate for collective bargaining and are mandatory subjects. The general understanding of PERC and federal precedent is that

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[9] The court explained:

> "In this case, the employer failed to establish that the layoff represented a fundamental decision to close down any part of its business or to change its nature or scope. After the layoff, which involved but six of eighty-five unit employees, the employer continued to operate much as before, pursuing the same business, in the same manner, at the same locations. As its decision reflected more 'a desire to reduce labor costs,' *First National Maintenance,* 452 U.S. at 680, 101 S. Ct. at 2581, than an exercise of entrepreneurial prerogative or control, we agree with the Board that it was amenable to resolution through the collective bargaining process."

N.L.R.B. v. 1199, Nat. Union of Hosp. & Health Care Employees, AFL-CIO, 824 F.2d 318, 321-22 (4th Cir. 1987).

[10] The *Kitsap* II specifically cited and quoted *N.L.R.B. v. Advertisers Mfg. Co. See Kitsap* II, ¶ 33.

where the layoff was motivated by labor costs, the employer must bargain the decision. "This requirement ensures that when an employer aims to reduce labor costs, employees are presented with the opportunity to negotiate concessions that reduce overall costs and thus spare jobs." *Pan Am. Grain Co. Inc.*, 558 F.3d at 27.

3. The decision of the Court of Appeals that the County jail layoffs are mandatory subjects of bargaining is consistent with PERC case law.

Equally important, *Kitsap* II is consistent with a substantial body of case law before PERC applying the multifactor balancing test. *Kitsap* II, at ¶ 27. While the County, in its argument below, argued that the decisions of PERC were inconsistent, *Kitsap* II carefully analyzed PERC's decisions and concluded that the cases cited by the County "show PERC to be consistent." *Id.*

> PERC has maintained the distinction that flows from *Fibreboard* and *First National:* generally, a layoff decision motivated by budget cuts is a mandatory subject of bargaining because of the impact it has on wages, hours, and working conditions, while a decision to change an agency's programmatic priorities or scope of operations is a permissive subject because it implicates management prerogatives.

Id.

In its petition to this Court, the County appears to have at last dropped its claims that PERC's decisions have created uncertainty about

whether layoffs are a mandatory subject of bargaining. Absent such an alleged inconsistency, the County fails to establish a substantial issue of public interest requiring this Court's review.

4. The decisions of the Court of Appeals do not conflict with decisions of the Washington Supreme Court because the Guild did not seek to bargain the allocation of the County budget.

The County next asserts that *Kitsap* II conflicts with this Court's holding in *Spokane Educ. Ass'n v. Barnes*, 83 Wn.2d 366, 517 P.2d 1362 (1974) on the grounds that the Guild seeks "to demand that a public agency's budget decisions be collectively bargained." Pet. at 2.

PERC agrees, as does the court in *Kitsap* II, that funding rates, allocation of county budget among county agencies and similar decisions are properly decisions of the voters and elected public officials. Employees and their unions are not powerless to influence this process—they may participate in the public budgeting process like other citizens and groups—but these decisions are not subject to collective bargaining. *Wenatchee School District,* Decision 3240-A (PECB, 1990).

However, the County continues to conflate and mischaracterize the Guild's demand to bargain the decision to layoff two jail employees with a demand to bargain the size, scope and allocation of the County budget. This misstates the subject to be bargained. As analyzed in detail by the

Kitsap II court, the Guild was not demanding to bargain the County budget, but rather the County's determination to layoff employees to save labor costs to meet that budget. *Kitsap* II, at ¶ 24.

There are multiple facts which directly contradict the County's rhetoric that the Guild was seeking to usurp the County's budgeting authority, including (1) the budget was not set when the layoffs were announced in October 2011, (2) the budget numbers and assumptions were subject to change before a final budget was adopted in December 2011, (3) the budget set by the County commissioners only set budget levels at a high operational level and did not specifically require or itemize layoffs of any employees, and (4) when the union learned of the layoffs announced by jail Chief Newlin, it requested to "bargain layoffs." All of these facts (undisputed by the County), as well as Chief Newlin's candid statement that the two officers would be laid off to reduce "our labor costs" contradict the assertion that the union was demanding to negotiate the budget in a manner to usurp managerial control from the County.

B. There Is No Unresolved Conflict Between the County's Statutory Budget Process and the Duty to Bargain Requiring Review

Contrary to the County's assertion, there is no unresolved statutory conflict between the budget process under chapter RCW 36.40 and the collective bargaining duty under chapter RCW 41.56 requiring this

Court's resolution under RAP 13.4(b)(3). The Legislature has directed that the duty of a public employer to collectively bargain controls over conflicting budgetary statutes, and this Court has long rejected the argument offered by the County here. RCW 41.56.905; *City of Spokane v. Spokane Police Guild*, 87 Wn.2d 457, 465, 553 P.2d 1316 (1976). Accepting review will not resolve a substantial open public issue, but rather revive a controversy settled forty years ago in a manner which will undermine the collective bargaining statute.

First, the County offers a series of speculations that it would not have been able to resolve its negotiations with the Guild before its budget deadline. These claims are not supported by the current record. *Kitsap* II, at ¶¶ 38-39. In this case, there were 76 days between the Guild's demand to bargain and the County's layoffs.

Second, where there is any question about a conflict between the County budgeting process and the bargaining obligation, the Legislature has plainly directed that the duty to bargain prevails. To the extent the County budget cycle conflicts with PECBA, it is preempted by

RCW 41.56.905.[11] PECBA is to be interpreted liberally to accomplish its purpose and conflicts resolved in favor of the dominance of that chapter. *Rose v. Erickson,* 106 Wn.2d 420, 424, 721 P.2d 969 (1986).

Third, in *City of Spokane*, this Court squarely rejected a similar claim that a public employer is relieved of the duty to bargain wages because it could not complete bargaining, mediation, and arbitration within its statutory budget cycle. 87 Wn.2d at 464 (noting the "familiar rule of statutory construction that legislation should be construed to make it purposeful and effective.") "The mandatory deadline construction urged by Spokane and adopted by the trial court would severely hamper the effectiveness of the statute." *City of Spokane*, 87 Wn.2d at 464-65. The Division I court came to the same conclusion. *Kitsap* II, at ¶ 39. (County's argument "must fail, as it would mean that the possibility of interest arbitration that might extend beyond the current annual budget cycle could always be used to justify a refusal to bargain over wages, hours and working conditions.")

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[11] [RCW 41.56.905—Uniformed personnel—Provisions additional—Liberal construction.] The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.

