NO. 46735-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD, INC.,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Appellant,

v.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents.

PUBLIC EMPLOYMENT RELATIONS COMMISSION'S OPENING BRIEF

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I. INTRODUCTION/SUMMARY OF ARGUMENT

This case, which returns to the Court of Appeals following remand, involves cross-claims for unfair labor practices between Kitsap County and the Kitsap County Sheriff (County)[1] and the Kitsap County Correctional Officers' Guild, Inc. (Guild) charging each other with refusal to bargain in good faith over a decision to layoff two correctional officers. The central issue in the case is whether that decision was a mandatory subject of bargaining.

In the original proceeding and on remand, the trial court granted summary judgment to the County, finding that the layoff decision was not a mandatory subject of bargaining (i.e., not a matter subject to the process required for resolving labor disputes under the Public Employment Collective Bargaining Act (PECBA), RCW 41.56. The Public Employment Relations Commission (PERC) intervened because it is required by law to interpret and enforce PECBA, administer the bargaining relationship between the County and the Guild, and promote uniform application of the act throughout the state. PERC has a keen interest in developing uniform standards for determining mandatory subjects of bargaining, and the entry of appropriate remedial orders an unfair labor practice has occurred.

[1] Parties Kitsap County and the Kitsap County Sheriff will be collectively referred to as the "County" unless otherwise appropriate.

The trial court erred for three reasons. First, while budget and staffing level decisions are generally permissive subjects of bargaining, layoffs undertaken to reduce labor costs are a mandatory subject of bargaining — distinguishing between them requires a case by case fact analysis not made by the court.

Second, summary judgment for the County was improper because of the limited and disputed record currently before the court. It is not possible to conclude as a matter of law that the decision to layoff jail officers was exempt from the bargaining procedures required by PECBA — evidence in the record suggests that the layoff decision should have been bargained as requested by the Guild.

Third, the nature of the claims between the County and Guild mean that — depending upon whether the layoff decision was subject to mandatory bargaining — either the County or the Guild has committed an unfair labor practice and this court should remand for entry of an appropriate remedy. Having determined that the Guild insisted to impasse on bargaining permissive subject (an unfair labor practice), the court should have entered an appropriate remedial order as requested by PERC. Alternatively, should the Guild ultimately prevail on its claims that the layoff decision is subject to the bargaining process, then the County refused to bargain. On remand, once the determination as to whether the

layoff was a mandatory subject of bargaining is resolved, the merits of the cross-claims of unfair labor practice between the parties should be decided, and the trial court should enter an appropriate remedial order consistent with PERC's standard remedies for a refusal to bargain case, rather than simply issuing a declaratory order.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erred in holding that there were no material facts in dispute and granting summary judgment.[2]
2. The trial court erred in granting summary judgment to Kitsap County holding that the October 2011 decision to layoff two employees effective January 1, 2012 for the purpose of reducing labor costs is not a mandatory subject of bargaining where the record, viewed in favor of the Guild, shows the proposed budget reduction was preliminary at the time of the decision, the actual budget was not adopted until December 2011, the Guild promptly requested an opportunity to meet and bargain alternative cost saving measures, and the County had on other occasions negotiated reductions in labor costs with unions to avoid layoffs.

[2] Because on appeal of summary judgment findings and conclusions entered by the court are superfluous and the court reviews the record de novo, PERC does not attribute error to specific findings reached by the trial court.

3. The trial court erred because the law required a fact specific balancing of the interests explaining how requiring the County to bargain alternatives to reduce labor costs in lieu of proposed layoffs placed a burden upon the County budgeting process which outweighs the benefits and purposes of the Public Employees Collective Bargaining Act, where layoffs directly impact employee wages, hours and working conditions.
4. Assuming that the summary judgment is not reversed, trial court erred when, after declaring that the decision to layoff employees was not a mandatory subject of bargaining, it did not address the County's underlying unfair labor practice claim and enter an appropriate order to remedy the Guild's failure to bargain in good faith by pressing to impasse proposals on a permissive subject.

B. Issues Relating to the Assignments of Error

1. Is the layoff of two employees, motivated by the County employer's desire to reduce labor costs to meet a budget reduction, a mandatory subject of bargaining?
2. Are there sufficient undisputed facts in the current record to permit the court to grant summary judgment utilizing the fact-specific balancing test required to determine whether the layoff of two jail employees was a mandatory subject of bargaining?

3. Where the record shows that the determination whether the layoffs are mandatory subjects of bargaining means that either the County or the Guild engaged in a refusal to bargain in good faith amounting to an unfair labor practice under Chapter 41.56 RCW, should the trial court have imposed a remedial order consistent with the standard remedies under RCW 41.56.160?

III. STATEMENT OF THE CASE

This case returns to the Court of Appeals following a previous remand. *Kitsap Cnty. v. Kitsap Cnty. Corr. Officers' Guild, Inc.*, 179 Wn. App. 987, 320 P.3d 70 (2014).

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

Kitsap County's jail is operated by the Kitsap County Sheriff, an independently elected officer of Kitsap County. CP 394, 598. The Sheriff's Office is divided into a number of functional divisions, including

the Corrections Division which operates the jail. CP 597. In 2011, the jail employed approximately 74 officers, 9 sergeants and two lieutenants.[3] *Id.*

Ned Newlin is Chief of Corrections. Under the Sheriff's oversight, Newlin is responsible for management of the jail operations, including hiring and layoffs. CP 597. Newlin also represents the Sheriff's Office in collective bargaining with the jail's unionized employees. *Id.* Newlin is assisted in collective bargaining by Fernando Conill, a Kitsap County labor relations manager. CP 577.

