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 REPLY BRIEF

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The trial court erred by granting summary judgment and this case should be remanded for trial. Material issues of fact remain unresolved, and on the record currently before the court, the facts favor the Kitsap County Correctional Officers' Guild's (Guild) position that the layoff of two jail officers, in order to reduce labor costs, is a mandatory subject of bargaining. Even if the appellate court believes the record is sufficient for the particularized balancing required and decides the legal issue on its merits, however, the Public Employment Relations Commission (PERC) seeks remand for entry of an appropriate remedial order.

While giving lip-service to the multi-factor balancing test used by PERC and Washington courts to determine mandatory subjects of bargaining, Kitsap County (County) devotes its brief to a single factor – interference and inconvenience to the County of the bargaining obligation on its freedom to manage its business. In support of this "one note samba," the County offers an incorrect analysis of state and federal precedent applying the multi-factor test, misstates the issue to be bargained as the scope of the county budget, rather than the two layoffs at hand, and offers speculation rather than evidence to support its claim that the County's freedom to manage its budget would be "severely abridged" by the statutory obligation to collectively bargain over these layoffs. In effect, the County wants to reduce the multi-factor balancing test based

upon the totality of the circumstances to one factor. The court should apply the full multi-factor balancing test as developed in the Washington and federal case law and reverse.

The county also seeks to renew its waiver defense previously rejected by the Court of Appeals in the first appeal of this case.[1] Resp. Br. at 39. However, the County offers nothing new to its previous arguments and did not raise these arguments to the trial court. The court should decline this untimely invitation to reconsider its previous decision. RAP 2.5(a).

Finally, the County does not dispute that a remedial order should conform to the standard remedies used by PERC, but argues that remand is unnecessary because the county is satisfied with the declaratory judgment in its favor entered by the trial court. The county's position should be rejected for two reasons. First, the obligations of the parties to bargain in good faith under the Public Employees' Collective Bargaining Act (PECBA), RCW 41.56 is not a private right of the County and the Guild – the jail employees and the public have interests in the proper discharge of the employer and union of their duties. Where either the County or the Guild have breached these obligations, the requirement of

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[1] *Kitsap Cnty. v. Kitsap Cnty. Corr. Officers' Guild, Inc.*, 179 Wn. App. 987, 320 P.3d 70 (2014). West Publishing mistakenly cites the year of decision of the previous appeal in this case as 2013.

the public posting, cease and desist order, and other components of PERC's standard remedies serve an important role in providing transparency as to what occurred, who was at fault, and what will be expected from the parties in the future. The County's position also assumes that it will prevail on the merits, a result which is not assured at this stage in the proceedings.

I. DETERMINATION OF A MANDATORY SUBJECT OF BARGAINING IN WASHINGTON INVOLVES A MULTI-FACTOR ANALYSIS BASED UPON THE TOTALITY OF THE CIRCUMSTANCES

As described in PERC's opening brief, determination of whether a particular matter is a mandatory subject of bargaining is determined by a case-by-case balancing approach based upon the totality of the circumstances. PERC Br. at 20-21. The test is best envisioned as a continuum with mandatory subjects involving wages, hours, and working conditions at one end and matters only slightly related to personnel matters that lie at the core of entrepreneurial control at the other. Where a particular matter impacts both "wages, hours and working conditions" and the employer's ability to manage the enterprise, the multi-factor balancing test is employed to determine on which end of the continuum the issue falls. In its brief, PERC outlined seven, non-exclusive questions or factors

used by PERC and the courts to conduct this balancing analysis.[2] This summary judgment record is inadequate to weigh these factors properly, but the evidence tends in favor of the layoff of the two jail officers being a mandatory subject of bargaining.

A. Kitsap County Misstates and Misapplies the Balancing Test for Determining Mandatory Subjects of Bargaining

The county gives lip-service to the multi-factor balancing test, but then argues most of these factors only apply to layoffs "when staffing is reduced in order to contract out the same work." Resp. Br. at 27. In a somewhat confusing and misleading analysis, the County suggests that the decision in *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), limited the earlier decision in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 85 S. Ct.

