NO. 46735-6-II

COURT OF APPEALS, DIVISION OF THE STATE OF WASHINGTON

KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD, INC.,

Appellant,

vs.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Appellant,

vs.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents.

RESPONDENTS' OPENING BRIEF

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I. INTRODUCTION

The Honorable Lisa Sutton correctly concluded that the County's statutory duty to manage a budget is not a mandatory subject of bargaining:

> Having considered the specific facts relating to the entrepreneurial control and management prerogatives at issue and the decision's impact on working conditions, the Court concludes that entrepreneurial control and management prerogatives predominate. The subject of budgeting and staffing levels are central to entrepreneurial control and management prerogative. In addition the decision involves the performance of statutory duties in that the Board of County Commissioners has a statutory duty to adopt a budget and the Kitsap County Sheriff's Office must abide by the budget adopted for it by the Commissioners.
>
> Bargaining over the layoff of employees resulting from the decision to reduce the budget and staffing levels and from the performance of statutory duties to adopt and limit the making of expenditures or incurring of liabilities as fixed in the budget cannot be fruitful for the collective bargaining process because the employer cannot negotiate the level of revenues and expenditures adopted in the budget.[1]

A thorough review of case law including decisions of the National Labor Relations Board (NLRB) and Public Employment Relations Commission (PERC) does not support the Guild's and PERC's contention that there is a mandatory duty to bargain the decision to reduce staffing when it is caused by a reduction in revenues. On the other hand, case law is consistent that layoffs caused by contracting out unit work or a

[1] CP 787

discriminatory motive require bargaining. In a situation such as presented here, where jobs are eliminated as a consequence of reductions in the budget and services, there is no duty to bargain because budgeting, including the allocation of funds, is a quintessential managerial prerogative, and even more so for public entities that must provide certain services with a balanced budget. Consequently, bargaining over the budget allocation and staffing levels would be an intolerable burden on the County and would not benefit the collective bargaining process.

The County bargained the *impacts* of the decision to eliminate positions and layoff employees which can and has produced fruitful bargaining, but requiring the County to bargain high level policy decisions such as budget appropriations or service, program, and staffing levels would be an intolerable burden on the County and taxpayers and frustrate the collective bargaining process.

II. STATEMENT OF THE CASE

A. Procedural History

On December 21, 2011, Kitsap County filed a Complaint for Declaratory Judgment in Mason County Superior Court to determine whether staff reductions due to budget constraints are a mandatory subject

of bargaining.[2] The Correctional Officers Guild (Guild) answered and filed a Counterclaim requesting declaratory relief.[3] Both parties submitted extensive declarations for the Trial Court's consideration.[4] On September 21, 2012, the parties argued their case in front of the Honorable Lisa Sutton, a visiting judge from Thurston County.

The Trial Court asked the parties to further brief an additional issue of whether the Court should exercise its discretion to send the case to the PERC. The parties complied with additional briefing.[5] On October 11, 2012, the parties again appeared before the Trial Court who then granted the County's Motion for Declaratory Judgment and determined that the court could hear the matter rather than the PERC.[6]

The Correctional Officers Guild appealed the Trial Court order to the Court of Appeals. The Court of Appeals remanded the case back to the Trial Court to conduct a balancing test on the record. When the case returned to the Trial Court, PERC intervened and became a party in the action.[7] All the parties briefed the issue again and the Trial Court gave all the parties an opportunity to submit any additional evidence for

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[2] CP 1339-1364 (Throughout the brief, citation will be to the Guild CP).
[3] CP 1103-1119
[4] *See,* CP 816-826, 850-899, 1120-1308, 1329-1338
[5] CP 1013-1049
[6] CP 1010-1012
[7] CP 921-922

consideration in conducting the balancing test.[8] The Trial Court reviewed the entire record, conducted a detailed balancing test, and once again determined that the Guild had committed an unfair labor practice for insisting to impasse on a permissive subject of bargaining. PERC and the Guild appealed the decision.

