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

APPELLANT KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD'S REPLY BRIEF

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I. INTRODUCTION

It is apparent that Kitsap County ("County") chose the path the parties now find themselves on in this case because it wanted to create a new framework for assessing questions as to the scope of an employer's bargaining obligation. The County likely knew how the Public Employment Relations Commission ("PERC") would rule on such an endeavor, which is why this matter originated in Superior Court. While the County is lawfully entitled to file its claim seeking a declaratory judgment, in so doing it should not be a license to abandon a well-established and routinely applied legal framework by both the State courts and PERC that provide a clear answer to the decision in this case.

The County has done little to refute the overwhelming body of authority presented by both the Correctional Guild ("Guild") and PERC in their respective opening briefs demonstrating why, through this well-established balancing analysis, the issue over layoffs should be declared a mandatory subject of bargaining. The County begins its obfuscation on this matter by trying to recast the entire issue as centering on its budgetary authority when the actual legal question undoubtedly concerns whether the layoff decision was a mandatory subject or not. Further, to try and get around the adverse legal authority under the traditional balancing analysis, the County then urges this Court to apply rules from unrelated State court,

federal court, and other State administrative board decisions interpreting entirely different statutory frameworks with few direct parallels to the relevant provisions of the Public Employees Collective Bargaining Act ("PECBA") at issue in this case. These efforts should be rejected in favor of finding that the County committed an unfair labor practice ("ULP") for refusing to bargain over its layoff decision, with an Order from the Court that all appropriate remedies be applied.

II. ARGUMENT

A. The County Continues to Misstate the Relevant Question of Law for the Court, Which Centers on the County's Duty to Bargain Over a Decision to Layoff Guild Members

For Kitsap County, this is an open and shut case because, in its own words, "there is no duty to bargain the budgetary decision which resulted in a reduction of staffing levels."[1] Whether or not this statement is accurate, the central problem with the County's conclusion is that it has nothing to do with the case in front of the Court. Instead, the case solely turns on the question of whether, under RCW Chapter 41.56, a public employer's decision to engage in layoffs of existing personnel constitutes a mandatory subject of bargaining. The County seeks to conflate these two distinct issues into one and then repackage the whole legal question around its budgetary decisions. Notwithstanding this noble undertaking,

[1] Respondent Opening Brief, pg. 17.

neither logic nor law support that effort. When the question at hand is appropriately understood as one centering on the layoff decision, the County's entire case falls apart.

The County's fundamentally misguided efforts in this regard fail for at least three distinct reasons. For one, the starting point for the courts or PERC in assessing whether certain subjects of bargaining constitute mandatory or permissive topics is to determine precisely what issue the union has requested to bargain. For a case or controversy to arise under the unfair labor practice provisions of PECBA, either the union or the employer must allege that the other party is refusing to "engage in collective bargaining."[2] Collective bargaining is defined to include the duty to "confer and negotiate in good faith...on personnel matters, including wages, hours and working conditions..."[3] "The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the statutory collective bargaining obligation or the terms of a collective bargaining agreement."[4] Thus, the

[2] RCW 41.56.140; 41.56.150.
[3] RCW 41.56.030(4).
[4] *City of Yakima*, Decision 11352 (PECB, 2012); citing *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

natural first question in cases of this nature is to determine the precise subject of bargaining in dispute.

In this case, since it was the Guild making a request to bargain over a change being implemented by the County, the subject of bargaining at issue must necessarily be *defined based on the Guild's request.* There is no doubt that the Guild's request was to bargain over the County's decision to conduct "any *layoffs* of Corrections Officers and the impacts to our working conditions."[5] This request is so stated in the Guild's "demand to bargain" letter that was provided to the Chief of Corrections by the Guild President immediately following the Guild learning that two of its members would be laid off at the outset of 2012. This same demand was repeated, in writing, to County representatives from the Guild's legal counsel on at least two subsequent occasions on October 25, 2011 and December 2, 2011.[6] In the short period of time that the parties were discussing this matter, the Guild made it abundantly clear as to what it sought to bargain, and that request was exclusively focused on the decision to layoff two of its members.