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[2] As described in PERC's brief at 21-26, these non-exclusive factors are:

a. Would Bargaining Over This Sort of Decision Advance the Process of Resolving Conflicts Between Labor and Management and Advance the Purposes of the Bargaining Law?
b. What Are the Employer's Reasons or Motives for the Layoff? Was the Employer's Motivation for the Layoff Primarily or Solely Economic?
c. To What Extent Does the Layoff Decision Involve a Fundamental Change in the Employers' Operation or Scope of Services?
d. What Control Does the Union or the Employer Have Over the Cause of the Decision?
e. Would Bargaining About the Matter Significantly Abridge the Employer's Freedom to Manage the Public's Business?
f. Does the Layoff Involve a Substantial Impact or Significant Detriment to Bargaining Unit Members (i.e., by Changing Conditions of Employment or Significantly Impairing Reasonably Anticipated Work Opportunities)?
g. Are There General Understandings Which Can Inform the Legal Analysis?

398, 13 L. Ed. 2d 233 (1964) to its facts, rejected the "labor cost" factor from further use and limited the balancing test to a three-factor "*First National*" test. Resp. Br. at 29. Thus, the County rejects the multi-factor analysis described in PERC's brief. The county further asserts that PERC adopted this same approach in *City of Bellevue*, Decision 10830-A (PECB, 2012). Resp. Br. at 34, 35. The upshot of the County's argument is that layoff cases fall into two categories: layoffs from contracting out (which must be bargained) and those for other reasons, for which bargaining is not required. Resp. Br. at 31.

The first problem here is that *First National* does not overrule or limit *Fibreboard* in the manner suggested by the County. The holding in *First National* was "that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *First Nat'l Maint. Corp.,* 452 U.S. at 686. However, the court noted "we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." *Id.* at n.22. Language from *First National* cited by the County for the proposition that the "labor cost" analysis used in *Fibreboard* is "too ambiguous" is

misquoted and taken out of context. *See* Resp. Br. at 32. The *First National* court was criticizing the decision of the lower court finding a "presumption" that all layoffs are mandatory subjects of bargaining, not a critique of the earlier *Fibreboard* decision.[3] Federal courts have continued to apply the labor cost distinction from *Fibreboard* in a number of circumstances unrelated to contracting out of unit work. *E.g., Pan American Grain Co., Inc. v. N.L.R.B.,* 558 F.3d 22, 27-28 (1st Cir. 2009) (employer must bargain over mixed motive layoffs partially involving labor costs); *N.L.R.B. v. 1199, Nat'l Union of Hosp. & Health Care Employees, AFL-CIO*, 824 F.2d 318, 321-322 (4th Cir. 1987) (employer failed to establish that its failure to bargain about layoffs was justified on basis of compelling economic reasons or as a fundamental managerial decision).

The County likewise misrepresents PERC's holding in *City of Bellevue*. That case does involve the factual choice between whether the transfer of the city's emergency dispatch operations to a regional dispatch center constituted "contracting out" or a "partial shutdown." However, contrary to the County's assertion, PERC recounted and used the factors

[3] "[T]he presumption analysis *adopted by the Court of Appeals* seems ill-suited to advance harmonious relations between employer and employee." *First Nat'l Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 684, 101 S. Ct. 2573, 2584, 69 L. Ed. 2d 318 (1981) (emphasis added).

from *Fibreboard* and *First National* as well as its own case law. *Id.* at 9. PERC specifically applied the "reduction of labor costs" factor and concluded that this was not the primary motivating factor of the city. *Id.* at 10. The County may like the result in *City of Bellevue*, in which the employer did not have to bargain the decision to close its emergency dispatch operation, but the County does not explain how its narrow reading of *City of Bellevue* helps analyze the current case, where the County neither contracted out work nor closed the jail.