The correctional officers are represented in collective bargaining by the Kitsap County Correctional Officers' Guild, Inc., which employs the law firm of Cline & Casillas. Terry Cousins is the president of the Guild. CP 634. Attorney Chris Casillas represented the Guild in negotiations about the layoffs. CP 653.

The County maintains that the layoffs were precipitated by reduction in jail budget revenue for 2012 as a result of the County budgeting process.[4] CP 599, 604. The size of the Sheriff Office's budget is determined through the annual County budgeting process. The timing

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[3] In 2012, following the layoff of the two employees at issue, the jail had 72 officers.

[4] The extent of this reduction is unclear from the record. Newlin indicated in his email to employees that while jail revenue had decreased more, the budget was cut by $513,000. CP 603-604, 644, 650. In his first declaration, he indicates that jail *revenue* was reduced by $935,000 for 2012. CP 599. In a second declaration, he states that the jail *budget* was reduced by that amount. CP 332.

and steps of this process is generally set out in statute RCW 36.40.010-.080. For the 2012 budget the process was initiated by the call letter 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. When the Sheriff submitted the proposed budget to County staff, the proposal does not appear to have included the elimination of the two jail positions.[5] CP 644. 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).[6] While the County is required to publish a preliminary budget for public comment and hearing, this was not available to the public or the Guild until mid-November. CP 649. Public hearing on the 2012 preliminary budget was scheduled for December 5, 2011. CP 649. The final 2012 budget was not adopted until December 12, 2012. CP 434.

On October 24, 2011, Newlin 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, Newlin also sent an email to all jail employees represented by the Guild announcing the layoffs and the

[5] The record is silent as to what was contained in this proposal or whether it was communicated to the Guild.

[6] The record is also silent on the timing and nature of this preliminary communication, but it apparently prompted the Sheriff's Executive Staff to put together over a "few days" a package of additional cuts, including the layoff of the two correctional officers. CP 604, 650.

reasons for them. CP 599, 603. Newlin did not provide separate notice to the Union representatives until after the announcement.[7] CP 635.

The stated reason for the layoffs was to cut labor costs. As stated by Newlin:

> In order to reduce expenditures, I reduced our labor costs through two layoffs, cut an open position and reduced maintenance staff by .75 FTE. The labor savings was about one-third the total necessary cuts.

CP 332; *See* CP 603-604.

Upon learning of the proposed layoffs, on October 25, 2011, the Guild provided written demands to bargain, including the "decision." CP 606, 646. The Guild renewed these requests on December 2 and December 17, 2011. CP 667, 669.

Almost immediately, the County took the position that it would bargain over the impacts of the layoff, but not the layoff decision itself. As early as October 26, 2011, during a meeting with the Guild president, "Chief Newlin agreed to discuss the impacts of the layoffs as they had done in the past, but did not agree to bargain the decision." CP 599.

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[7] The County maintains that the Guild should have been aware of potential layoffs. CP 578. The Guild maintains that it did not have specific notice of the number of employees proposed for layoff or the timing until the announcement was made to employees. CP 635. There is virtually no specific factual information in the record on this point. However, given the previous procedural history of the case, the question of whether notice or a demand to bargain should have been provided earlier is no longer material.

Although the parties had several meetings,[8] notably on November 8, 2011,[9] and continued to communicate by email regarding the Guild's request to bargain,[10] the County remained steadfast in its position that it would not bargain the decision to layoff employees.[11] CP 58, 98. Bargaining was limited to voluntary layoff procedures and changes in duties as a consequence of the layoffs. CP 58.

On December 17, 2011, shortly after adoption of the County budget, the Guild again sent an email asserting that refusal to bargain the layoff decision was an unfair labor practice "but the Guild would still like to engage the County in decisional bargaining on this issue in order to find a mutually agreeable resolution." CP 667. No other communications on decision bargaining subsequently occurred. CP 638.

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.

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[8] Meetings regarding the effects of the layoffs occurred on October 26, November 8, December 21 and December 30, 2011. CP 58.

[9] *See* Cousins ¶¶ 13, 14 [CP 636]; Newlin ¶ 13 [CP 600]; Conill ¶ 6 [CP 578].

[10] Emails were exchanged between the parties regarding the demand to bargain on October 25, December 1, December 2, December 13 and December 17, 2011. CP 649, 662, 663, 667.

[11] During this period, the County also maintained that unspecified additional Corrections Officers might need to be laid off "depending on the Corrections Division's still-developing 2012 revenue picture." CP 586.

On December 21, 2011, the County and Sheriff filed the present court action for declaratory judgment. The County sought a declaratory judgment in superior court stating that layoffs are a permissive bargaining subject and the Guild committed an unfair labor practice when it demanded to bargain the decision. CP 772. The Guild filed a cross-motion for summary judgment seeking (1) a declaration that layoffs are a mandatory bargaining subject and (2) an injunction against further layoffs without bargaining. CP 763-765. The trial court granted declaratory judgment in the County's favor. The Guild appealed.

On appeal, the County asserted that the Guild had waived its right to bargain through its expired collective bargaining agreement, and by past conduct. The court of appeals rejected these waiver arguments. *Kitsap Cnty.*, 179 Wn. App. at 996-997. The Guild argued that the Trial court erred in finding that the decision to layoff the two employees was not a mandatory subject of bargaining. *Id.* at 997. On March 13, 2014, the Court of Appeals, Division II entered a decision holding:

> The trial court in this case . . . failed to balance on the record the County's management prerogatives against the layoffs' impact on working conditions. 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.
>
> The trial court erred when it failed to conduct the balancing test to determine whether the layoffs in this situation are mandatory or permissive bargaining subjects. We remand for the trial court to engage in the balancing analysis.