The County does not raise a current substantial issue needing resolution under RAP 13.4(b)(4), but rather invites this Court to create confusion by reviewing an issue already resolved.

C. Kitsap County Failed to Appeal or Preserve the Waiver Issues and this Court Should Decline the Belated Efforts to Revive Them

Finally, this Court should decline review of the County's attempt to resurrect its waiver arguments rejected on the merits in *Kitsap* I and again rejected on law of the case and factual grounds in *Kitsap* II. The County asserts vaporous differences is the wording of the two opinions with regard to the waiver issues to suggest a conflict between Divisions worthy of review under RAP 13.4(b)(2). But the County never appealed the decision in *Kitsap* I, and did not renew its waiver arguments in the trial court on remand. *Kitsap* II, at ¶¶ 42-47. These issues do not warrant review by this Court.

The County first raised its waiver arguments in its previous appeal and the *Kitsap* I court rejected them. *Kitsap* I, 179 Wn. App. at 996-97. The County did not appeal. Thus, the single issue subject to remand was for the trial court "to conduct the balancing test to determine whether the layoffs in this situation are mandatory or permissive bargaining subjects." *Kitsap* I, 179 Wn. App. at 999. Likewise, the County did not raise waiver arguments again to the trial court following remand. CP 78-79, 191-193.

"Questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause." *Folsom v. Cty. of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196, 1200 (1988).

The previous determination in *Kitsap* I that the Guild did not waive its bargaining rights has become the law of the case. The law of the case doctrine provides that "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Kitsap* II, at ¶ 46. The law of the case doctrine "derives from both RAP 2.5(c)(2) and common law." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

In addition, the County failed to raise any waiver claims before the trial court on remand and the trial court on remand made no rulings related to them. It was not until the County filed its Response Brief in the second appeal that it suggested, for the first time, that there were additional waiver arguments not resolved by *Kitsap* I. Thus, the *Kitsap* II court had a second reason to reject the County's request to re-tread this ground. RAP 2.5(a). Given the law of the case and abandonment of the issue on remand, the County's waiver argument does not warrant this Court's review.

IV. CONCLUSION

The dispute in this case involved application of established law. After two reviews by the Court of Appeals, the matter is properly resolved and does not warrant review by this Court.

RESPECTFULLY SUBMITTED this 20th day of June, 2016.

ROBERT W. FERGUSON
Attorney General

MARK S. LYON, WSBA #12169
Assistant Attorney General
Attorneys for Respondent
Public Employment Relations Commission

193 Wash.App. 40
Court of Appeals of Washington,
Division 1.

KITSAP COUNTY and Kitsap County Sheriff, Respondents,
v.
KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD, INC., and Public Employment Relations Commission, Appellants.

No. 73637–0–1.
|
March 21, 2016.

Synopsis

Background: Following union's demand for collective bargaining on issue of county's decision to lay off two corrections officers for budgetary reasons, county brought action seeking declaratory judgment that layoffs were a permissive, rather than mandatory, subject of bargaining and that union committed an unfair labor practice when it demanded bargaining on the issue. Union filed cross motion for summary judgment. The Superior Court, Mason County, David Edward Foscue, J., granted declaratory judgment in favor of county. Union appealed. The Court of Appeals, 179 Wash.App. 987, 320 P.3d 70, reversed and remanded. The Superior Court, Mason County, Lisa Leann Sutton, J., concluded layoffs were a permissive subject. Union appealed.

Holdings: The Court of Appeals, Becker, J., held that:

[1] layoff decision was a mandatory subject of bargaining, and

[2] remand was required for an appropriate remedial order to be entered.

Reversed and remanded.

West Headnotes (15)

[1] **Labor and Employment**
- Mandatory subjects in general

Labor and Employment
- Wages and hours

Mandatory collective bargaining subjects include wages, hours, and working conditions.

Cases that cite this headnote

[2] **Labor and Employment**
- Permissive subjects in general

Permissive collective bargaining subjects include managerial decisions that only remotely affect personnel matters and decisions that are predominantly managerial prerogatives.

Cases that cite this headnote

[3] **Labor and Employment**
- Subjects of bargaining in general

Parties to a collective bargaining agreement must bargain on mandatory subjects; they may bargain on permissive subjects, but they are not obliged to bargain to impasse.

Cases that cite this headnote

[4] **Labor and Employment**
- Subjects of bargaining in general

If an employer makes a unilateral decision regarding a permissive collective bargaining subject, the employer is still required to bargain over the effects of the decision upon a mandatory subject such as wages, hours, and working conditions.

Cases that cite this headnote

[5] **Labor and Employment**
- Conduct Constituting Refusal

It is an unfair labor practice to refuse to bargain a mandatory subject to impasse or to demand to bargain a permissive subject to impasse. West's RCWA 41.56.140(4).

Cases that cite this headnote

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[6] **Labor and Employment**
Subjects of bargaining in general

The scope of mandatory collective bargaining is limited to matters of direct concern to employees; managerial decisions that only remotely affect personnel matters, and decisions that are predominantly managerial prerogatives, are classified as nonmandatory subjects.

Cases that cite this headnote

[7] **Labor and Employment**
Subjects of bargaining in general

In applying balancing test, when an issue involves both mandatory and permissive subjects of collective bargaining, the first step is to characterize accurately the decision that is the subject of the bargaining demand.

Cases that cite this headnote

[8] **Labor and Employment**
Particular Subjects of Bargaining

A public employee organization does not have the right to negotiate with the employer upon the subject of budget allocations.

Cases that cite this headnote

[9] **Administrative Law and Procedure**
Deference to agency in general

Administrative Law and Procedure
Scope of Review in General

Administrative decisions are not binding on a court, but a court may find guidance in an agency's interpretation of the law.

Cases that cite this headnote

[10] **Labor and Employment**
Layoffs;contracting out work

Although county's need to achieve budgetary savings was a legitimate interest, county's interest in the method by which savings would be achieved was not at core of its management prerogatives, thus its decision to achieve budget savings by laying off two correctional officers was suitable for collective bargaining, and it so substantially impacted wages, hours, and working conditions in the bargaining unit that the decision was a mandatory subject of bargaining; layoffs were not related to programmatic changes, nor did they implicate county's entrepreneurial right to control level of service provided in the jail as would render the layoff decision a permissive subject of bargaining. West's RCWA 41.56.030(4).