The mandatory subject balancing test as it has developed in Washington is much more nuanced and flexible than suggested by the County.[4] PERC and Washington courts have employed this "balancing test" in a variety of circumstances beyond contracting out. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Comm'n*, 113 Wn.2d 197, 778 P.2d 32 (1989) (balancing test used to weigh extent to which equipment staffing policies affected fire fighter workload and safety and to independently evaluate nature of city's interest in setting equipment staffing levels); *King County*, Decision 10547 (PECB, 2009), *aff'd*, Decision 10547-A (PECB, 2010) (balancing used to determine if furloughs to reduce labor costs mandatory subjects of bargaining); *Griffin*

[4] The County wrongly accuses PERC of creating a "false dichotomy" in which all layoffs fall neatly into those which involve "labor savings" and must be bargained and those that do not. Resp. Br. at 34.

School District, Decision 10489-A (PECB, 2010) (balancing applied to require bargaining on reduction of work days); *City of Vancouver*, Decision 11276 (PECB, 2012) (balancing used to determine if shift-trade policy mandatory subject). This multi-factor balancing approach which includes but is not limited to the factors used in *First National* is the approach that should be used in this case.[5]

Subtracting their misreading of the case law, the County offers no reasoned basis or test for distinguishing layoffs from other matters which are mandatory subjects of bargaining under RCW 41.56.030(4) (requiring "collective bargaining" over "grievance procedures and . . . *personnel matters, including wages, hours and working conditions*") (emphasis added). This court should be analyzing the facts and factors that distinguish mandatory from permissive subjects of bargaining, not adopting an ever finer series of "pigeon holes" by which to label bargainable and non-bargainable subjects. For example, in *King County* PERC held that a county facing budget pressure similar to that faced by Kitsap County was obligated to bargain and arbitrate furloughs imposed to reduce labor costs. The County distinguishes *King County* from this case because the furloughs involved a "wage reduction" rather than a "staff

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[5] The County asserts that PERC in its briefing "neglected to apply the *First Nat'l* factors." Resp. Br. at 35. However, the *First National* criteria are specifically listed in PERC's Opening Brief at 21 (Factor a), 24 (Factor d) and 24-25 (Factor e).

reduction" to save labor costs. Resp. Br. at 32-33. But this distinction cannot be found in RCW 41.56.030(4). In the end, the County appears to argue (for no identified reason) that layoffs are special, and only those involving contracting out are special enough to be a mandatory subject of bargaining. This approach invites exactly the kind of summary labeling without balancing rejected in *Int'l Ass'n of Fire Fighters, Local Union 1052,* 113 Wn.2d at 202.

Use of the multi-factor balancing analysis summarized in PERC's Opening Brief at 20-26 provides a more useful approach to resolving this case and others. This approach permits a determination, from the facts of the case, as to whether a particular subject – here the layoff of two jail officers to reduce labor costs – is a mandatory subject of bargaining. *Int'l Ass'n of Fire Fighters, Local Union 1052,* 113 Wn.2d at 203.

B. Kitsap County Misstates the Subject of the Demand to Bargain

As it did before the trial court, the County continues to conflate the Guild's demand to bargain the decision to layoff two jail employees with a demand to bargain the size, scope and allocation of the County budget. As PERC notes in its opening brief, this misstates the subject to be bargained. PERC Br. at 29-31. 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.

As recited in PERC's brief at 30-31, there are a number of facts which directly contradict the County's argument that the Guild was seeking to usurp the County's budgeting authority, including (1) the budget was not set when the layoffs were announced in October 2011, (2) the budget numbers and assumptions were subject to change before a final budget was adopted in December 2011, (3) the budget set by the County commissioners only set budget levels at a high operational level and did not specifically require or itemize layoffs of any employees,[6] and (4) when the union learned of the layoffs announced by jail Chief Newlin, it requested to "bargain layoffs." All of these facts (undisputed by the County), as well as Chief Newlin's candid statement prompting the demand to bargain that the two officers would be laid off to reduce "our labor costs" contradict the assertion that the union was demanding to negotiate the budget in a manner to usurp managerial control from the County.

The county claims that that the Guild does not want to bargain labor cost alternatives, but allocations of the County budget itself.[7]

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[6] "Layoffs were never the goal of the budget cuts, but a necessary and incidental consequence." Resp. Br. at 17.