Id. at 999.

Following remand, PERC (not previously a party) was granted intervention.[12] CP 162. PERC argued below, as it does here, 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.

After additional briefing and affidavits,[13] the superior court again granted summary judgment to Kitsap County, finding that the layoff

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[12] PERC was not a party or participant in the previous proceedings, and did not learn of the case until the court of appeals decision was published.

[13] While adding some marginal facts regarding the decision to conduct layoffs, the declarations submitted by the Guild and County primarily address an argument that the reduction in correctional staff affected the safety and other working conditions of the remaining employees. While declarations filed during the first superior court proceeding referenced safety discussions [*see* CP 600], this issue was not given attention on appeal. PERC leaves argument of whether the safety issue by itself makes the layoffs a mandatory subject of bargaining to the Guild, but notes that as with the issues around the

decision was within the entrepreneurial control of the County. CP 8-13. Neither the letter opinion nor findings and conclusions entered by the court indicate which specific facts or factors were weighed or what weight was given to these factors. The decision was limited to a declaratory judgment and directed no remedial order against the Guild for refusal to bargain. CP 13. The Guild and PERC have separately appealed this order. CP 5-6, 15.

IV. ARGUMENT

A. Scope of Review: On Appeal of Summary Judgment This Court Reviews the Record De Novo

This case is currently before the court on appeal from cross-motions for summary judgment by the County and the Guild. Summary judgment is granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). An appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Kitsap Cnty. v. Kitsap Cnty. Corr. Officers' Guild, Inc.*, 179 Wn. App. 997, 320 P.3d 70 (2014). The court should construe the facts and reasonable inferences in favor of the nonmoving party and summary judgment is only appropriate if reasonable persons could reach only one conclusion from the evidence

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labor cost motive, the record is at best conflicting. *Compare* Cousins, CP 92-96 *with* Newlin, CP 58.

presented. *Id.*; *Imperato v. Wenatchee Valley Coll.*, 160 Wn. App. 353, 357-58, 247 P.3d 816, 818 (2011).

"The trial court's findings on summary judgment are superfluous and this court need not consider them." *Lewis v. Krussel*, 101 Wn. App. 178, 182, 2 P.3d 486, 489 (2000). It is unnecessary for the trial court to enter findings on summary judgment. CR 52(a)(5)(B). Any that are entered may be disregarded on appeal, because summary judgment determines issues of law, not issues of fact. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483, 484-85 (1994).

B. Kitsap County Has the Burden of Proof

The moving party on summary judgment, in this case the County, bears the burden of showing the absence of a material issue of fact. *Id.* at 426.

In addition, in an unfair labor practice case, the ultimate burdens of pleading, prosecution and proof lie with the party asserting the complaint — in this case the County. *Kitsap County*, Decision 11610-A (PECB, 2013), at 3. The determination as to when the duty to bargain exists is a mixed question of law and fact. *Id.* at 3-4; WAC 391-45-550. Where an employer (County) asserts that a union (Guild) seeks to bargain a permissive subject, "using a balancing test means that some burden is placed on the union to produce evidence showing that the subject is related

to wages, hours, and working conditions; however, the employer is ultimately responsible for proving its case." *Spokane International Airport*, Decision 7889-A (PECB, 2003), at 15.

C. Refusal to Bargain Over the Decision to Layoff Employees Taken to Reduce Labor Costs is an Unfair Labor Practice

Whether a layoff decision is a mandatory subject of bargaining is a perennial problem which requires a close, fact specific weighing of factors. While the decision to layoff employees is not always a subject for bargaining, the courts and PERC generally hold that where an employer undertakes layoffs in order to reduce labor costs, employees may bargain over the decision and a refusal by the employer is an unfair labor practice.

In this section PERC reviews the factors relied upon PERC and courts in conducting this balancing and the general understandings on how these factors should be applied. In the following section, these factors will then be applied to the facts in the record, considered in a light most favorable to the Guild, to illustrate the lower court's error – issuing a ruling on summary judgment.

Under the Public Employees' Collective Bargaining Act (PECBA), Chapter 41.56 RCW, a public employer such as the County has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). An employer commits an unfair labor practice (ULP)

when it refuses to engage in collective bargaining on a mandatory subject of bargaining. RCW 41.56.140. Likewise, a union such as the Guild commits an unfair labor practice when it refuses to bargain on mandatory subjects. RCW 41.56.150. It is also an unfair labor practice to demand to impasse bargaining over a permissive subject. *Kitsap Cnty.*, 179 Wn. App. at 998.

For a mandatory subject, the bargaining obligation applies to both the decision and the effect of the decision. For a permissive subject of bargaining, the obligation applies only to the effect of the decision, not to the decision itself. *Id.* at 997-998.

1. Elements of a Refusal to Bargain Unfair Labor Practice

An employer violates RCW 41.56.140(4) if it implements a unilateral change of a mandatory subject of bargaining without having fulfilled its bargaining obligations. As a general rule, an employer has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: (1) gives notice to the union; (2) provides an opportunity for bargaining prior to making a final decision; (3) bargains in good faith, upon request; and (4) bargains to agreement or impasse concerning any mandatory subjects of bargaining. *Skagit County*, Decision 8746-A (PECB, 2006).