B. Factual History

Neither PERC nor the Guild dispute the Trial Court's Findings of Fact which set forth in detail the County's budget situation, yet they still contend that Kitsap County's primary goal was to reduce labor costs, not to balance the budget.[9] In addition, PERC claims that the record is inadequate[10] and that there a "host of pertinent questions."[11] Consequently, the following factual history is set forth in detail to answer PERC's "pertinent questions" and to demonstrate that the budgetary decisions were necessary in light of the declining revenues, and that a reduction in staffing was one of the many consequences of declining revenues.

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[8] CP 794-841

[9] CP 782-788

[10] CP 782-788 (The Trial Court explained the extensive record reviewed and allowed the parties to submit additional evidence. The Guild provided a declaration which was refuted by the County, PERC did not provide any additional evidence.)

[11] PERC Opening Brief, p. 26-27 ("Who made the layoff decision? When was the decision made? What was the motive for the decision? . . .")

1. The Board's Budget Decisions.

Kitsap County's budget is adopted annually by the Board of County Commissioners. In July of each year, the County's chief financial officer issues a "call letter" notifying officials and departments to file detailed and itemized estimates of probable revenues and expenditures for the ensuing fiscal year.[12] The call letter includes a forecast of revenues and projection of expenditures and guidelines based on budget assumptions as directed by the Board of County Commissioners (Board).[13] Officials and departments file their estimates of revenues and expenditures in August, and these estimates are used by the chief financial officer to prepare a preliminary budget.[14] Public meetings on the preliminary budget are held in the fall, and at a hearing on the first Monday in December the Board adopts a budget fixing each item in detail. The adopted budget constitutes the appropriations for the ensuing year, and County officials are limited to the expenditures and liabilities as fixed for that office or department.[15]

Kitsap County's largest sources of revenue for funding the majority of traditional government services are property and sales taxes.

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[12] CP 1130-1135
[13] *Id.*
[14] CP 1278-1292 (County Budget Director's testimony at interest arbitration hearing)
[15] *Id.*

Property and sales tax revenues, together with admissions and cable television taxes, fees for services, intergovernmental revenue, licensing and permitting fees, and fines, are all deposited into the general fund.[16]

Revenues in the general fund pay for operating the courts, general government, the sheriff and jail, juvenile services, parks, the coroner, and facilities.[17] By far the largest expenditure from the general fund is salaries and benefits, totaling about 67 percent of the general fund.[18]

2. The Recession.

The recession hit Kitsap County's finances in 2008. By the fall of that year, revenues were less than budgeted by more than $2 million, requiring the Board to make mid-year cuts to meet anticipated deficits.[19] Then, just four months after its 2009 budget went into effect, the expenditures were reduced further by more than $4.2 million. The Board closed the County's Administration and Public Works buildings on Fridays, reducing operations, employee work hours, and services to the public. An additional 15 employees were laid off between January and May 2009.[20]

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[16] *Id.*
[17] CP 1137-1143
[18] CP 1287
[19] CP 1216
[20] CP 1296

Those efforts were not enough. The Board had to again borrow from Public Works just to meet payroll, this time an unprecedented $4 million.[21] Between November and December 2009, 17 employees were laid off, including four corrections officers. Actual expenditures were almost $6 million less than what was budgeted, but revenues actually received in 2009 were almost $5 million less than what was budgeted, and $1 million less than what was received in 2008.[22]

Budget year 2010 did not look better. Reserves had been reduced to perilously low levels, and the County's five-year financial forecast indicated that it could not sustain even minimal growth without reducing expenditures further. Elected officials and department heads were instructed that 2010 expenditure budget submissions could not exceed 2009 actual expenditures.[23]

The ratcheting down of revenues and expenditures continued with the 2011 budget. On February 22, 2011, in a memorandum to all employees, the Board reported on the sad state of the County's finances:

> . . . As we enter 2011, we are without enough resources to maintain the status quo and we cannot afford the service levels our citizens have come to expect. Since 2008, we have unfunded and eliminated approximately 150 positions, and reduced the hours for an additional 183. Critical overhead and