In contrast, the County cannot point to one iota of evidence in the record demonstrating that the Guild ever requested to bargain over its budget, or specific staffing levels, or how it ran its operations. At one

[5] CP 642 (emphasis supplied).
[6] CP 646; 663.

point, the County goes so far as to acknowledge that *the Guild's bargaining demand was over layoffs*, but then argues for "all relevant aspects"[7] this request was really just a demand to bargain over its budget. These two issues are not one and the same, and the only reason the County continues to conflate these two topics is that it knows its only chance of prevailing in this case is to recharacterize the Guild's request as regarding its budget, knowing layoffs are indeed mandatory subjects of bargaining.

Additionally, the fact that the Guild called into question the budgetary necessity underlying the County's rationale for the layoffs does not somehow magically turn its demand to bargain into something that it never was in the first place. In bargaining over the layoff decision, the Guild has the right, and obligation, to raise a diverse set of arguments, from questioning the County's budgetary priorities to suggestions on alternative means to meet the budgetary constraints short of layoffs. While apparently somewhat foreign to Kitsap County, that process is called collective bargaining and does nothing to change the scope of the Guild's original demand letter or the topic for which it sought negotiations.

Second, in assessing legal questions of this nature, PERC has been consistently clear that the focus of the inquiry must be on the essential nature of the change and not on some creative label that one party may

[7] Respondent's Opening Brief, Pg. 25.

seek to impose. It is not in dispute that the County had reduced the Jail's 2012 budget by several hundred thousand dollars, and with personnel costs representing the biggest part of the Jail's expenses, it was *determined by the County* that layoffs were the best way to save on labor costs.[8] While the Guild did not agree that the level of these reductions was required, it never claimed that the County was obligated to bargain, and reach an agreement with the Guild, over the level of the Jail's budget. For the Guild, the essential nature of the change has always been focused on the layoffs of two its members. Simply because, in the County's opinion, the layoffs stemmed from its budgetary decision, this does not convert the fundamental bargaining issue from one of layoffs to the County's budgetary authority.

If the County's argument were accepted and taken to its logical conclusion, it *would nullify the entire collective bargaining law.* On some level, virtually every issue that can be defined as a "wage, hour, or working condition" affects a public employer's budget. When, for example, a union and employer are bargaining over member wages or health care benefits, the outcome of those negotiations will likely impact the employer's budget. Issues like work schedules, compensatory time, or vacation time all can have a budgetary impact. If a different amount than

[8] CP 65-66; 599.

what was originally planned is negotiated for on any of these issues then the public employer will need to modify its budgetary allotment to satisfy the requirements of that collective bargaining agreement.

But, if the County's argument is taken to its logical conclusion, any public employer would have no obligation to bargain over wage increases beyond what was originally set in that employer's budget because any new amounts would force the employer to increase the amount in its budget allotted for employee salaries. This outcome is, of course, absurd, because the entire premise of the collective bargaining laws of this State is that the union and employer have the right, and obligation, to bargain over these mandatory topics and each side has the obligation to abide by those terms. If the agreed upon terms require the employer to alter its budget, then this is what is required. A public employer is always going to be making decisions about its personnel that reflect a strong consideration of its budget. The fact that this routinely occurs does not remove from the bargaining process any employer decision originated from the casting of its budget. If this were to be the state of the law the entire collective bargaining framework would become essentially meaningless as every employer would argue almost any decision affecting wages, hours, or working conditions was prompted by a budgetary constraint that is non-negotiable.

For this, and other very good reasons, PERC and the courts have always looked past whatever label an employer may want to place on its decision, instead focusing on the fundamental nature of the change. Thus, for example, in *King County v. PERC*[9], the Court of Appeals, confronted with a question as to whether the County had to bargain over a new rule that nurses in its jail had to wear name tags on their uniforms, rejected the County's argument that the case was about its authority to regulate jail security. Instead, the Court appropriately recognized that the essential nature of the change impacted employee safety and, hence, was a working condition for which the County was required to negotiate.

Likewise, in another more recent case involving *King County*[10], PERC dismissed the County's argument that its decision to furlough its members was not a mandatory subject of bargaining. Again, rejecting the County's claim that the decision was necessitated by *cuts to its budget*, PERC focused on the underlying issue, which was the loss of wages to employees and forced time off stemming from the furloughs. Understood as such, the bargainable decision clearly centered on the issue of furloughs and was deemed to be mandatory in nature.[11]

The County desperately wants to slap a label on this case that the

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[9] 94 Wn.App. 431, 438-39, 979 P.2d 130 (1999).
[10] Decisions 10576-A, 10577-A, 10578-A (PECB, 2010).
[11] *Id.*

issue begins and ends solely with the County's budgetary authority. But, PERC and the courts have wisely seen through this approach, knowing that such an allowance would completely undermine the entire collective bargaining statutory framework. Instead, the focus is, and should be, not on the creative label that can be attached, but *on the fundamental character of the change.* In this case, the reason the Guild made the bargaining demand was because the County intended to layoff two of its members. That is the fundamental change, and the scope of bargaining analysis turns on the layoff issue, not the County's budgetary authority.