[7] The county also points to the Guild's statement in its brief that "[[t]he Guild] may be able to analyze the employer's budget situation and suggest alternative solutions to achieve the required budgetary savings." Resp. Br. at 37. The County is correct that if this had been the limit of the Guild's response, the parties would have come to impasse over the budget – a permissive subject of bargaining. However, on the same page the Guild notes that it could "offer various concessions that its members are entitled to

However, the record contains a clear statement that the Guild was willing to negotiate labor cost alternatives. CP 97-98. The County argues that this sworn declaration is "years after the fact . . . [and] lacks sincerity." Resp. Br. at 24-25. However, the credibility of the Guild's willingness to make concessions if given the opportunity is not an issue to be resolved on summary judgment.

C. The Record Fails to Support Kitsap County's Claim That Bargaining the Two Layoffs Would "Severely Abridge" the County's Ability to Manage Its Budget

Having conflated the demand to bargain the layoffs with the budget decision, the County devotes the bulk of its argument to asserting that requiring bargaining over the layoffs in this case would be an "intolerable" burden on the Sheriff and the County. Boiled down, the County argues that bargaining would not have been practical, based upon a number of speculative hypotheticals not supported by the record. The County further argues that this interference with entrepreneurial control outweighs any other factors to be considered, including the purposes of PECBA and impact upon employees.

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receive under the contract, but that it may be willing to give up or temporarily forego, in order to avoid layoffs." Guild Br. at 32, 33. These include, for example, furlough days for jail officers or suspension of certain premium or specialty pay. *Id.*

1. The duty to bargain under PECBA preempts any conflicts with the County's statutory budget cycle

The County's primary point is that there would not be time to bargain/mediate/arbitrate layoffs within the County's annual budget cycle so layoffs must be permissive subjects. In effect, the County argues that the budget cycle set out in RCW 36.40.071-.080 must override other considerations including the requirement to bargain. Taken to its logical conclusion, this argument would eviscerate the rights under PECBA for jail employees to negotiate and arbitrate their wages, hours and working conditions.

However, PECBA is to be interpreted liberally to accomplish its purpose. RCW 41.56.905.[8] Thus, "a liberal construction should be given to all of RCW 41.56 and conflicts resolved in favor of the dominance of that chapter." *Rose v. Erickson,* 106 Wn.2d 420, 424, 721 P.2d 969 (1986). To the extent the county budget cycle conflicts with PECBA, it is preempted by RCW 41.56.905. *Id.* at 423 (RCW 41.56 prevails where conflicts with other law); *See City of Spokane v. Spokane Police Guild,* 87 Wn.2d 457, 465, 553 P.2d 1316 (1976) (compliance with arbitration

[8] RCW 41.56.905 provides: "[t]he provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control."

deadlines not mandatory and arbitration obligation binding even where delays prevent resolution before annual budget was approved).

2. The record does not show a lack of time to bargain

Moreover, the assertion of a lack of time for the bargaining process is speculation; the evidence in this record does not demonstrate that bargaining would have been impossible here. Although the number and timing of layoffs within the jail were not announced until October 2011, the County was clearly aware of its ongoing budget challenges and the possibility that it would propose layoffs.[9] *See* Resp. Br. at 10-11. It was the County which was in control of the timing and scope of its proposed layoffs. The record is at best conflicting (or all together silent) on why, if the County believed that more time would be needed to bargain the layoff, it did not provide a proposal to the union earlier.

Likewise, there is nothing in the record that supports the County assertion that bargaining and arbitration "can take anywhere from one to four years" (Resp. Br. at 22, 23), or that it would necessarily take that long to resolve the layoff issue at hand. For example, in *City of Spokane*,

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[9] It appears that the Guild was also on notice of these ongoing budget constraints, although the Guild denies it was on notice of the scope, number, and timing of specific layoffs until the County announced the layoffs on October 24, 2011. PERC Br. at 7-8. The Guild's obligation to demand bargaining does not arise until notice of the specific change proposed by management. *City of Bellevue*, 10830-A (PECB, 2012) at 4 (obligation to bargain does not begin until employer provides clear and unambiguous notice containing specific and concrete information regarding the proposed change).