For employees like these represented by the Guild, who are eligible for interest arbitration, an employer may not unilaterally implement its desired change after bargaining to a lawful impasse, but rather must obtain an award through interest arbitration. *See Snohomish County*, Decision 9770-A (PECB, 2008). The interest arbitration requirements are also applicable to situations where an employer desires to make a mid-term change to terms and conditions of employment. *See City of Yakima*, Decision 9062-A (PECB, 2006).

In deciding refusal to bargain cases, PERC ordinarily focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Kitsap County*, Decision 11610-A (PECB, 2013); *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the employer's decision or action has already occurred when the employer notifies the union (*a fait accompli)*, the notice is not considered timely, and the union will be excused from the need to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found.

Id., *citing Lake Washington Technical College,* Decision 4721 (PECB, 1994).

Here, the previous procedural history strips this case down to the single question as to whether the decision to layoff the two correctional employees is one over which the County is required to bargain. If the answer is "yes", then the County has committed an unfair labor practice under RCW 41.56.140. If the answer is "no", then the Guild has committed an unfair labor practice under RCW 41.56.150.

2. Determining Mandatory Subjects of Bargaining

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 Cnty.*, 179 Wn. App. at 998.

The leading Washington case 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 the 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."

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).[14]

Federal cases identify three categories of management decisions when evaluating the scope of mandatory subjects of bargaining. *Pan Am. Grain Co., Inc. v. N.L.R.B.*, 558 F.3d 22, 26-27 (1st Cir. 2009). Decisions that only tangentially affect the employment relationship, such as advertising and product design, are not mandatory subjects. *Id.* Decisions directly affecting the relationship – wages, working conditions and the like- are mandatory subjects. "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." *Id.* Finally, some management decisions have a direct impact on employment but focus on economic profitability or other factors not primarily about the employment relationship. "An employer need not

[14] 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 Alliance, 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).

bargain over a decision "involving a change in the scope and direction of the enterprise" and not " 'primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.' " *Id.* For this third category, the "central thrust" is determined using a balancing analysis weighing whether "the benefit, for labor-management relations and the collective-bargaining process outweighs the burden placed on the conduct of the business." *Id.*

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 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* 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.

3. Factors to Consider in Determining if a Layoff Decision is a Mandatory Subject of Bargaining

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. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Public Emp't Relations Comm'n*, 113 Wn.2d 197, 203 (1989). The inquiry focuses on which characteristic predominates. *Id.* The Supreme Court in *Fire Fighters, Local Union 1052* held that "[t]he scope of mandatory bargaining thus is limited to matters of direct concern to employees" and that "[m]anagerial decisions that only remotely affect 'personnel matters' and decisions that are predominately '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. The list of relevant factors will vary, and different factors may predominate as required by the case-by-case analysis of the specific facts. A non-exclusive list of relevant factors to be considered includes the following:

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?

The public purpose and benefits from applying the bargaining law is a key factor in both state and federal cases. *City of Bellevue*, Decision 10830-A (PECB, 2012), at 7; *see First Nat'l Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 681, 101 S. Ct. 2573, 2582, 69 L. Ed. 2d 318 (1981) ("It seems particularly important, therefore, to consider whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act.") The purpose of collective bargaining is to promote labor peace, "continued improvement of the relationship between public employers and their employees", "uninterrupted public service" and "ensure the public of quality public services." RCW 41.56.010, .430; RCW 41.58.005(1). As noted in *Fibreboard*, this goal is achieved by "bringing a problem of vital

concern to labor and management within the framework established . . . as most conducive to industrial peace."[15] The mechanism requires that, where otherwise consistent with the bargaining law, issues "be submitted to the mediatory influence of collective negotiations." 379 U.S. at 214.

b. What Are the Employer's Reasons or Motives for the Layoff? Was the Employer's Motivation for the Layoff Primarily or Solely Economic?

Determining the actual motive for the layoff is also a fundamental factor. *City of Bellevue*, Decision 10830-A (PECB, 2012), at 7, 10; *City of Everett*, Decision 11241-A (PECB, 2013), at 16. The United States Supreme Court has "emphasized that a desire to reduce labor costs" is "considered a matter 'peculiarly suitable for resolution within the collective bargaining framework.' " *First Nat'l Maint. Corp.*, 452 U.S. 666 at 680, *quoting Fibreboard*, 379 U.S. at 214. PERC follows this same

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[15] In *Fibreboard*, the court noted that:

> One of the primary purposes of the [NLRA] is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. . . . To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 211, 85 S. Ct. 398, 403, 13 L. Ed. 2d 233 (1964). The purposes behind PECBA are similar. RCW 41.56.010; RCW 41.58.005. This is particularly the case with regard to uniformed personnel. RCW 41.56.430.

approach. *King County*, Decision 10547 (PECB, 2009), at 8, *aff'd*, Decision 10547-A (2010).

In determining these motives, it is appropriate to look both to what the employer says, and what it does. *N.L.R.B. v. 1199, Nat'l Union of Hosp. & Health Care Employees, AFL-CIO*, 824 F.2d 318, 321-22 (4th Cir. 1987) (looking to employers actions); *King County*, Decision 10576-A (PECB, 2010) (looking to County's stated reasons for furloughs).

c. To What Extent Does the Layoff Decision Involve a Fundamental Change in the Employers' Operation or Scope of Services?