The third and final defect in the County's argument is that it mistakenly asserts that any impairment on its budgetary authority as a result of collective bargaining is, by definition, impermissible.[12] This is, of course, not true. PERC has repeatedly held that collective bargaining cannot be "an exercise in futility"[13] where one side is "merely going through the motions."[14] An employer must "meet with a willingness to hear and consider a union's view and a willingness to change its mind."[15]

It would meet the definition of bad faith bargaining for a public

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[12] At pg. 22 of Respondent's Opening Brief, the County notes: "There is no place for collective bargaining concerning the budgetary decisions, only for the impact of those decisions."

[13] *Kitsap County*, Decision 11675, (PECB, 2013); citing *Mansfield School District*, Decision 4552-B (EDUC, 1995).

[14] *Id.*; citing *Western Washington University*, Decision 9309 (PSRA, 2006)

[15] *Id.*; *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988), *aff'd,* Decision 2350-D (PECB, 1989)

employer to take the position that once its budget is finalized a union could not negotiate over any changes that would affect that original budget. While an employer does not have to agree to a specific proposal, it must be willing to consider those alternatives, and potentially agree on them, even if it means an adjustment to a previously established budget amount. Such an outcome frequently occurs across the hundreds of different collective bargaining agreements negotiated between unions and public employers in this State each year where, often times, those negotiations do not perfectly align with the employer's budgetary cycle. Public employers have the ability to amend budgets and adopt supplemental requests at any time, and they routinely do so for things like recently ratified collective bargaining agreements.[16] The County's argument that any impacts on its budgetary process would be "disastrous for everyone"[17] is hyperbole in its finest form.

Additionally, under the terms of PECBA, many public employers can actually be forced to make adjustments to previously adopted budgets to account for increased wage amounts or other benefits stemming from an interest arbitration decision. Under the terms of PECBA, the bargaining unit represented by the Guild is eligible for interest arbitration, meaning that if the parties cannot reach a mutually satisfactory agreement and an

[16] *See* RCW Chapter 36.40.
[17] Respondent's Opening Brief, Pg. 21.

impasse is reached, the contract may be submitted to a neutral arbitrator.[18] The neutral arbitrator is authorized to "make written findings of fact and a written determination of the issues in dispute, based on the evidence presented" which determination "shall be final and binding on the parties..."[19] Thus, through the statutorily mandated interest arbitration process, the County is already subject to a system whereby the final terms of a collective bargaining agreement could require it to modify its budget to meet the imposed terms, which could be retroactive by several years.

Based on the foregoing, the County falls down its own slippery slope of illogical misstatements of the law in concluding that the Guild has no ability to impact any aspect of the County's budgetary process. It is correct that the union does not have the ability to bargain over the size or scope of an employer's budget, but that entire argument is a red-herring that has never once been advanced by the Guild in these proceedings. What is the case, however, is the ability to bargain over "wages, hours or working conditions," and in engaging such topics it is to be expected that the resulting agreement may affect the employer's budget. Simply because the outcome of bargaining may impact an employer's budget in some way does not make the whole process of collective bargaining a non-mandatory subject of bargaining. If that were the case, as noted above, it would

[18] See RCW 41.56.030.
[19] RCW 41.56.450.

subvert the whole system of collective bargaining as established in PECBA.

The County takes this argument to a point of absurdity by asserting that its straw-man characterization of the Guild's argument would result in the Sheriff and the County incurring "huge deficits for which the Sheriff would be personally civilly and criminally liable."[20] In support of this proposition, the County cites to the RCW on County budgets, but this statute makes clear that any liability is only for expenditures "*in excess of* any of the detailed budget appropriations *or as revised by transfer as in RCW 36.40.100.*" As detailed in RCW 36.40.100, the County can make revisions to its original budget and pass supplemental appropriations, which if done properly would nullify any alleged liability.