Cases that cite this headnote

[11] **Labor and Employment**
Public employment in general

When a demand to bargain about a mandatory subject arises after a budget is set, the employer does not have to agree to a specific proposal under Public Employees Collective Bargaining Act; but the employer must be willing to consider alternatives suggested by the union and potentially agree on them, even if it means an adjustment to a previously established budget amount. West's RCWA 41.56.030(4).

Cases that cite this headnote

[12] **Labor and Employment**
Waiver or loss of right

County failed to prove that correctional officers' union clearly and unmistakably waived its right to collectively bargain on issue of county's decision to lay off two corrections officers for budgetary reasons; prior collective bargaining agreement did not include a waiver of the right to bargain layoffs by its reference to civil service rules applicable to sheriff's employees providing that layoffs made necessary by a shortage of funds would be done through seniority.

Cases that cite this headnote

[13] **Labor and Employment**
Waiver or loss of right

A waiver of a right to bargain must be clear, unmistakable, and knowingly made, and it must specifically address the subject upon which the waiver is claimed.

Cases that cite this headnote

[14] Labor and Employment
⇦ Collective bargaining in general

Considering that the purpose of the Public Employees' Collective Bargaining Act is to provide a uniform basis for implementing the right of collective bargaining, the trial court has the same authority and obligation as the Public Employment Relations Commission (PERC) to issue an appropriate remedial order that it believes is consistent with the purposes of the Act. West's RCWA 41.56.160(1).

Cases that cite this headnote

[15] Labor and Employment
⇦ Purpose

The purpose of the Public Employees Collective Bargaining Act is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right. West's RCWA 41.56.

Cases that cite this headnote

Appeal from Mason County Superior Court; Hon. Lisa Leann Sutton, J.

Attorneys and Law Firms

Christopher James Casillas, Cline & Casillas, Seattle, WA, Mark Spencer Lyon, Office of the Atty General, Olympia, WA, for Appellant.

Jacquelyn Moore Aufderheide, Kitsap Co. Pros. Office, Deborah Ann Boe, Kitsap County Prosecuting Attorney's Off, Port Orchard, WA, for Respondent.

PUBLISHED OPINION

BECKER, J.

*1 ¶ 1 Faced with a directive from the board of county commissioners to cut the budget of the sheriff's office, the Kitsap County Sheriff laid off two jail officers. The officers' union, appellant Kitsap County Correctional Officers' Guild, demanded to bargain the layoff decision. Kitsap County and the Kitsap County Sheriff (the county) refused and proceeded to obtain a declaratory judgment that the layoff decision was not a mandatory subject of bargaining. The court perceived the Guild's position as a demand to bargain the level of funding allocated to the jail's budget. This was error. The subject of the demand to bargain was the layoff decision, not the budget. Adopting a budget is a management prerogative. But when a public sector employer proposes to balance the budget by laying off workers who are represented by a union, the union must have the opportunity to bargain over whether the cost saving can be achieved by other means.

[1] [2] [3] [4] ¶ 2 The Public Employees' Collective Bargaining Act, chapter 41.56 RCW, requires a public employer to bargain collectively with a union representing its employees. Mandatory bargaining subjects include wages, hours, and working conditions. Permissive bargaining subjects include managerial decisions that only remotely affect personnel matters and decisions that are predominantly managerial prerogatives. *Kitsap County v. Kitsap County Corn Officers' Guild, Inc.*, 179 Wash.App. 987, 998, 320 P.3d 70 (2014). Parties to a collective bargaining agreement *must* bargain on mandatory subjects. They *may* bargain on permissive subjects, but they are not obliged to bargain to impasse. If an employer makes a unilateral decision regarding a permissive bargaining subject, the employer is still required to bargain over the effects of the decision upon a mandatory subject such as wages, hours, and working conditions. *Kitsap County*, 179 Wash.App. at 997–98, 320 P.3d 70.

¶ 3 In February 2011, the county was still experiencing budgetary problems stemming from the 2008 recession. The board of county commissioners notified all county employees to expect more budget cuts in the 2012 budget as revenues were still declining.

¶ 4 The sheriff operates and supervises the county jail. Of the portion of the overall budget allocated to the sheriff by the county commissioners, the sheriff has the authority to determine how funds will be distributed and utilized within the programs of the sheriff's office.

¶ 5 In 2011, the most recent collective bargaining agreement between the county and the Guild had expired two years earlier. Negotiations for a new agreement had twice reached an impasse. The parties were certified for an interest arbitration that had not yet occurred.

¶ 6 In the last quarter of the year, the jail projected that its revenues would be reduced by $935,000. On October 24, 2011, corrections chief Ned Newlin sent an email to all correctional officers entitled "2012 Budget Update." He explained that even after some significant cuts had been made to supplies and services, "the bottom line is that the Sheriff's Office (including the jail) is now directed to take an additional $513,000 cut from our budget requests for 2012."

*2 ¶ 7 Newlin announced that the sheriff's office would take the cut by eliminating three positions in the jail—the two correctional officer positions lowest in seniority and an open position. Newlin stated in the letter, "This is not a decision that was made lightly and it causes me great angst to do so, but there is no other reasonable alternative available to us."

¶ 8 The next day, Newlin received a demand to bargain letter from the president of the Guild. The Guild represents correctional officers who are responsible for the housing, control, and care of the inmates. The letter stated, "We are demanding to bargain the decision to conduct any layoffs plus any associated effects/impacts. Layoffs are a mandatory subject of bargaining [and] our input was not invited or incorporated in the discussions you held with two of our bargaining unit members this afternoon." The Guild requested that the status quo be maintained until the parties had bargained the layoff decision and reached an agreement. The Guild was prepared to "explore some potential cost saving measures with the County to at least avoid one of the layoffs, if not both."

¶ 9 The county engaged only in impacts bargaining, limited to voluntary layoff procedures, changes in duties as a consequence of the layoffs, and safety issues. The county did not retreat from its refusal to bargain the layoff decision itself. The layoff of two correctional officers was effective on January 1, 2012.