87 Wn.2d at 459-60, full bargaining and arbitration began May 1 and were complete, after two arbitrator delays, by December 23 the same year. Generally, parties are required to bargain only for a "reasonable" time before seeking mediation and arbitration, which are also to be provided within a "reasonable" time.[10] *See* RCW 41.56.450; RCW 41.58.040. Moreover, in this case the parties had an interest arbitration date already scheduled to commence on February 6, 2012, approximately a month after the proposed layoff effective date. CP 388. The parties could easily have added this issue to those already pending, and asked for an expedited decision by the arbitrators.

In *King County*, Decision 10547-A (PECB, 2010) at 10, PERC found 68 days to bargain and arbitrate adequate, and noted that failure to invoke mediation services weighs against an employer seeking to invoke a business necessity defense. In this case there were 76 days between the Guild's demand to bargain and the County's layoffs. The County offers no concrete reason why this time would not have been adequate to discharge the bargaining process.

[10] The bargaining obligation is not onerous and does not have to be drawn out. An employer is not required to engage in futile discussions and may lawfully refuse to continue negotiations when good-faith bargaining demonstrates that the parties are unable to reach agreement. Indeed, as the Commission has noted, "impasse may be reached in a compressed time frame." *Port of Anacortes*, Decision 12160-A (PORT, 2015) at 6.

3. The County cannot distinguish impact of layoffs on the budget from impact of other mandatory subjects

King County points up another problem. The County concedes that the furloughs in that case were a mandatory subject of bargaining but distinguishes *King County* from this case because it involved "wages," not "layoffs." Resp. Br. at 32-33. The obligations to bargain and arbitrate furloughs in *King County* were just as disruptive to that county budget, perhaps more so, than the layoffs involved in this case. The County cannot point to facts in the record showing how bargaining and arbitrating over layoffs is more burdensome to Kitsap than the furloughs were to King County, or how bargaining over the layoffs in this case differs from using the same process for other wages, hours and working conditions which it concedes are mandatory subjects.

4. Speculative or hypothetical inconvenience does not excuse the County from bargaining

The County speculates that it would be impossible to bargain layoff decisions with all 14 County bargaining units and that only bargaining the impacts is practical. Resp. Br. at 21. The county does not explain how only bargaining the effects would be logistically easier than bargaining the decision and the effects. The number of bargaining units per county is not a sound basis for determining mandatory subjects and would not promote the uniformity required by PECBA; under this

proposed factor the more employees who seek to exercise their rights to be represented under PECBA, the fewer mandatory subjects the employer would be required to negotiate. The County's hypothetical difficulty is not a determinant – mere inconvenience to the County is not the touchstone of a mandatory subject of bargaining. Granted that it might be difficult for the County if layoffs were proposed for all bargaining units, there is no evidence that this was the situation facing the County here.[11]

5. Speculative or hypothetical union delay does not excuse the County from bargaining

The County also speculates that the Guild would likely engage in dilatory tactics and invoke arbitration merely to delay layoffs. Resp. Br. at 24. As already noted, there are practical problems with these assertions because there were 76 days available to bargain before the proposed layoff and arbitration was already scheduled for February 2012, limiting the delay from the bargaining/arbitration process.

Moreover, the Guild has an obligation to bargain in good faith. RCW 41.56.150(4). Had the Guild failed to make substantive proposals to reduce labor costs, it would have violated its duty to bargain in good faith

[11] Union contracts usually contain a management rights clause as *a quid pro quo* for the grievance arbitration clause that grants managers the right to determine layoffs. In this case, however, the court has ruled that the clause waiving the Guild's right to bargain expired with the contract. There is no evidence that this was the case for other bargaining units. In addition, not all of the bargaining units would have been eligible for interest arbitration as uniformed personnel. Where proposed cuts to labor costs involve negotiations with multiple bargaining units, public employers frequently manage the multiple players through joint or coalition bargaining.

and waived its rights to arbitration.[12] However, what the union actually would have done is speculation, because the County determined from the outset that it would not bargain the layoff decision. Resp. Br. at 16. In the end, the County has *deprived itself* of the delay argument by refusing from inception to bargain about alternatives to the layoffs which may reduce labor costs and presenting the union with a *fait accompli.*[13]