[21] CP 1216
[22] CP 1216
[23] CP 1238-1241

> regional services such as the Assessor, Treasurer, Auditor, and Personnel have been reduced to virtually unsustainable levels. Many factors contribute to our declining revenues. Fewer sales tax dollars are coming in than for previous years and forecasts show no growth in this revenue stream for 2011. The 1 percent cap on property taxes presents an even bigger long-term challenge, adding a mere $280,000 to the general fund this year. This amount does not even cover routine cost increases for which we have virtually no control, including for fuels, utilities, and the negotiated employee costs of step increases, longevity payments, and medical premiums. This means that every budget cycle from now on will require cuts because our on-going revenue growth can never keep up with our growth for on-going expenses. Further, these revenue and expenditure slope issues do not take into account future losses of revenue through recent annexations and those that are on the horizon through 2015. . .[24]

The County and its employees were acutely aware of the impact of the recession in 2011 and were preparing for even more cuts in 2012.

3. 2012 and Ongoing Revenue Problems

The need for conservative budgeting continued with adoption of the 2012 budget.[25] Although property and sales tax revenue were no longer declining, the Board anticipated an almost 2 percent reduction in general fund revenues.[26] In addition, the cost to fund increases in health care premiums in 2011 and 2012 comprised more than 24 percent of the one percent increase in property tax revenue.[27]

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[24] CP 1151-1154
[25] CP 1166-1177
[26] CP 1248-1249
[27] CP 1245-1249

Other factors the Board faced were that sales tax revenues continued to be lost to cities through annexations. Between 2009 and 2011, the County lost close to $655,000 in sales tax revenues to cities.[28] The County projected that it would lose close to $357,000 in sales tax revenue in 2012 with an annexation by the City of Port Orchard, and in 2013 the revenue loss was projected to increase to more than $1 million with annexations by the cities of Port Orchard and Bremerton.[29]

4. The Kitsap County Jail.

By law, the County's annual budget must include appropriations for a jail for confining prisoners.[30] Kitsap County's jail is operated and supervised by the Sheriff, who employs correctional officers whose duties include booking, searching, transporting, and releasing prisoners, maintaining security in all areas of the jail, supervising inmate meals, visitation time, recreation, employment, and monitoring access and egress to the jail.[31] About 37 percent of the County's general fund is used to fund the operating costs of the Sheriff (22 percent) and jail (15 percent).[32]

Ned Newlin is the Chief of Corrections, and is appointed by and reports to the Sheriff. Many challenges exist in running a jail, not the least

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[28] *Id.*
[29] CP 1273-1276
[30] RCW 2.28.139 (county "shall furnish a jail or suitable place for confining prisoners").
[31] CP 1329-1330
[32] *Id.*

of which is managing a budget that does not necessarily correlate to providing mandated services for a growing inmate population. In the 2010 budget, four correctional officer positions were eliminated. The impacts of these layoffs were negotiated with the Guild, the exclusive bargaining representative for all Kitsap County correctional officers.[33] Chief Newlin and Fernando Conill, the County's labor representative, met with the Guild to bargain the impacts of the layoffs. An agreement was reached that allowed officers to volunteer for layoff; one officer volunteered and three of the least senior officers were laid off consistent with the longstanding Civil Service Rules.[34]

While the County's overall budget was cut another $2 million in 2011, the jail was able to offset the cuts it would have faced due to a $1 million revenue contract with South Correctional Entity (SCORE) for temporary housing of inmates at the Kitsap County jail. Together with contracts with cities, tribes, and the Department of Corrections, the jail had approximately $4 million in off-setting revenue in 2011, enough to allow the County to rehire two of the officers who were laid off in 2010.[35]

During bargaining sessions in 2010 and 2011, numerous discussions were had between the Guild and County about the likelihood

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[33] *Id.*
[34] *Id.*
[35] CP 1330-1332

of staff reductions when the SCORE contract terminated in the fall of 2011. In fact, officers were encouraged to apply to SCORE and one officer who would have been laid off was hired by SCORE.[36]