As noted in the Guild's opening brief, there are any number of scenarios in which the County could satisfy its bargaining obligations concerning a layoff decision, and even reach an agreement with the Guild, without remotely affecting its earlier budgetary decision. There is an entire range of solutions, short of layoffs, that the parties could have bargained over and all of which exist within the County's budgetary constraints. Examples of this include possible furloughs, a temporary across-the-board wage cut, a reduction in time off to limit the need for overtime, the

[20] RCW 41.56.130 (emphasis supplied).

suspension of specialty pays or premiums, greater contributions on health care premiums, etc. The list of possibilities here is expansive. If any, or some combination, of these things could be agreed upon, it is entirely possible that one or both of the proposed layoffs could have been avoided. Ultimately, the County just needed to save money on its personnel costs. There were alternate paths to achieve this goal, outside of layoffs, all of which could have been discussed, and agreed upon, with the Guild.

On this note, in its briefing the County seriously misrepresents the record on this issue of exploring alternative solutions. Contrary to the County's assertion that the parties "met numerous times over several months,"[21] as the record makes clear, even from the County's own declarations, the parties actually *only met one time*, on November 8, 2011 and then communicated a few more times via email in late November and early December before the County filed its lawsuit.[22] Given that there was actually *only one meeting* and that, admittedly, the County refused to bargain its layoff decision with the Guild, there was little opportunity for the Guild to ever discuss and present alternative ideas. Thus, contrary to the County's statement that there was "nothing" stopping the Guild from "bringing forward their labor saving ideas," in fact there was quite a lot

[21] Respondent's Opening Brief, Pg. 25.
[22] CP 578; 599-600; 636-638.

preventing that from happening given the County's refusal to bargain the issue and the limited exchanges between the parties as a result.

Whether or not the Guild would have proposed any alternative solutions or if those proposals would have resulted in any kind of agreement is beside the point. The fundamental issue that the County overlooks here is that there are multiple paths that could have been explored, within the confines of collective bargaining, to achieve the budgetary savings required by the County but through a means other than layoffs. That is the fundamental point that the County has completely missed in this case. The decision to reduce its budget is reserved to the County, but *the means* by which the reduction takes place constitutes a mandatory subject of bargaining to the extent it affects wages, hours, or working conditions, which layoffs undoubtedly affect. *Other means* could have been explored had the County bargained in good faith. The Guild has the right to pursue those other means, and the County is prohibited from unilaterally imposing its idea on how to achieve the required savings.

B. The County Improperly Relies on Misapplied Legal Authority and Inapposite "Tests" not Applicable under RCW Chapter 41.56

1. The County Relies on Federal and Other State Authority that is Not Controlling and Does Not Apply to PECBA

In both the County's original Complaint and the Guild's Counterclaim, each party's legal claims are centered on alleged violations of RCW Chapter 41.56.[23] As detailed in the Guild's Opening Brief, both the courts of Washington State and PERC have analyzed, in detail, the required balancing analysis that is to be applied when interpreting RCW Chapter 41.56 over questions of whether a subject of bargaining is mandatory or not. In fact, this very Court recognized the predominance and exclusivity of this test in the case at hand when this matter first came before the Court.[24] Yet in its brief, the County almost singularly relies on other State court decisions not interpreting RCW Chapter 41.56, federal court decisions interpreting the National Labor Relations Act ("NLRA"), and other state administrative board decisions interpreting different state laws with no clear parallels to RCW Chapter 41.56. For obvious reasons, it is the position of the Guild that the sum of this authority has no impact on the case at hand given the ample Washington State authority interpreting RCW 41.56 and questions over the scope of bargaining.

The County begins its misguided analysis by arguing that "[s]ince 1969, courts and PERC" have supported its analysis.[25] One immediate problem with this argument is that PERC was not even formed by the

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[23] CP 753-766; 767-773.
[24] *Kitsap County v. Kitsap County Correctional Officers Guild*, 179 Wn. App. 987, 997-999, 320 P.3d 70 (2013).
[25] Respondent's Opening Brief, Pg. 17.