"It is generally accepted that the level or types of services an employer provides is a management prerogative. . . . The decision to cease providing services is an entrepreneurial decision." *City of Bellevue*, Decision 10830-A (PECB, 2012), at 5, 11. Where, however, the employer continues "to operate much as before, pursuing the same business, in the same manner, at the same location[]," a layoff decision is much less likely to be an exercise of fundamental entrepreneurial control beyond the scope of mandatory bargaining. *N.L.R.B. v. 1199, Nat'l Union of Hosp. & Health Care Employees, AFL-CIO*, 824 F.2d 318, 321-22 (4th Cir. 1987).

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d. What Control Does the Union or the Employer Have Over the Cause of the Decision?

Whether the parties have control over the reasons for the layoff is important factor to be weighed. *City of Bellevue*, Decision 10830-A (PECB, 2012), at 7. For example, in *First National Maintenance Corp.*, the union had no control over the amount a third party was willing to pay the employer for its services. 452 U.S. at 687. Likewise, in *Skagit County*, Decision 8886-A (PECB, 2007) an employer was excused from bargaining changes to the deduction of industrial insurance premiums mandated by statutory changes by the Washington State Legislature.[16]

e. Would Bargaining About the Matter Significantly Abridge the Employer's Freedom to Manage the Public's Business?

It is generally recognized that an employer has no duty to bargain concerning a decision to reduce its budget. *City of Bellevue*, Decision 10830-A (PECB, 2012), at 6 (*citing Wenatchee School District,* Decision 3240-A (PECB, 1990). Likewise, the number of staff assigned

[16] In very limited circumstances, the Commission excuses an employer from fulfilling its full bargaining obligation when necessitated by compelling practical or legal circumstances. *King County*, Decision 10547 (PECB, 2009), at 2, *aff'd*, Decision 10547-A (PECB, 2010); *City of Tukwila*, Decision 9691-A (PECB, 2008). In making such decisions, the Commission "examines all of the relevant facts and circumstances surrounding the particular event . . . ." The employer bears the burden of proving this so-called "business necessity" defense. WAC 391-45-270(1)(b); *Cowlitz County*, Decision 7007-A (PECB, 2000). Even when an employer meets the burden of establishing a business necessity defense, the employer must still bargain the effects the decision has on mandatory subjects of bargaining.

to a shift is generally considered to be a management prerogative, although circumstances such as employee safety concerns can require a different result. *Compare City of Kelso*, Decision 11321 (PECB, 2012) (staffing not mandatory subject), *with Spokane International Airport*, Decision 7889-A (PECB, 2003), at 20-21 (staffing mandatory subject where unrebutted evidence shows potential safety impact).[17]

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)?

This impact of layoffs may go directly or immediately to employee wages, hours and working conditions or it may be felt in the future, in the form of increase work duties or, where transfer of work or subcontracting leads to erosion of work opportunities, loss of promotional opportunities and future job security. *City of Everett*, Decision 11241-A (PECB, 2013), at 16; *City of Seattle*, Decision 8313-A (PECB, 2003), at 3. Layoffs can also directly and adversely undermine access to collective representation through their union. *N.L.R.B. v. Advertisers Manufacturing Co.,* 823 F.2d 1086 (7th Cir. 1987) (refusal to bargain a layoff "sends a dramatic signal of the [U]nion's impotence").

[17] Note however, that shift staffing is a different question than layoffs. The ideal number of employees assigned to a shift is a different kind of question from terminating employment for existing employees.

g. Are There General Understandings Which Can Inform the Legal Analysis?

While not determinative, courts and PERC may rely on general understandings in the form of past case law. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Comm'n*, 113 Wn.2d 197, 207, 778 P.2d 32, 37 (1989). General understandings may also be based upon "industrial practice." *First Nat'l Maint. Corp.*, 452 U.S. at 680; *Fibreboard Paper Products Corp.*, 379 U.S. at 211.

D. The Determination of a Mandatory Subject of Bargaining is Fact-Intensive and the Record is Insufficient to Support Summary Judgment for Kitsap County.

The balancing test to determine whether layoff decisions are a mandatory subject of bargaining is fact-intensive and requires a case by case analysis. The record currently before the court is inadequate to conduct the necessary balancing test and resolve the other conflicting claims in favor of the County. Evidence in the record suggests the opposite – that the layoff decision should have been bargained as requested by the Guild. At present, the declarations in the record are silent on many of the facts which should be weighed.

While it is clear that there was a projected shortfall in the 2012 jail budget, the record is far from clear on a host of pertinent questions. Who made the layoff decision? When was the decision made? What was the

motive for the decision? What concessions or alternative actions could have been taken to fill the budget gap other than layoffs? Why was it not feasible to allow the union an opportunity to propose alternatives? The record on summary judgment is silent or muddled on all these key questions, precluding a resolution of the issue by summary judgment.

Nothing in the trial court's decision, or the record below, explains why the burden to the County of allowing the Guild to propose alternatives to the layoffs outweighs the injury to the employees and the public benefits of collective bargaining. In the end, this record returns on appeal little better than when first appealed.

The remand to the trial court following the first appeal was an invitation to correct this problem. As this court noted, "it is important that the trial court carefully consider the specific facts of this case and balance the competing interests." *Kitsap Cnty.*, 179 Wn. App. at 999. This conclusion is supported by the recognition in the first decision that the court of appeals reviews a summary judgment order *de novo*. *Kitsap Cnty.*, 179 Wn. App. at 997. If the record before the court on appeal were adequate to conduct the required balancing, there would have been no need to remand the case — the appellate court would have conducted the balancing.