For budget year 2012, the jail projected a reduction of more than $935,000 in revenue.[37] There was the loss of revenue from the SCORE contract, plus declining revenue for housing inmates from the Washington Department of Corrections, continuing increases in inmate food services and health care costs, and the costs associated with unfunded mandates for DUI and DWLS enhanced sentences, sex offender registration, and DNA sample collections. Consequently, in late October 2011, the County's correctional officers were notified that the budget proposed for 2012 would result in the need to reduce operations and again eliminate positions in the jail.[38]

5. The Demand to Bargain Decision to Reduce Staffing

By the fall of 2011, the Guild was quite aware of cuts proposed to the jail's 2012 budget. As explained more fully below, the parties had been unable to conclude negotiations for a successor collective bargaining agreement and were exchanging budget records as part of discovery. During bargaining sessions in 2011, discussions occurred about the

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[36] *Id.*
[37] *Id.*
[38] CP 1329-1332

potential for layoffs. [39] The Guild was aware of the loss of the SCORE contract, and the County's overall budget as well as the jail's budget because they were advertised and discussed in meetings open to the public.

Specific notice was provided to each employee on October 24, 2011, when Chief Newlin sent an email entitled "2012 Budget Update" in which he described the basis for the Board's reduction of the Sheriff's Office budget. Chief Newlin also explained how the Sheriff was managing the budget cuts:

> We defunded four (4) open deputy positions, cut approximately $400,000 in fleet expenses, along with approximately another $100,000 for line items, defunded two (2) open corrections officer positions, .75 FTE of jail maintenance staff, and eliminated the Community Service Work Contract (alternative) with Kitsap Community Resources, which saved an additional $70,000. We made these cuts understanding the bleak budget picture for the county general fund.
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> Even with these significant cuts, the bottom line is that the Sheriff's Office (including the jail) is now directed to take an additional $513,000 cut from our budget requests for 2012. This is a significant reduction and one with significant impacts. In putting together a package of reductions for the Sheriff's Office these past few days, the Executive Staff was able to come up with enough savings to substantially reduce the number of additional staff positions lost in 2012. We were able to do this by further cuts to supplies and services through the Sheriff's Office (including the jail). Even with these additional cuts, the unfortunate reality is that this magnitude of cut will require the loss of three (3) additional positions in the jail.

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[39] *Id.*

> This is not a decision that was made lightly and it causes me great angst to do so, but there is no other reasonable alternative to us. We will attempt to mitigate the impact by offering voluntary RIF opportunities similar to what we did in late 2008. . . [40]

The day after the above letter was sent, the County received a demand from the Guild to "bargain the decision to conduct any layoffs plus any associated effects/impacts."[41] Responding to the demand, the County agreed to bargain the impacts of the layoffs as they had done in the past, but not the decision. The Guild's primary concern was that the jail's budget did not need to be cut.[42] A meeting was held in November 2011 between representatives of the Guild and County to discuss the Guild's demand to bargain layoffs.[43] The discussion focused primarily on the budget as well as the effects of the reduction in staffing. That meeting ended with an understanding that the parties would look at the agreement reached in 2010 as a possible solution to the dispute.[44]

As promised, the Guild was sent a proposed agreement "drafted based on our impacts negotiations on the current (and potentially additional) 2012 reductions in force in the Corrections Division."[45] The

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[40] CP 1335-1336
[41] CP 1338
[42] CP 1395-1397
[43] CP 1309-1310
[44] *Id.*
[45] CP 1314-1315

Guild's principal negotiator and attorney, Chris Casillas, responded the next day contending that "the decision to reduce the jail budget and do these layoffs" is a mandatory subject of bargaining.[46]

The County responded to the Guild's demand to bargain, offering: "will be glad to continue to bargain the effects of the layoffs," but not the decision to reduce the jail's budget and staffing. The County cited to language in the applicable collective bargaining agreement which adopts the Civil Service Rules which state that layoffs shall be by reverse seniority "whenever such action is made necessary by reason of a shortage of work or funds..."[47]

6. Collective Bargaining and Civil Service Rules

The Guild and County are parties to a collective bargaining agreement (CBA) which expired in 2009.[48] The parties engaged in negotiations for a successor contract, but were unsuccessful in reaching an agreement. By law, when impasse is reached between a county and its uniformed employees, unresolved issues are submitted for determination by an independent arbitrator. Consequently, when the County and Guild reached impasse in negotiations for their successor CBA, unresolved issues were certified for interest arbitration. A hearing was held in

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[46] CP 1321-1323
[47] CP 1325
[48] CP 1156

February, 2012, and an award issued in June, 2012 for 2010 through 2012.[49] The provisions of the CBA relevant to this action are as follows:[50]

1. Article I, Section I Management Rights

> It is expressly recognized that such [management] rights, powers, authority and functions include, but are by no means whatever limited to . . . the right to establish, change, combine or eliminate jobs, positions, job classifications and descriptions . . . the number of employees..