¶ 10 The county brought the dispute directly to superior court through a complaint for a declaratory judgment. The Public Employee Relations Commission (PERC) is empowered to enforce the act, but its jurisdiction is not exclusive. Because interpretation of a statute is a question of law, the superior court may also decide in the first instance whether an unfair labor practice exists under a particular set of facts. *State ex rel. Graham v. Northshore Sch. Dist. No. 417*, 99 Wash.2d 232, 239–40, 662 P.2d 38 (1983). The county chose the superior court as a forum rather than PERC because in the county's view, PERC's decisions have created uncertainty about when layoffs are a mandatory subject of bargaining .[1]

[5] ¶ 11 It is an unfair labor practice to refuse to bargain a mandatory subject to impasse. It is also an unfair labor practice to demand to bargain a permissive subject to impasse. *Kitsap County*, 179 Wash.App. at 998, 320 P.3d 70. The county's complaint asked the court to declare that the Guild committed an unfair labor practice when it insisted that the layoff decision was a mandatory subject. The Guild cross-claimed and moved for summary judgment declaring that the county had committed an unfair labor practice by refusing to bargain the layoff decision. After a hearing, the court signed a proposed order granting the county's motion and denying the Guild's motion. The Guild appealed.

¶ 12 That first appeal was decided by Division Two of this court in March 2013. *Kitsap County*, 179 Wash.App. at 987, 320 P.3d 70. The court determined that the issue of layoffs was related both to a mandatory subject of bargaining and a permissive subject. In such a case, a balancing test is used to determine which characteristic predominates. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Comm'n*, 113 Wash.2d 197, 203, 778 P.2d 32 (1989).

*3 [6] ¶ 13 Under RCW 41.56.030(4), the duty to bargain extends to "personnel matters, including wages, hours and working conditions."[2] "The scope of mandatory bargaining thus is limited to matters of direct concern to employees. Managerial decisions that only remotely affect 'personnel matters', and decisions that are predominantly 'managerial prerogatives', are classified as

nonmandatory subjects." *Int'l Ass'n of Fire Fighters, Local Union 1052,* 113 Wash.2d at 200, 778 P.2d 32.

¶ 14 The court found the record inadequate to determine whether the trial court had engaged in the balancing analysis.[3] "Arguably, the layoffs heavily impact employees' working conditions, but, on these facts, the County's duty to implement a budget weighs on the management prerogative side of the balance. With such significant interests on each side of the balance, it is important that the trial court carefully consider the specific facts of this case and balance the competing interests." *Kitsap County,* 179 Wash.App. at 999, 320 P.3d 70. Following *International Association of Fire Fighters,* the court remanded "for the trial court to conduct a balancing test based on the facts of this case." *Kitsap County,* 179 Wash.App. at 1000, 320 P.3d 70.

¶ 15 On remand, PERC moved for permission to intervene in view of its interest in promoting uniform application of the law of labor relations in the area of public employment, see RCW 41.58.005(1), particularly its interest in developing uniform standards for determining what subjects of bargaining are mandatory. The trial court allowed intervention. The parties submitted additional evidence and briefing. In August 2014, the trial court again ruled in favor of the county.

¶ 16 This time, to demonstrate application of the balancing test, the court adopted and entered findings and conclusions prepared by the county. The findings of fact are undisputed:

> 1. The evidence before this Court was well developed, including testimony and exhibits submitted to the Court from the record in a four-day interest arbitration hearing.
>
> 2. The Kitsap County Board of Commissioners adopts an annual budget fixing revenues and expenditures for the ensuing fiscal year.
>
> 3. In adopting a budget the Board of County Commissioners takes into consideration revenue sources including revenue from property and sales taxes, reductions in revenue from annexations, the existence or elimination of grant funding, the County's debt servicing obligations, and managing reserves.
>
> 4. In adopting a budget the Board of County Commissioners takes into consideration expenditures necessary to provide public services, including whether the services are mandated by law or proprietary, the level of services needed, and the amount of revenues available to fund particular services.
>
> 5. The Kitsap County Sheriff's Office is limited in the making of expenditures or incurring of liabilities as fixed in the budget by the Board of County Commissioners.
>
> *4 6. For year 2012, the Kitsap County Board of County Commissioners adopted a budget reducing the Sheriff's jail budget by $935,000 because of declining County revenues.
>
> 7. The Sheriff's Office reduced the jail's budget by $935,000 as established in the budget adopted by the Board of County Commissioners.
>
> 8. The Sheriff's Office reduced the jail's budget in part by eliminating two corrections officer positions.
>
> 9. On October 24, 2011, two corrections officers were informed that their positions would be eliminated and they would be laid off as of January 1, 2012, due to the budget reduction.
>
> 10. The Corrections Officers' Guild demanded to bargain the layoffs, and the County agreed to bargain the impact of layoffs, and did bargain the impact with the Guild.
>
> 11. Two corrections officers were laid off on January 1, 2012.
>
> 12. No allegation or evidence exists that the reduction of the County's or Sheriff's budget, the elimination of two corrections officer positions, or the layoff of two corrections officers was motivated by retaliation.

¶ 17 The court concluded from the findings that the layoff decision was a permissive subject of bargaining. The Guild and PERC appeal from this decision.

¶ 18 We must first decide what standard of review to apply. The county suggests that the findings of fact entered by the court are entitled to deference. But the findings of fact do not resolve conflicts in evidence. Because there is no genuine issue of material fact and only the court's

conclusions are disputed, it is appropriate to treat the declaratory judgment as an order resolving cross motions for summary judgment. Our review is de novo. CR 56(c); *Kitsap County,* 179 Wash.App. at 997, 320 P.3d 70.

¶ 19 Two United States Supreme Court cases provide the framework for analyzing whether a layoff decision will be classified as permissive or mandatory: *Fibreboard Paper Products Corp. v. National Labor Relations Board.* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), and *First National Maintenance Corp. v. National Labor Relations Board,* 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). In *Fibreboard.* employees were laid off as a result of the employer's decision to contract out the work union employees had been performing. In that situation, the Court held the layoffs to be a mandatory bargaining subject. Because the decision did not alter the employer's basic operation, requiring the employer to bargain "would not significantly abridge his freedom to manage the business." *Fibreboard,* 379 U.S. at 213. The Court noted that the employer was induced to contract out the work by assurances that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments, all of which had "long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework." *Fibreboard.* 379 U.S. at 213–14.

> Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.
>
> *5 ... While "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *[National] Labor [Relations] Board v. American Nat. Ins. Co.,* 343 U.S. 395, 404, [72 S.Ct. 824, 829, 96 L.Ed. 1027 (1952)] it at least demands that the issue be submitted to the mediatory influence of collective negotiations. As the Court of Appeals pointed out, "[i]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly."

Fibreboard. 379 U.S. at 214.