However, the court did not conduct a detailed balancing on the record of the various factors. Nor does the evidence point solely in one direction such that summary judgment can resolve the case.

The evidence certainly does not support a decision as a matter of law for the County. Applying the six factors identified in the previous section to the limited evidence currently in the record suggests the layoff decision was undertaken primarily to reduce labor costs - a mandatory subject of bargaining. In summary, the County points to the importance and fundamental political nature of the County budget process and the significant revenue constraints affecting the County in establishing the budget, and these are supported in the record. (Factor e). However, it is also clear that the layoffs were motivated by a desire to reduce labor costs (factor b), making this kind of layoff especially appropriate to the collective bargaining framework. The decision to layoff does not appear to involve a fundamental change in the jail operations or scope of service. (Factor c). The Guild is in a position to make alternative proposals to reduce labor costs in lieu of layoffs, and the cause of the layoffs is thus in the control of the County and the Guild. (Factor d). The County has negotiated similar labor cost concessions to avoid layoffs with other unions in the past, and a significant body of case law holds that layoffs to reduce labor costs are subject to barging. (Factor g).

In weighing the impact of the layoff on employees, the impact is substantial, both in terms of the wages and hours of the two terminated employees, and the workload and concerns regarding representation of the remaining Guild employees. (Factor f). For all of these reasons, the purposes of PECBA in promoting labor peace and quality public service will be advanced by applying the collective bargaining process to this kind of dispute. (Factor a).

In order to apply the balancing test, it is first important to properly characterize the "decision" which the Guild seeks to bargain. That decision is the choice to layoff employees, not to set the budget for the jail.

Kitsap County argues that "[t]he key question . . . is whether the County's decision to reduce the jail budget, operations, and staffing levels is a mandatory subject of bargaining." CP 608. 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 mere desire, even need, to reduce expenditures or labor costs does not turn a mandatory subject into a management right. *King County*, Decision 10547-A (PECB, 2010) ("[A]lthough outside forces may have impacted the employer's budget, no outside force compelled the employer to choose furloughs as the means by which to reduce its budget."). For example, if the decision was to make up a budget shortfall by cutting the wages of employees, rather than layoff employees, there would be little question that the decision to cut wages would be a mandatory subject.

In this case, the Guild sought "to bargain any layoffs of Corrections Officers and the impacts to our working conditions" and asserted that "[l]ayoffs are a mandatory subject of bargaining" upon learning of the proposed layoffs on October 24, 2011. CP 606; *see also* CP 646 ("Our expectation, based upon the demand letter, is to engage the County over any possible layoff decision in advance of a final decision.") It is the decision by Newlin to terminate employees by layoff to make up for the budget shortage, and not the County budget decision itself (which was not finally adopted until several months later), which the Guild seeks to bargain.

The County characterizes the layoff decision as the inevitable result of the County Commissioners' budgeting decisions and that

bargaining the decision would significantly abridge the County's ability to control its budget. This is not clear from this record, however. First, in October 2011, when employees were notified of the layoffs, the 2012 budget process was far from done. The preliminary budget had not even been made public.[18] The budget numbers and assumptions are subject to change as the budget process proceeds, as acknowledged in Newlin's notice to employees. CP 604 ("Between now and the end of the year, should the budget picture improve, we will continue to try and find ways to mitigate the need for a reduction in force.") The final budget was not adopted until December 12, 2011. Second, the County Commission only set the 2012 budget at a high operational level. CP 434. The Sheriff was given the flexibility to allocate labor costs within that budget. CP 485, 499, 514. As Newlin candidly noted in his email to employees: "While the BoCC has the authority to determine our total budget, they do not have the authority to determine how that funding will be utilized within the Sheriff's Office. Those decisions belong exclusively to the Sherriff." CP 603. 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.

[18] The Guild was informed as late as November 5, 2011, that the full preliminary budget would not be available until mid-November. CP 649.

Having determined that it is the layoff decision at issue only starts the analysis, however. Where layoffs are the result of programmatic or scope of service changes resulting from the employers 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. *City of Kelso*, Decision 2633 (PECB, 1988) at 10, *aff'd* Decision 2633-A (PECB, 1988). The "general understanding" of PERC and federal precedent is that 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.

The evidence presented by the County so far suggests that the decision to layoff the two correctional officers was motivated by a desire to reduce labor costs, and not to reorganize or curtail its jail operations.[19] The stated reason for the layoffs was to reduce labor costs. The County has presented no evidence that the layoffs were prompted by a change in scope or operation of the jail. Only two of the 74 correctional officers

[19] Second Newlin Decl. at CP 332 ("The jail budget was reduced by $935,000 for 2012. In order to reduce expenditures, I reduced our labor costs through two layoffs, cut an open position and reduced maintenance staff by .75 FTE. The labor savings was about one-third the total necessary cuts."); Newlin Decl. at ¶11. CP 599, 603-604.

were subject to layoff. The County's declarations are completely silent with regard to any changes in the scope or direction of jail operations prompting the layoffs. It appears that the Kitsap jail continues to operate in essentially the same manner and in the same location after the layoffs as it did before.

The County points to no sudden, catastrophic change in circumstances that would have made bargaining regarding the layoffs a futile exercise. Concessions regarding labor costs were within the control of the Guild to make. A total of 76 days elapsed between the County's announcement of the proposed layoffs and the termination of the employees during which the County and Guild could have met, bargained, and potentially resolved on alternative labor cost reductions.