Legislature until 1975, making it impossible for the agency to have any perspective on this topic "since 1969."[26] Moving over to the court decisions it considers persuasive, the County principally relies on *Spokane Educ. Ass'n v. Barnes*[27], a Washington State Supreme Court decision from 1974 that arose under RCW Chapter 28A.72, the Personnel Act that was subsequently repealed by the Legislature in 1975. That statute, which was created to develop "orderly methods of communication between certificated employees and the school districts by which they are employed,"[28] is both now repealed[29] and has no clear parallels with the more modern and expansive PECBA in RCW Chapter 41.56.[30] Therefore, whatever proposition the County feels that this case stands for has no bearing on the matter at hand.

Recognizing this deficiency, the County then turns its attention to other "state administrative boards" in concluding that being required to bargain a decision to layoff employees would be "intolerable." For this proposition, the County cites to decisions from Michigan, New Jersey, and

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[26] See RCW 41.58.005.
[27] 83 Wn.2d 366, 519 P.2d 1362 (1974).
[28] *Spokane Educ. Ass'n*, 83 Wn.2d at 368.
[29] 1969 ex.s. c 223 § 28A.72.010. Prior: 1965 c 143 § 1. Formerly RCW 28.72.010, Repealed by 1975 1st ex.s. c 288 § 28, effective January 1, 1976.
[30] For example, RCW 28A.72.030 created a duty to "meet, confer, and negotiate" over matters relating to "curriculum, textbook selection, in-service training, student teaching programs, personnel, hiring and assignment practices, leaves of absence, salaries and salary schedules and noninstructional duties." There is no mention of the phrase "wages, hours and working conditions," which is the operative PECBA phrase defining the scope of collective bargaining for public employees.

California.[31] The problem with this argument is that the County makes no effort to demonstrate any parallels between the state laws at issue in those decisions with the scope of PECBA, which is at issue herein. In the absence of at least closely similar statutory language on collective bargaining from those states, those decisions would not even constitute persuasive authority, let alone anything that might serve as binding on this Court. Additionally, a close review of the cited decisions reveal that none of them support, or event directly confront, the broad conclusion concerning an employer's duty to bargain layoffs that the County seeks to draw from those cases.[32]

Finally, as it has done throughout this matter, the County largely rests its analysis on two United States Supreme Court decisions arising under the NLRA, the first of which actually predates the adoption of PECBA by several years. The County's errant reliance on the "more nuanced balancing test" from these decisions is misplaced. The primary problem with the County's argument is that both decisions expressly interpret the NLRA. While PECBA models the NLRA in many ways and PERC has cited to these decisions in some of its own cases, this does not

[31] Respondent's Opening Brief, Pg. 20.
[32] The County's own explanatory parentheticals fail to demonstrate how any of the cited cases even confront the legal question at issue in this case, which is a question over whether the decision to layoff personnel to achieve a labor savings constitutes a mandatory subject of bargaining.

mean the analysis from those opinions would override the balancing test adopted by the Washington State Courts and PERC in applying PECBA. The issue in this case was not whether there was a violation of the NLRA; rather, the issue is whether the layoff decision constitutes a mandatory subject of bargaining under PECBA. Since the courts and PERC have adopted, and repeatedly applied, a clear balancing test and analysis for questions of this nature, there is no reason to seek out, or apply, a test first developed by the U.S. Supreme Court in 1964 under the NLRA.

Additionally, in *First Nat'l Maintenance*, as framed by the Court, the issue was whether an employer must "negotiate with the certified representative of its employees over its decision to close a part of its business?"[33] The incidental effect of the employer's decision in *First Nat'l.* was to terminate the employment of several employees, but the legal issue centered on the employer's obligation to bargain over its decision to cease operations. As detailed in the Guild's Opening Brief, this case has nothing to do with ceasing a particular operation or the closing of its business. The County merely sought to save on labor costs by laying off some Guild members. Even if the test developed in *First Nat'l* had some applicability under PECBA, the two cases are completely inapposite because of the different legal questions. Likewise, in *Fibreboard Paper*

[33] *First Nat'l Maintenance v. National Labor Relations Board*, 452 U.S. 666, 667, 101 S. Ct. 2573; 69 L. Ed. 2d 318 (1981).

Products Corp.[34], as framed by the Court, the primary issue was "whether the 'contracting out of work being performed by employees in the bargaining unit is a statutory subject of collective bargaining" under the NLRA.[35] Thus, the legal question at issue in *Fibreboard* centered on a decision to contract work out, which again has nothing to do with the issue present in this case.