2. Article J, Section I – Relationship to Civil Service Rules

> Except as expressly limited by its terms, nothing in this Agreement shall supersede any matter delegated to the Kitsap County Civil Service Commission by State law or by ordinance, resolution or laws of or pertaining to the County of Kitsap and such Commission shall continue to have primary authority over subjects within the scope of its jurisdiction and authority. If there then should be a conflict between any provisions of this Agreement and Civil Service, then the provisions of this Agreement shall govern.

Also relevant to issues presented here are the Kitsap County Civil Service Rules. In 1994, the Kitsap County Civil Service Commission established the following rules for layoff:[51]

> Section 10.3.01 The Appointing Authority may lay off any employee in the Classified Service whenever such action is made necessary by reason of a shortage of work or funds, the abolition of a position because of changes in organization or other reasons outside the employee's control which do not reflect discredit on the services of the employee; however, no regular or probationary employee shall be laid off while there are provisional employees

[49] CP 1179-1208
[50] CP 1158
[51] CP 1163-1164

> serving in the same class of position for which the regular or probationary employee is eligible and available.
> Section 10.3.02 Layoff of probationary or regular employees shall be made in inverse order of seniority in the class involved. . .

In February 2010, the Civil Service Commission amended Civil Service Rule 10.3.03 so that employees laid off would remain on the reinstatement list for two years instead of one. The language above did not change in the parties' collective bargaining agreement for 2010-2012.[52]

III. ARGUMENT

In order to determine whether staff reduction due to a budget reduction are a mandatory subject of bargaining, the Trial Court balanced the extent that the subject "lies at the core of entrepreneurial control or is a management prerogative" with the impact on employees' wages, hours and working conditions.[53] Because the impact of layoffs on employees is obvious and significant, that side of the equation does not require extensive analysis. Instead, the fact intensive analysis focused on management's reasons for the layoffs and whether those reasons give rise to a subject amenable to collective bargaining. The Trial Court concluded that the County's statutory duty to implement a budget is central to

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[52] CP 1179-1280

[53] *Int'l Assn. of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 211, 778 P.2d 32 (1989).

entrepreneurial control so it cannot be fruitful for the collective bargaining process.

Since 1969, courts and PERC have not found that a reduction in budget, operations, or staffing is a mandatory subject of bargaining except in two discrete instances: 1) where the reduction in staffing is for the purpose of contracting out the same work; and 2) where the reduction is due to a retaliatory or discriminatory motive. Consequently, the analysis requires a well developed factual record of the entire context of the decision in order to balance the benefit to collective bargaining process with the burdens on the employer.

This case was remanded for the Trial Court to conduct a balancing test on the record which focused on the County's reasons for the budget cuts, so there can be no dispute that the sole reason for the reduction in staffing was a reduction in the budget set by the Board of County Commissioners. The reduction in two staff members was a consequence of the declining revenues, and only taken as the last alternative after hundreds of thousands of dollars were cut in every way possible to avoid layoffs. Layoffs were never the goal of the budget cuts, but a necessary and incidental consequence. Therefore, there is no duty to bargain the budgetary decision which resulted in a reduction of staffing levels.

A. Due To The Additional And Unique Burdens Placed On Government Agencies, Courts Consistently Conclude That Government Cannot Bargain Budgetary Decisions That Result in Staff Reductions.