6. The County's perceived inability to pay does not excuse the County from bargaining

Finally, the County argues that bargaining would have been burdensome because it did not have the "ability to pay" due to the budget shortfall. Perceived ability to pay *is not* generally a factor in determining whether a matter is a mandatory bargaining subject. While a potentially important factor to the positions of the parties and the outcome of the

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[12] "The 'Waiver by Inaction' defense is available where a party has given appropriate notice of a proposed change of a mandatory subject of bargaining, and the other party does not request bargaining in a timely manner. . . . A waiver by inaction will also be found where a union initiates a proposal and then declines to respond to an employer's request to discuss the matter in detail." *Cowlitz County*, Decision 7007 (PECB, 2000) at 11 (citations omitted).

[13] A *fait accompli* may be found where the decision to make a change had already been determined when the employees were notified of the change. *City of Moses Lake*, Decision 6328 (PECB, 1998). Where an employer presents the union with a *fait accompli*, no waiver by inaction will be found. *City of Tukwila*, Decision 2434-A (PECB, 1987). "[I]t is an unfair labor practice for the employer to present a change to a mandatory subject of bargaining as an irrevocable decision . . . . In determining whether an employer has presented a decision to change a mandatory subject as a *fait accompli*, the focus is on whether an opportunity for meaningful bargaining existed under the circumstances as a whole." *City of Vancouver*, Decision 11276 (PECB, 2012) at 14.

bargaining/arbitration process,[14] ability to pay *does not* determine whether the collective bargaining process must be followed by the public employer in resolving the dispute. Inability to pay does not turn wages, hours and working conditions into permissive subjects, any more than an ability to pay turns permissive subjects into mandatory ones. Kitsap County is, in effect, asking the court to play the role of the interest arbitrator and determine, based on this summary judgment record, that it could not, under any circumstances and regardless of any union concessions, take any action but to layoff employees. However, this record cannot support this claim.

When the county argues that the layoffs in this case were taken as "a last alternative" or "last resort,"[15] what the County really appears to mean is "last resort" *other* than meeting and conferring with the Guild to identify alternatives to reduce labor costs. There is nothing in this record which indicates that alternative labor cost concessions by the Guild could not have met the budget shortfall identified by the County.

D. Other factors support treating the 2012 jail layoff decision as a mandatory subject of bargaining

For the reasons previously laid out by PERC, application of the full symphony of the multi-factor, totality of the circumstances balancing

[14] So-called ability to pay is only one factor of many considered by interest arbitrators in resolving a dispute. RCW 41.56.465.

[15] *See* Resp. Br. at 17, 20, 23, and 37.

analysis to the current record suggests that the layoff of the two jail officers should be a mandatory subject of bargaining. PERC Br. at 28-29, 32-34.

The County concedes that "the impact of layoffs on employees is obvious and significant" (Factor f) but gives this factor little weight or analysis, and does not include it in the so-called *First National* matters the County thinks the court should weigh. Resp. Br. at 16, 35-38. The record amply shows that 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. PERC Br. at 25, 34.

Loss of employment is exactly the kind of action which can lead to labor strife, and the identification of savings to labor costs are the kinds of decisions which will benefit from the bargaining process. The County gives no weight to the strong declaration of purpose behind PECBA in RCW 41.56.010, RCW 41.56.430 and RCW 41.58.005. 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). PERC Br. at 21-22, 34.

Where a savings in labor costs is the reason for layoffs, this strongly suggests that the purposes of PECBA will be best fulfilled by

subjecting the decision to the collective bargaining process. (Factor b). PERC Br. at 22-23. "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 American Grain Co., Inc.*, 558 F.3d at 27. The decision to layoff does not appear to involve a fundamental change in the jail operations or scope of service. (Factor c). PERC Br. at 23, 32-33.