¶ 20 By contrast, *First National* is a case where the employer made an economically motivated decision to shut down a part of its business. *First Nat'l,* 452 U.S. at 680. As a result of a financial dispute with one of its customers, the employer terminated the contract and discharged the employees who worked for that customer. The employer claimed it had no duty to bargain about its decision to terminate operations, and the court agreed. The issue raised was whether the shutdown decision should be considered part of the employer's "retained freedom to manage its affairs unrelated to employment." *First Nat'l,* 452 U.S. at 677. The Court concluded that "the harm likely to be done to the employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *First Nat'l,* 452 U.S. at 686.

¶ 21 Washington courts and PERC follow *Fibreboard* and *First National.* The parties agree that under *First National,* there is no duty to bargain when layoffs are an indirect result of programmatic or service changes by the employer. They also agree that under *Fibreboard.* bargaining the layoff decision is mandatory when an employer decides to reduce labor costs by replacing union workers with nonunion workers. The county argues that when a public employer lays off employees in response to a budget shortfall, it is more like the partial shutdown of operations in *First National.* In the county's view, the decision to layoff the two correctional officers implicated a core management prerogative: the county's duty to maintain a balanced budget.

¶ 22 The trial court ratified the county's position that the layoff decision was a component of the decision to reduce the jail's budget. Although the findings of fact correctly state that the Guild "demanded to bargain the layoffs," the court did not balance the competing interests involved in the layoff decision. Rather, the court balanced the competing interests in "the decision to reduce the budget, reduce staffing levels, and layoff employees."

> Balancing the relationship between the decision to reduce the budget, reduce staffing levels, and layoff employees bears to conditions of employment on the one side, and to entrepreneurial control or management prerogative on the other, the Court must determine which characteristic predominates.[4]

*6 The court concluded, "The decision to reduce the budget and staffing levels lies at the core of entrepreneurial control and management prerogative."[5] The court reasoned that the layoff decision was a result of the decision to reduce the budget and was therefore necessarily and inherently a management prerogative: "the decision involves the performance of statutory duties in that the Board of County Commissioners has a statutory duty to adopt a budget and the Kitsap County Sheriff's Office must abide by the budget adopted for it by the Commissioners."[6] The court concluded that bargaining over the layoffs could not be fruitful "because the employer cannot negotiate the level of revenues and expenditures fixed and adopted in the budget."[7]

[7] [8] ¶ 23 In applying the balancing test, the first step is to characterize accurately the decision that is the subject of the bargaining demand. The county's position on appeal depends entirely on redefining the Guild's position as a demand to bargain over the reductions in the budget. The county claims the Guild demanded to bargain "the Board's decision to reduce the budget in order to balance expenditures with revenues."[8] If that were true, the county's position would likely prevail. A public employee organization does not have the right to negotiate with the employer "upon the subject of budget allocations." *Spokane Educ. Ass'n v. Barnes,* 83 Wash.2d 366, 374, 517 P.2d 1362 (1974). As stated in PERC's brief, "Funding rates, allocation of county budget among county agencies and similar decisions are properly decisions of the voters and elected public officials."[9]

¶ 24 Contrary to the county's rhetoric about the budget, however, the record is clear that the Guild's demand was only to bargain over the layoff decision. The Guild consistently recognized that it was the prerogative of the county commissioners to reduce the jail's budget to meet the shortfall in revenues. The budget set for the jail by the county commissioners did not specifically require or itemize layoffs of employees. The Guild demanded to bargain over the jail's decision to achieve the reduction by laying off two employees. By mischaracterizing the Guild's position as a demand to bargain the budget, the county thoroughly undermines its argument. The layoff decision alone was the subject of the Guild's demand to bargain.

¶ 25 It is also inaccurate for the county to say that the Guild was demanding to bargain over "staffing levels." In using that phrase, the county invokes the principle that "general staffing levels are fundamental prerogatives of management." *Int'l Ass'n of Fire Fighters, Local Union 1052,* 113 Wash.2d at 205, 778 P.2d 32. That principle, however, refers to programmatic decisions about how large or how small an agency should be as a matter of policy—for example, whether a community " 'will have a large police force, a small one, or none at all.' " *Int'l Ass'n of Fire Fighters, Local Union 1052,* 113 Wash.2d at 205, 778 P.2d 32, quoting *Yakima v. Yakima Police Patrolman's Ass'n.* Pub. Empl. Relations Comm'n Dec. 1130–PECB, at 4 (1981) (examiner's opinion). Chief Newlin did not decide as a matter of policy that the jail staff had become too large. He did not announce a programmatic decision to reduce inmate population or reorganize the jail's services in a way that could be managed with fewer correctional officers. Indeed, he expressed "great angst" at having to cut staff. His layoff decision represented his unilateral judgment that laying off the two officers was the only way to comply with the budget set by the county commissioners after all other possible cuts had been considered and implemented. For this reason, his layoff decision was not analogous to the employer's decision in *First National* to shut down the part of the operation affected by the loss of a customer. It was a decision to reduce labor costs in order to meet the budget cut.

*7 [9] ¶ 26 All parties cite and discuss decisions by PERC in support of their respective positions. Administrative decisions are not binding on a court, but a court may find guidance in an agency's interpretation of the law. *Miotke v. Spokane County,* 181 Wash.App. 369, 325 P.3d 434, *review denied.* 181 Wash.2d 1010, 335 P.3d 941 (2014).

¶ 27 The county claims PERC's decisions are inconsistent with each other. The county cites 10 cases to demonstrate the alleged inconsistency. [10] The cited cases, however, show PERC to be consistent. [11] In seven of them, PERC ruled that a reduction in staffing was not a mandatory subject of bargaining where the employer was closing operations, reorganizing, or changing the scope of services. [12] Another was decided on the ground that although the decision to conduct layoffs was "within the 'mandatory' category," the union waived its right to bargain layoff decisions. [13] In two cases that did not involve a change in operations or services, PERC ruled that the employer had a duty to bargain the layoff decisions because the employer was making layoffs to save labor costs. [14] In these cases and others, PERC has maintained the distinction that flows from *Fibreboard* and *First National:* generally, a layoff decision motivated by budget cuts is a mandatory subject of bargaining because of the impact it has on wages, hours, and working conditions, while a decision to change an agency's programmatic priorities or scope of operations is a permissive subject because it implicates management prerogatives.