The record indicates that in previous years the County and its officials had negotiated a host of labor cost issues with unions in order to avoid or reduce layoffs, including suspending Cost of Living increases (COLAs) (CP 508, 522, 569), reduction in health plans (CP 494), and reductions in hours. CP 491. The County maintains that it had no other reasonable alternative but to layoff the employees. CP 604. The Guild maintains that it was prepared to discuss and explore other possible cost saving measures and bargain over such measures with the County, but was never given the chance. CP 98.

Requiring negotiations regarding the layoffs to reduce labor costs also supports the purpose of the Public Employee Collective Bargaining Law. "An important premise underlying the collective bargaining laws is that collective discussions between management and labor will result in better decisions. . . . How an employer reduces labor costs is a type of decision that can be improved through collective bargaining." *King County*, Decision 10547 (PECB, 2009), at 8, *aff'd*, Decision 10547-A (PECB, 2010). The observation by the court in *Fibreboard* is equally apt here, "although it is not possible to say whether a satisfactory solution could be reached . . . labor policy is founded upon the . . . determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." 379 U.S. 203 at 214. This is particularly the case because layoffs have such a significant impact upon employment and employees.

Here the two employees suffered a catastrophic impact to their wages and employment. CP 638. Other officers in the bargaining unit were required to do more work to absorb their duties. CP 99. In the background, the County continued to rattle its layoff sabre that additional, unspecified layoffs might be imminent. CP 586, 638

The current record before the court does not demonstrate as a matter of law that the burdens on the County budget process outweigh the

state labor policy where the proposed budget reduction was preliminary at the time of the layoff decision, the actual budget was not adopted until December 2011, the Guild promptly requested an opportunity to meet and bargain alternative cost saving measures, there were 76 days to negotiate before the layoffs and negotiations on the effects occurred during that time, and the County had on other occasions negotiated reductions in labor costs with unions to avoid layoffs.

E. Where a Court Finds an Unfair Labor Practice, It Should Enter an Appropriate Remedial Order

The trial court failed to enter an appropriate remedial order. Regardless of how the court ultimately resolves the question as to whether the layoffs at issue here are a mandatory subject of bargaining, the case should be remanded to correct this error. The nature of the claims between the County and Guild mean that — depending upon whether the layoff decision was subject to mandatory bargaining — either the County or the Guild has committed an unfair labor practice. If the decision of the trial court is upheld, then the Guild insisted to impasse on a permissive subject (an unfair labor practice), and the case should be remanded for entry of an appropriate remedial order. Alternatively, if the layoff decision is a mandatory subject, then the County refused to bargain and an

appropriate unfair labor practice remedy should be entered against the County.

The Appellate court should direct – once the final determination as to whether the layoffs are a mandatory subject of bargaining is resolved – that the merits of the unfair labor practice claims between the parties be decided, and the trial court enter an appropriate remedial order consistent with PERC's standard remedies under RCW 41.56.160 for a refusal to bargain case, rather than simply issuing a declaratory order.

1. The Court Should Remedy the Unfair Labor Practices Because PECBA Directs Appropriate Remedial Orders

PECBA directs that PERC prevent unfair labor practices and issue appropriate remedial orders. The Statute provides:

> (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.
>
> (2) If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees.

> (3) The commission may petition the superior court for the county in which the main office of the employer is located or in which the person who has engaged or is engaging in such unfair labor practice resides or transacts business, for the enforcement of its order and for appropriate temporary relief.

RCW 41.56.160.

Where parties invoke the concurrent jurisdiction of the courts to enforce their collective bargaining rights under RCW 41.56, the courts should also head this statutory direction to enter appropriate remedial orders.[20] Entry of a trial court judgment without a remedy risks inconsistent precedent in the delicate area of collective bargaining, curtailing or complicating enforcement of the public sector bargaining law, and establishment of inconsistent remedies for failure to bargain.

Uniformity in the application of remedies under PECBA is important because the relationship between public employers and their employees is a matter of the public interest and not just a matter between private parties.[21] A finding that an employer or union has committed an unfair labor practice should not go without a remedy. The appropriate

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[20] Washington courts share concurrent jurisdiction with PERC over actions brought under the Public Employees Collective Bargaining Act, Chapter 41.56 RCW, and the responsibility to enforce these statutes. *State ex rel. Graham v. Northshore School District No. 417*, 99 Wn.2d 232, 662 P.2d 38 (1983).

[21] The purpose of PECBA and of PERC is "to . . . ensure the public of quality public services" (RCW 41.58.005(1)) and to assure "uninterrupted and dedicated service" of uniformed personnel "vital to the welfare and public safety." RCW 41.56.430; *See* RCW 41.56.010.

remedial order can have significant implications for how PERC administers the bargaining relationship between the parties. For example, past findings of unfair labor practices can affect PERC's remedies for future violations. *Kitsap County*, Decision 11869 (PECB, 2013) (repetitive pattern of illegal conduct can support extraordinary remedy). PERC is empowered and directed to prevent and remedy unfair labor practices. RCW 41.56.160. The court should do the same.

2. The Court Should Look to PERC Precedent When Implementing Unfair Labor Practice Remedies

When interpreting the PERC's remedial authority under Chapter 41.56 RCW, the Washington Supreme Court approved a liberal construction of the statute to accomplish its purpose. *METRO v. Pub. Emp't Relations Comm'n*, 118 Wn.2d 621, 826 P.2d 158 (1992). With that purpose in mind, the Supreme Court interpreted the statutory phrase "appropriate remedial orders" as including those remedies necessary to effectuate the purposes of the collective bargaining statute and to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d at 633. The Commission's expertise in resolving labor-management disputes was also recognized and accorded deference. *Id.* at 634 (*citing Public Emp't Relations Comm'n v. City of Kennewick*, 99 Wn.2d 832 (1983)).