Because the issue was reduction of labor costs, without the closure of the jail or discontinuation of major programs, 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). While the County and the Guild may have had little control over the revenue impacts of the Great Recession, once reduction in labor costs became the proposed solution, the Guild was in a position to propose viable labor cost reductions other than layoff, just as was done by the County and other unions in previous years. PERC Br. at 33. 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 bargaining. (Factor g). *Id.*

All of these factors tilt the balance toward mandatory bargaining for the jail layoffs in this case.

II. KITSAP COUNTY'S BELATED ATTEMPT TO RENEW ITS WAIVER ARGUMENT COMES TOO LATE

In its response, the County belatedly seeks to renew its waiver defense against the Guild. The County raised its waiver arguments in its previous appeal and the court rejected them. *Kitsap County*, 179 Wn. App. at 996-97. The County did not raise waiver arguments again to the trial court following remand. CP 78-79, 191-193. Raising the waiver arguments would have been improper since the single issue subject to remand was for the court "to conduct the balancing test to determine whether the layoffs in this situation are mandatory or permissive bargaining subjects." *Kitsap County,* 179 Wn. App. at 999.

At this stage of the proceedings, the previous determination by this court that the Guild did not waive its bargaining rights is the law of the case. The law of the case doctrine provides that "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." The law of the case doctrine "derives from both RAP 2.5(c)(2) and common law." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Here, the Court of Appeals has ruled on the merits of the County's waiver claims, and the trial court on remand made no rulings related to them. The court should decline the County's request to re-tread this ground. RAP 2.5(a).

III. REMAND IS NECESSARY FOR ENTRY OF A PROPER REMEDY

Even if the Court chooses to resolve this case on the merits, remand is appropriate for entry of an appropriate remedial order. The County does not dispute that a remedial order should conform to the standard remedies used by PERC. Resp. Br. at 44. However, the County argues that remand is unnecessary because the County is satisfied with the declaratory judgment in its favor entered by the trial court. The County's position should be rejected for two reasons. First, the obligations of the parties to bargain in good faith under the PECBA is not a private right of the County and the Guild – the jail employees and the public have interests in the proper discharge of these duties by the public employer and union. PERC Br. at 37. Where either the County or the Guild have breached these obligations, the requirement of the public posting, cease and desist order, and other components of PERC's standard remedies serve an important role in providing transparency as to what occurred, who was at fault, and what will be expected from the parties in the future. Thus, County officials who fail in their bargaining obligations can be held accountable to the public, and likewise union leaders who fail to bargain in good faith can be held responsible by union members. Allowing parties to avoid these consequences by litigating their refusal to bargain claims in

superior court rather than before PERC will encourage a lack of uniformity in the application of PECBA which is contrary to the purposes of the act.

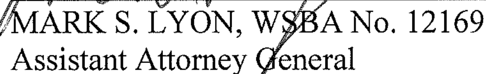
In addition, the County's position also assumes that it will prevail on the merits, a result which is not assured at this stage in the proceedings. If, in fact, it is the Guild which ultimately prevails, additional proceedings will be necessary to determine if reinstatement and/or back pay for the two jail officers is appropriate as part of the remedy.

IV. CONCLUSION

This case should be remanded for trial because material issues of fact remain unresolved, and on the record currently before the court, the facts favor the Kitsap County Correctional Officers' Guild's position that the layoff of two jail officers in order to reduce labor costs is a mandatory subject of bargaining. Even if the appellate court believes the record is sufficient for the particularized balancing required and decides the legal issue on its merits, PERC requests remand for entry of an appropriate remedial order.

RESPECTFULLY SUBMITTED this 13th day of March, 2015.

ROBERT W. FERGUSON
Attorney General



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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 March 13, 2015, I caused true and correct copies of the foregoing *PUBLIC EMPLOYMENT RELATIONS COMMISSION'S REPLY BRIEF* to be filed with the Washington State Court of Appeals, Division II and be served as follows:

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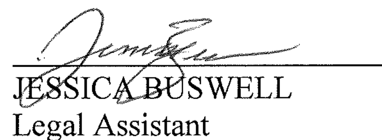

JESSICA BUSWELL
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WASHINGTON STATE ATTORNEY GENERAL

March 13, 2015 - 2:57 PM

Transmittal Letter

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Court of Appeals Case Number: 46735-6

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