¶ 28 Three PERC decisions in particular are illustrative. The first involved the Wenatchee School District's decision to convert from half-day to full-day kindergarten as a means of managing a budget crisis. [15] Making the change to full day kindergarten resulted in the elimination of mid-day bus runs, and that saved the school district the wages and benefits for the bus drivers who had driven those runs. PERC rejected the union's argument that the decision to convert to full-day kindergarten had to be bargained. PERC's decision cited *Spokane Educ. Ass'n,* 83 Wash.2d at 366, 517 P.2d 1362, recognizing and applying the principle that an employer has "no duty to bargain the decision to reduce its budget." [16] Noting that the decision was "clearly a decision regarding the educational program to be offered," PERC concluded that the employer's prerogative of defining the curriculum outweighed the decision's relationship to the wages, hours and working conditions of the employees. [17]

¶ 29 In PERC's Wenatchee School District decision, like in *First National,* management interests predominated because the decision at issue involved a change in services or a closure of facility or operations. On the other side of the spectrum is a PERC case where the Griffin School District responded to a budget squeeze by reducing the school calendar from 260 working days to 240 working days, with the result that union employees lost 20 days of paid work . [18] PERC concluded that the reduction in the work calendar was a mandatory subject of bargaining. The district was not reducing its services or closing its facilities on certain days. Thus, its decision did not implicate the entrepreneurial right of employers to control the level of service they provide. "Despite the employer's legitimate need to achieve budgetary savings, the decision to close facilities for 20 days impacted employee wages and hours so substantially that the decision must be bargained." [19] The union, PERC concluded, had a "legitimate interest in being afforded the opportunity to work with the employer through collective bargaining to provide possible alternatives to reducing the wages and hours of certain of its bargaining unit employees." [20]

*8 ¶ 30 In the third case, PERC ruled that King County's decision to furlough its employees was a mandatory subject of bargaining. [21] King County faced budget deficits and revenue shortfalls as a result of the 2008 financial crisis. The county decided to shut down all nonessential services and furlough the affected employees for 10 days in order to save enough money to balance the budget. PERC acknowledged that the county had the right to determine and manage its own budget. But that "did not make the decision to furlough employees a permissive one." [22] The county's chief motivation for imposing the furloughs was to reduce labor costs. Unlike the Wenatchee School District case, where the respondent made a wholesale change to the scope of its operation, "this employer's decision to close its offices does not constitute a programmatic change to any employer service." [23]

[10] ¶ 31 Here too, the decision to layoff the two officers was a decision to meet budget cuts by reducing labor costs. The layoffs were not related to programmatic changes, and they did not implicate Kitsap County's entrepreneurial right to control the level of service provided in the jail. The fact that the county had a legitimate need to achieve budgetary savings and had a statutory duty to manage its own budget did not make the layoff decision a permissive subject of bargaining.

¶ 32 The bargaining unit employees clearly had an interest in the county's decision to implement layoffs. "There is no

greater possible impact on an employee than the complete loss of the employment relationship." [24] Even the county concedes that the impact of layoffs on employees was "obvious and significant." A declaration in the record details the financial, personal, and emotional impacts of these two layoffs on the officers who lost their jobs.

¶ 33 No one accuses the county of having an anti-union or retaliatory motive to make the layoffs. But contrary to the county's argument, that does not bring this situation back to the *First National* side of the spectrum. What is critical is that bargaining the layoffs would not significantly abridge the prerogative and duty of the county commissioners to adopt a budget. The predominant impact of the layoff decisions was on wages, hours, or working conditions in the bargaining unit. The reason why such a decision must be subject to negotiation has been succinctly explained by Judge Richard Posner:

> The rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them. Of course, if the change is authorized by the collective bargaining agreement, it is not in derogation of the union and is not an unfair labor practice. But there was no agreement here. Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence.

*9 *Nat'l Labor Relations Bd. v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir.1987).

¶ 34 Corrections chief Newlin stated when announcing the layoffs that "there is no other reasonable alternative available to us." His announcement made the layoff decision a fait accompli before the Guild had the opportunity to suggest alternatives. Yet the possibility existed that bargaining with the Guild could have revealed reasonable alternatives to layoffs.

¶ 35 The Guild claims it could have offered various concessions, such as changes in the work schedule, furlough days for officers, or suspension of certain premium or specialty pays. A declaration from Guild president Terry Cousins confirms that the Guild was "ready and willing to explore some potential cost saving measures with the County to at least avoid one of the layoffs, if not both."

¶ 36 Although it is not possible to say that bargaining will necessarily result in a satisfactory solution, "national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." *Fibreboard,* 379 U.S. at 214.

¶ 37 In the King County furlough case, PERC commented that "no outside force compelled the employer to choose furloughs as the means by which to reduce its budget." [25] Similarly here, no outside force compelled the sheriff to reduce the jail budget by laying off members of the Guild.

¶ 38 The county contends there was not enough time to bargain the layoffs. The county analogizes to the time crunch faced by the school board in *Spokane Educ. Ass'n,* 83 Wash.2d 366, 517 P.2d 1362. In that case, the school board had a statutory deadline for giving notices of nonrenewal to employees who were not going to be rehired for the ensuing school year. Four days before the deadline, voters rejected a special levy, necessitating a reduction in the budget. The next day, the teachers' association made a request to negotiate " 'budget allocations and other policy decisions related to the reduced school program.' " *Spokane Educ. Ass'n,* 83 Wash.2d at 370, 517 P.2d 1362. The school board, while willing to negotiate to explore the possibility of rehiring, nevertheless felt compelled to send out the nonrenewal notices before the looming deadline. The teacher's association unsuccessfully sought a writ to prevent the notices from being sent. Affirming, the Supreme Court took the view that the request was not made within a reasonable time. *Spokane Educ. Ass'n,* 83 Wash.2d at 372, 517 P.2d 1362. The situation here was not comparable. The Guild requested to bargain the layoffs on October 25, 2011. More than two months remained before the layoffs were to occur. The record does not

contain evidence that two months was too short to engage in potentially fruitful negotiations.

[11] ¶ 39 The county emphasizes its statutory responsibility to finalize a balanced budget for 2012 by the end of the year. The county contends that agreeing to bargain the allocation of funds within the county budget would have presented an intolerable risk of creating a large budget deficit. Again, though, the demand was to bargain layoffs, not the budget. The county also argues there was not enough time to bargain layoffs, given the fact that interest arbitration can take months to resolve an issue bargained to impasse. This argument too must fail, as it would mean that the possibility of interest arbitration that might extend beyond the current annual budget cycle could always be used to justify a refusal to bargain over wages, hours and working conditions. When a demand to bargain about a mandatory subject arises after a budget is set, the employer does not have to agree to a specific proposal. But the employer must be willing to consider alternatives suggested by the union and potentially agree on them, even if it means an adjustment to a previously established budget amount. *See City of Spokane v. Spokane Police Guild.* 87 Wash.2d 457, 465, 553 P.2d 1316 (1976).