The reality is that the County is not satisfied with the balancing analysis applied under PECBA, which has repeatedly been used by the State courts and PERC, because it leads to an outcome contrary to what the County prefers. This concern, however, does not constitute a basis for this court to apply judicial or administrative decisions from other States or from other court cases interpreting different statutory frameworks or legal questions with no direct parallel to the case at hand. The County's means-end approach to the legal question at issue in this case, therefore, should be rejected in favor of applying the balancing analysis as advocated for both by the Guild and PERC and already applied by this same Court.

2. The County Misrepresents the State of the Law on Layoffs in front of PERC

In its efforts to move outside of the well-established balancing analysis, the County tries, in vain, to cast past PERC decisions on the issue

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[34] *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 85 S. Ct. 398; 13 L. Ed. 2d 233 (1964).
[35] *Id.* at 204.

of layoffs constituting a mandatory subject of bargaining as being filled with a "variety of conclusions" and "uncertainty."[36] The County then goes on to argue that since 1990 there have been "10 PERC decisions" on this topic and then "in eight cases PERC ruled that a reduction in staffing was not a mandatory subject of bargaining, and in two cases ruled that there was a duty to bargain."[37] In reviewing the ten decisions cited to by the County, two things become apparent. First, the County has not accurately described the holding in those decisions. Second, its characterization of these opinions highlights the fundamental misunderstanding the County has concerning its bargaining obligations over layoffs.

In four of the decisions cited by the County in favor of its position – *Wenatchee School District*[38], *City of Anacortes*[39], *City of Kirkland*[40], and *City of Bellevue*[41] – as the Guild already detailed in its Opening Brief, in each decision PERC determined that any layoffs were only a secondary effect of an underlying an original management decision to cease operations or change the scope of the enterprise.[42] The same was true with

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[36] Respondent's Opening Brief, Pg. 32.
[37] *Id.*
[38] Decision 3240-A (PECB, 1990).
[39] Decision 6830-A (PECB, 2000).
[40] Decision 10883-A (PECB, 2012).
[41] Decision 10830-A (PECB, 2012).
[42] Similarly, the County cites to *State Corrections*, Decision 11060 (PSRA, 2011), but this decision also involved a decision to close a particular facility, which PERC characterized as an "entrepreneurial decision." Ultimately, however, PERC still found the employer committed a ULP in this case for not bargaining over the layoff of personnel.

Tacoma-Pierce County Health Dept.[43], where the employer decided to close part of its program. Those cases are distinguishable from our own and stand for a more limited proposition that excludes the conclusion that any staffing reductions are not mandatory subjects of bargaining.

Additionally, in *North Franklin School District*[44], the Commission actually found that the decision to conduct layoffs falls "within the mandatory category," and only ultimately ruled against the union upon a finding that it had waived its right to bargain the layoff decision through contract language. The County also errantly cites to a final decision, *State Attorney General*[45]; however, the legal issue in this case concerned an interference charge during a representation petition and the elimination of a job position, which again has nothing to do with the matter herein.

Ironically, in characterizing these decisions as the "uncertainty" created by PERC, the County emphasizes its own fundamental confusion over the legal question in this case. While this point has already been heavily briefed, it is worth reemphasizing the fundamental distinction in these PERC decisions the County overlooks or simply does not understand. On the one hand, in cases where an employer has decided to layoff or furlough its workers in an effort primarily motivated to save on

[43] Decision 6929-A (PECB, 2001).
[44] Decision 5945-A (PECB, 1998).
[45] Decision 10733 (PSRA, 2010).

labor costs, PERC has consistently found such a decision to constitute a mandatory subject of bargaining.[46] In contrast, when an employer has initially made a decision to limit or cease operations or fundamentally change the scope of its operations, any secondary layoffs that may stem from that decision are subsumed by what PERC has characterized as a fundamental managerial prerogative. The different outcomes in these cases have clearly divided along those lines even though some aspects of each of these cases involved the laying off of personnel.

It is only with this latter set of cases where PERC has concluded that any secondary decision to layoff is not bargainable because any layoff was only the effect of an underlying management right to determine the scope of its operations. In this case, however, the evidence is clear and uncontested that Kitsap County was at all relevant times never engaged in any kind of cessation of its operations or closing part of its business. The layoffs were motivated solely by a desire on the part of the County to save on labor costs. In such cases, PERC has been entirely clear and consistent in concluding that any layoff decision constitutes a mandatory subject of bargaining, and a similar outcome is warranted herein.