PERC request that the court remand this matter for entry of a remedial order consistent with PERC's standard remedy.

> "Appropriate remedial orders" are those necessary to effectuate the purposes of the statute and to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d 633. The standard remedy for an unfair labor practice 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. *State — Corrections*, Decision 11060-A (PSRA, 2012); *City of Anacortes*, Decision 6863-B (PECB, 2001); *University of Washington*, Decision 11499-A. Requiring an employer to read a copy of the notice at a meeting of its governing body has become part of the standard remedy in an unfair labor practice hearing. *Seattle School District*, Decision 5542-C (PECB, 1997); *University of Washington*, Decision 11414 (PSRA, 2012), *aff'd*, Decision 11414-A (PSRA, 2013); *City of Yakima*, Decision 10270-A (PECB, 2011); *Port of Seattle*, Decision 7000-A (PECB, 2000); *University of Washington*, Decision 11499-A. Deviation from the standard remedy, including not ordering a portion of the standard remedy, is an extraordinary remedy. *University of Washington*, Decision 11499-A.

Kitsap County, Decision 11869 (PECB, 2013), at 3. Where the refusal to bargain results in loss of pay or employment, the return to the status quo will include an order of back pay. PERC has adopted a rule regarding backpay orders, WAC 391-45-410 – Unfair labor practice remedies – Back pay. That rule provides:

> If an unfair labor practice is found to have been committed, the commission or examiner shall issue a

> remedial order. In calculating back pay orders, the following shall apply:
>
> (1) Individuals reinstated to employment with back pay shall have deducted from any amount due an amount equal to any earnings the employee may have received during the period of the violation in substitution for the terminated employment, calculated on a quarterly basis.
>
> (2) Individuals reinstated to employment with back pay shall have deducted from any amount due an amount equal to any unemployment compensation benefits the employee may have received during the period of the violation, and the employer shall provide evidence to the commission that the deducted amount has been repaid to the Washington state department of employment security as a credit to the benefit record of the employee.
>
> (3) Money amounts due shall be subject to interest at the rate which would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of payment.

Upon a final determination of the merits of this case, the court should direct entry of an appropriate remedial order. If the decision of the trial court is upheld and the layoffs are determined to be a permissive subject of bargaining, then the remedial order should, at a minimum, require a cease and desist directive to the Guild and require a posting in the workplace consistent with PERC's practices. Should it be found that the County was obligated to negotiate the layoffs, then a remedial order including cease and desist directives, workplace posting, and possibly

reinstatement and back pay should be entered.[22] Either way, the case should be remanded back for entry of an appropriate remedial order.

V. CONCLUSION

PERC requests that the summary judgment be reversed and this case be remanded for creation of a proper record and a decision consistent with Washington's public employee bargaining policy, including an appropriate remedial order.

The trial court erred when it failed to conduct a fact specific balancing of the interests explaining how requiring the County to bargain alternatives to reduce labor costs in lieu of proposed layoffs placed a burden upon the County budgeting process which outweighs the benefits and purposes of the Public Employees Collective Bargaining Act, where layoffs directly impact employee wages, hours and working conditions. The evidence in the record, taken in the light most favorable to the Guild, does not support granting summary judgment to Kitsap County where the October 2011 decision to layoff two employees effective January 1, 2012 for the purpose of reducing labor costs where the proposed budget reduction was preliminary at the time of the decision, the actual budget was not adopted until December 2011, the Guild promptly requested an

[22] The extent to which back pay and reinstatement may be appropriate may be affected by the unique procedural status of this case, and should be left for a determination at hearing on remand.

opportunity to meet and bargain alternative cost saving measures, there was ample time available for bargaining and the County had on other occasions negotiated reductions in labor costs with unions to avoid layoffs. Although it is not possible to say whether a satisfactory solution could be reached the state's labor policy is founded upon the determination that the chances are good enough to warrant subjecting these layoffs to the process of collective negotiation." *See Fiberboard*, 379 U.S. 203 at 214.

The trial court also erred when, after declaring that the decision to layoff two employees was not a mandatory subject of bargaining, it did not address the underlying unfair labor practice claim and enter an appropriate remedial order for the Guilds failure to bargain in good faith by pressing to impasse proposals on a permissive subject of bargaining.

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It is an unfair labor practice for either a union or an employer to bargain to impasse over a non-mandatory subject of bargaining. Having found a refusal to bargain amounting to an unfair labor practice under Chapter 41.56 RCW, the court should have imposed a remedial order consistent with the standard remedies under RCW 41.56.160.

RESPECTFULLY SUBMITTED this 13th day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on January 13, 2015 I caused true and correct copies of the foregoing *PUBLIC EMPLOYMENT RELATION COMMISSION'S OPENING BRIEF* to be filed with the Washington State Court of Appeals, Division II and be served as follows:

☒ U.S. Mail Postage Prepaid via Consolidated Mail Service and E-mail to:

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JESSICA BUSWELL
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WASHINGTON STATE ATTORNEY GENERAL

January 13, 2015 - 12:44 PM

Transmittal Letter

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Court of Appeals Case Number: 46735-6

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Comments:

Revised 1/13/15 Public Employment Relations Commission's Opening Brief

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