*10 ¶ 40 In the Griffin School District case, PERC provided guidance for public employers when faced with a budget crisis:

> Chapter 41.56 RCW does not handcuff employers from taking action in the wake of a financial crisis. Should an employer be faced with a situation where it needs to make a change to a certain mandatory subject of bargaining, it should inform the union of the issue, the importance of the issue to the employer (including the timeline in which the employer needs to complete bargaining), and, upon request, bargain in good faith. If the employer and union reach a lawful impasse, then the employer is permitted to lawfully implement its last offer on that topic, while remaining willing to bargain all other mandatory subjects of bargaining, and remain willing to return to bargaining regarding the subject of bargaining implemented by the employer if the union makes such a request.[26]

PERC's guidance is sensible. The county's assertion that bargaining the layoffs would have introduced intolerable risk into the budget process is speculation not supported by the record.

¶ 41 Balancing the interests, we conclude that although the county's need to achieve budgetary savings was a legitimate interest, the county's interest in the method by which the savings would be achieved was not at the core of its management prerogatives. The decision to achieve budget savings by laying off the officers was suitable for collective bargaining, and it so substantially impacted wages, hours, and working conditions in the bargaining unit that the decision was a mandatory subject of bargaining.

WAIVER

[12] ¶ 42 The county argues that even if the layoffs are a mandatory subject of bargaining, the Guild waived its right to bargain over layoffs.

¶ 43 The collective bargaining agreement that expired in 2009 included language stating that nothing in the agreement supersedes "any matter delegated to" the Kitsap County Civil Service Commission by state law or ordinance. The civil service rules applicable to the sheriff's employees provide that layoffs made necessary by a shortage of funds will be done through seniority. "The Appointing Authority may layoff any employee ... whenever such action is made necessary by reason of a shortage of work or funds ... in inverse of seniority."

¶ 44 In the first appeal, the county argued that the Guild had waived its right to bargain layoffs by the provision in the collective bargaining agreement delegating certain matters to the civil service commission. The court did not reach the question of whether the quoted language amounted to a waiver of the right to bargain layoffs. Instead the court determined that "waivers are permissive subjects that expire with the collective bargaining agreement unless they are renewed by mutual consent." *Kitsap County,* 179 Wash.App. at

996, 320 P.3d 70. Because the agreement containing the alleged waivers had expired in 2010, the parties had not yet negotiated a new agreement, and there was no evidence at the time of the layoffs that the parties had agreed to renew the alleged waivers, the court concluded the alleged waivers expired in 2010. *Kitsap County,* 179 Wash.App. at 996, 320 P.3d 70.

***11** ¶ 45 The single issue on remand was for the court to conduct the balancing test. The trial court did not reconsider waiver on remand. Nevertheless, the county renews the waiver argument in the present appeal, with this addition: that the civil service rules govern layoffs regardless of what was in the collective bargaining agreement.

¶ 46 To a great extent, the county's argument is barred by the law of the case doctrine. The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. The doctrine seeks to promote finality and efficiency in the judicial process. *Roberson v. Perez.* 156 Wash.2d 33, 41, 123 P.3d 844 (2005). The law of the case doctrine is discretionary, not mandatory. Subsequent appellate reconsideration of an identical issue will be granted only where the holding of the prior appeal is clearly erroneous and application of the doctrine would result in manifest injustice. *Folsom v. County of Spokane.* 111 Wash.2d 256, 759 P.2d 1196 (1988); see also RAP 2.5(c)(2). The holding in the first appeal—that a waiver expires when the agreement expires—is not clearly erroneous. And the county does not persuasively demonstrate that reconsidering that holding is necessary to avoid a manifest injustice.

[13] ¶ 47 To the extent that the first appeal leaves room for the county to argue that the civil service rules preclude bargaining over layoffs, we reject the argument. A waiver of a right to bargain must be clear, unmistakable, and knowingly made, and it must specifically address the subject upon which the waiver is claimed. *Kitsap County,* 179 Wash.App. at 995, 320 P.3d 70. By this standard, we cannot say that the prior collective bargaining agreement included a waiver of the right to bargain layoffs by its reference to the civil service rules.

REMEDY

[14] ¶ 48 The trial court provided declaratory relief only. The county contends a declaratory order suffices to clarify the parties' bargaining obligations. PERC and the Guild ask for a more detailed remedial order.

[15] ¶ 49 Under the act, PERC has the authority to issue "appropriate remedial orders." RCW 41.56.160(1). The act is to be liberally construed to accomplish its purpose. *Mun. of Metro. Seattle v. Pub. Emp't Relations Comm'n.* 118 Wash.2d 621, 633, 826 P.2d 158 (1992). The purpose of the act "is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right." *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL–CIO Local 469.* 117 Wash.2d 655, 670, 818 P.2d 1076 (1991), *quoted* in *Mun. of Metro. Seattle.* 118 Wash.2d at 633, 826 P.2d 158. With that purpose in mind, the Supreme Court has interpreted the statutory phrase "appropriate remedial orders" to be those necessary to effectuate the purposes of the collective bargaining statute and to make PERC's lawful orders effective. *Mun. of Metro. Seattle,* 118 Wash.2d at 633, 826 P.2d 158.

***12** ¶ 50 Considering that the purpose of the act is to provide "a uniform basis" for implementing the right of collective bargaining, we hold that the court has the same authority and obligation as PERC to issue an appropriate remedial order. If PERC determines that any person has engaged in an unfair labor practice, a cease and desist order is appropriate, and PERC may also take affirmative action such as ordering the payment of damages and the reinstatement of employees. RCW 41.56.160(2). PERC's authority to fashion a remedy that suits the case is broad. *Mun. of Metro. Seattle.* 118 Wash.2d at 633, 826 P.2d 158.

¶ 51 The situation in the present case is clear-cut: either the county committed an unfair labor practice by refusing to bargain the layoffs, or the Guild committed an unfair labor practice by insisting on the right to bargain to impasse. Because we conclude that the layoff decision was a mandatory subject of bargaining, it follows that the county is the party who committed an unfair labor practice and that an appropriate remedial order should be entered. We remand for the trial court to decide what directives to include in the order. The court should

consider PERC's precedent and practice in the matter of remedies. *See Mun. of Metro. Seattle,* 118 Wash.2d at 634, 826 P.2d 158 (recognizing PERC's expertise in the relation of remedy to policy). The trial court may also consider on remand the Guild's arguments for an award of attorney fees.