C. The County Misstates the Superior Court's Order and the Scope of Any Remedy to Which the Guild is Entitled

[46] See *City of Kelso,* Decision 2633 (PECB, 1988); *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280 (PECB, 2009) ; *King County,* Decisions 10576-A, 10577-A, 10578-A (PECB, 2010).

On two separate occasions in its briefing, the County claims that it is entitled to a remedy finding that the Guild "committed an unfair labor practice by insisting to impasse on a permissive subject of bargaining."[47] Such a remedy is not available to the County for several reasons. For one, in its original complaint, there is no allegation or legal claim seeking a finding of an unfair labor practice.[48] Second, the Superior Court's Findings of Fact, Conclusions of Law, and Order, which were drafted by the County, make absolutely no mention of any unfair labor practice finding and there is no Order directing any specific remedy.[49] Finally, the County has not appealed any aspect of that Order, so it cannot now seek a modification to the original remedy for which it has not appealed.[50]

Interestingly, the County then goes on to admit that if there is any ULP violation in this case then any remedy "should be consistent with remedies awarded by PERC"[51] in such cases; but, it then argues that reinstatement and back pay would not be appropriate remedies. The County has failed to refute the fact that within the cases and statutory authority cited by the Guild, any remedy in this case in favor of the Guild would naturally include reinstatement and back pay to restore the *status*

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[47] Respondent's Opening Brief, Pg. 4, 43.
[48] CP 767-773.
[49] CP 27-30.
[50] *See* RAP 2.4
[51] Respondent's Opening Brief, Pg. 44.

quo ante and make the employees' whole for their loss. Restoration of the status quo is part of what PERC considers the "standard remedy" in these cases, and a requirement of reinstatement and the payment of damages is mandated in the remedial statute relating to ULP findings.[52]

D. The County's Waiver Argument Violates the Law of the Case

Although the question of whether any waivers were in effect at the time of the layoff decision has already been decided by this Court, the County seeks to revisit that issue on appeal once again. Although RAP 2.5(c)(2) would permit the Court to undertake such an endeavor, reconsideration of that earlier decision would not be appropriate herein. The Supreme Court has definitively found that "[w]here there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes redeciding the same legal issues in a subsequent appeal."[53] "Subsequent appellate reconsideration of an identical legal issue will be granted only where 'the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in manifest injustice'."[54]

This Court already confronted the County's waiver argument and

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[52] *Lewis County*, Decision 10571-A (PECB, 2011), (citing *City of Anacortes*, Decision 6863-A (PECB, 2001), citing *Seattle School District*, Decision 5733-A (PECB, 1997).; *See* RCW 41.56.160.
[53] *State v. Clark*, 143 Wn.2d 731, 745, 24 P.3d 1006 (2001); citing *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988).
[54] *Id.*

determined that "waivers are permissive subjects that expire with the collective bargaining agreement unless they are renewed by mutual consent."[55] Since the contract had expired at the time of layoffs and there was no indication of any renewal, the Court correctly decided that the waiver doctrine does not apply. In the current appeal, the County simply repackages its earlier argument without any sincere effort to demonstrate how the earlier ruling was clearly erroneous or its application would result in a manifest injustice in the current proceedings. Absent such a demonstration, the County's argument should be rightfully rejected under the law of the case doctrine.

III. CONCLUSION

Based on the foregoing reasons, the Guild respectfully requests that the Superior Court Order be overturned and for this Court to enter findings that the County committed a ULP for its refusal to bargain the layoff decision, in which case all appropriate remedies should be issued.

RESPECTFULLY SUBMITTED this 13th day of March, 2015, at Seattle, WA.

CLINE & CASILLAS

By: _____

Christopher Casillas, WSBA # 34394
Attorney for Appellant
Kitsap County Correctional
Officers Guild

[55] *Kitsap County*, supra at 996.

CERTIFICATE OF SERVICE

I certify that on March 13th, 2015, I caused to be served via electronic mail and U.S. Mail a true and accurate copy of the foregoing *REPLY BRIEF* and this *CERTIFICATE OF SERVICE* in the above-captioned matter on:

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I hereby declare under penalty of perjury under the laws of the states of Washington that the foregoing is true and correct.

DATED this 13th day of March, 2015 at Seattle, Washington.

CLINE & CASILLAS

Donna Steinmetz
Paralegal