¶ 52 We reverse and remand for entry of judgment in favor of the Guild and an appropriate remedial order.

WE CONCUR: LEACH and DWYER, JJ.

All Citations

--- P.3d ----, 193 Wash.App. 40, 2016 WL 1090154, 2016 L.R.R.M. (BNA) 86,590

Footnotes

1 Brief of Respondents at 32.

2 As defined by the act:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such employer.

RCW 41.56.030(4).

3 The trial court had inquired of the parties whether the order was sufficiently detailed and was advised by both parties that it was.

4 Conclusion of Law B.

5 Conclusion of Law D.

6 Conclusion of Law F.

7 Conclusion of Law G.

8 Brief of Respondents at 27.

9 Brief of Appellant PERC at 29.

10 *Pub. Sch. Emps. of Wenatchee v. Wenatchee Sch. Dist.,* No. 7425–U–88–1542, 1990 WL 656165 (Wash. Pub. Emp't Relations Comm'n Sept. 1, 1990); *Pub. Sch. Emps. of Wash. v. N. Franklin Sch. Dist.,* No. 12665–U–96–3022, 1998 WL 84382 (Wash. Pub. Emp't Relations Comm'n Feb. 1, 1998); *Anacortes Police Guild v. City of Anacortes,* No. 13634–U–98–03336, 2000 WL 1448857 (Wash. Pub. Emp't Relations Comm'n July 5, 2000); *Wash. State Council of County & City Emps. v. Tacoma–Pierce County Health Dep't,* No. 14710–U–99–03693, 2001 WL 1069585 (Wash. Pub. Emp't Relations Comm'n April 26, 2001); *Wash. Fed'n of State Emps. v. State Attorney Gen.,* No. 21156–U–07–5399, 2010 WL 1644961 (Wash. Pub. Emp't Relations Comm'n April 16, 2010); *Wash. Fed'n of State Emps. v. State Corrs.,* No. 23325–U–10–5941, 2011 WL 1979692 (Wash. Pub. Emp't Relations Comm'n May 10, 2011); *Kirkland Police Officers' Guild v. City of Kirkland,* No. 22415–U–09–5718, 2012 WL 1385445 (Wash. Pub. Emp't Relations Comm'n April 13, 2012); *Bellevue Police Support Guild v. City of Bellevue,* No. 22416–U–09–5719, 2012 WL 1385444 (Wash. Pub. Emp't Relations Comm'n April 13, 2012); *Int'l Ass'n of Fire Fighters. Local 451 v. City of Centralia,* No. 11233–U–94–2625, 1996 WL 387999 (Wash. Pub. Emp't Relations Comm'n June 1, 1996); *Teamsters Local Union 252 v. Griffin Sch. Dist.,* No. 22170–U–08–5653, 2010 WL 2553112 (Wash. Pub. Emp't Relations Comm'n June 18, 2010).

11 It is true that two different PERC hearing examiners heard nearly identical cases and ruled opposite on the duty to bargain issue. *See Kirkland Police Officers' Guild v. City of Kirkland,* No. 22415–U–09–5718, 2010 WL 4058051 (Wash. Pub. Emp't Relations Comm'n Oct. 7, 2010); *Bellevue Police Support Guild v. City of Bellevue,* No. 22416–U–09–5719, 2010 WL 3283656 (Wash. Pub. Emp't Relations Comm'n Aug. 12, 2010). But PERC has since reconciled these conflicting decisions. *See City of Kirkland,* 2012 WL 1385445; *City of Bellevue,* 2012 WL 1385444.

12 *Wenatchee Sch. Dist.,* 1990 WL 656165; *State Attorney General,* 2010 WL 1644961; *City of Anacortes,* 2000 WL 1448856; *Tacoma–Pierce Health.* 2001 WL 1069585; *State Corrs.,* 2011 WL 1979692; *City of Kirkland,* 2012 WL 1385445; *City of Bellevue.* 2012 WL 1385444.

13 *N. Franklin Sch. Dist.,* 1998 WL 84382, at *2.

14 *City of Centralia,* 1996 WL 387999, *Griffin Sch. Dist,* 2010 WL 2553112.

15 *Wenatchee Sch. Dist.,* 1990 WL 656165.

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17 *Wenatchee Sch. Dist.*, 1990 WL 656165, at *4.
16 *Wenatchee Sch. Dist.*, 1990 WL 656165, at *4.
18 *Griffin Sch. Dist.*, 2010 WL2553112.
19 *Griffin Sch. Dist.*, 2010 WL 2553112, at *6.
20 *Griffin Sch. Dist.*, 2010 WL 2553112, at *7.
21 *Tech. Emps. Ass'n v. King County*, No. 22175–U–09–5658, 2010 WL 2553113 (Wash. Pub. Emp't Relations Comm'n).
22 *King County*, 2010 WL 2553113, at *7.
23 *King County*, 2010 WL 2553113, at *7.
24 *Bellevue Police Support Guild.* 2010 WL 3283656, at *12.
25 *King County*, 2010 WL 2553113, at *9.
26 *Griffin Sch. Dist.*, 2010 WL 2553112, at *10.

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KITSAP COUNTY and KITSAP COUNTY SHERIFF, Appellants, v. KITSAP COUNTY CORRECTIONAL OFFICERS'GUILD and PUBLIC EMPLOYMENT RELATIONS COMMISSION, Respondents.	CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the Respondent Public Employment Relations Commission's Answer to Petition for Review and Certificate of Service was filed by email with the Supreme Court on the date identified below at the following address:

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Christopher J. Casillas
Cline & Casillas
520 Pike Street, Suite 1125
Seattle, WA 98101-4058
ccasillas@clinelawfirm.com

Jacquelyn M. Aufdereide
Chief Civil Deputy Prosecuting Attorney
Kitsap County Prosecutor's Office
614 Division St. MS-35A
Port Orchard, WA 98366-4676
jaufderh@co.kitsap.wa.us

Deborah Boe
Deputy Prosecuting Attorney
Kitsap County Prosecutor's Office
614 Division St. MS-35A
Port Orchard, WA 98366-4676
dboe@co.kitsap.wa.us

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Case Number: 93033-3

Name of person filing, phone number, bar number and email address: Assistant Attorney General Mark S. Lyon, (360) 753-6238, WSBA #12169, MarkL1@atg.wa.gov

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Angela M. Boggs

Legal Assistant
Office of the Attorney General
Transportation & Public Construction Division
P.O. Box 40113
Olympia, WA 98504-0113
(360) 664-0459
angelab@atg.wa.gov

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