1. The County has a right and a duty to establish a budget without bargaining it first with the Guild.

Courts and PERC have recognized that the decision to reduce "staffing levels are fundamental prerogatives of management," and particularly for public agencies where elected representatives have a statutory duty to set the budget.[54] PERC has also recognized the prerogatives of management when it held that "whether a community will have a large police force, or a small one, or none at all, is a very basic managerial decision which ultimately must be determined by the voting public through its elected representatives."[55]

In a case regarding insurance reserves, PERC determined that employer's "reserve accounts and budgets are the quintessential management prerogatives."[56] After applying the balancing test, the Hearing Examiner determined that reserve accounts is a permissive subject of bargaining explaining that "the employer's use of insurance

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[54] *Id.* at 205.

[55] *Yakima v. Yakima Police Ass'n.*, Dec. 1130, at 4 (PECB 1981). *See also, In re Danvers*, Labor Relations Comm'n Cases MUP-2292, MUP-2299 (Mass. 1977) (quoted in *Int'l Ass'n Firefighters*, 113 Wn.2d at 206) (holding that to require bargaining over the amount of fire services "represents an intrusion into that type of governmental decision which should be reserved for the sole discretion of the elected representatives").

[56] *Spokane County,* Decision 11627 (PECB, 2013).

reserves is an essential managerial prerogative [that] predominates over the impact on employees' wages, hours, and working conditions."[57] Because public agencies are mandated to provide numerous services with a balanced budget, they cannot reasonably bargain over those matters central to its managerial control and statutory duties.

In *Spokane Education Ass'n v. Barnes*, the Washington Supreme Court recognized the insurmountable burden to a public agency of bargaining a budget with the union.[58] The court held that the union had no right to bargain the budget allocation of the school district, even though the result was the layoff of 214 staff:

> It is obvious that they cannot be expected to negotiate for an unreasonable length of time or to delay decisions which must be made before statutory or other relevant deadlines. It is the board of directors upon which the duty is imposed by statute to make decisions in managing the affairs of the district and in each case the final decision rests with the board.[59]

Courts in other states have also considered the burden of bargaining the decision to layoff employees and concluded that the burden to a public agency is "intolerable," that it would "significantly interfere with the determination of government policy," and that it "severely restricts the

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[57] *Id.*
[58] *Spokane Education Ass'n v. Barnes,* 83 Wn.2d 366, 377, 376, 517 P.2d 1362 (1974).
[59] *Id.* at 377.

city in its ability to function."[60]

The Guild does not dispute that layoffs incidental to an underlying managerial prerogative such as allocating the budget are permissive subjects.[61] Declining revenues mandating a reduction in costs will likely result a reduction of employees because employee costs are typically the bulk of the expenses. In this case, Kitsap County had to reduce expenses and as a consequence, and as a last resort, had to reduce staffing.

2. The burden to the Sheriff's Office and Kitsap County would be intolerable if bargaining were required for budget decisions that resulted in staff reductions.

Every year, the Kitsap County Board of Commissioners must appropriate money sufficient to ensure the furnishing and operating of a courthouse, courtrooms, jail, and the offices of the County auditor, assessor, clerk, sheriff, prosecutor, and treasurer, pay the salaries of

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[60] *See, Bay City Education Ass'n v. Bay City Public Schools*, 430 Mich. 370, 382, 422 N.W. 2d 504 (1988) (school district's decision to transfer its special education services because of budgetary issues is not "the type of situation where labor concessions may have alleviated the employer's economic considerations, a situation providing an incentive for both labor and management to confer voluntarily prior to making a change"); *Local 195, IFPTE, AFL-CIO v. State of New Jersey*, 88 N.J. 393, 403, 443 A.2d 187 (1982) (recognizing that negotiations should occur "unless such negotiated agreement would significantly interfere with the determination of government policy"); *Metropolitan Council No. 23 and Local 1277, of the American Federation of State, County and Municipal Employees ALF-CIO v. City of Center Line*, 414 Mich. 642, 327 N.W. 2d 822 (1982) (holding that a layoff clause "severely restricts the city in its ability to function effectively and poses serious questions with regard to political accountability for such decisions); *Berkeley Police Association v. City of Berkeley*, 76 Cal. App. 3d 931, 143 Cal. Rptr. 255 (1978) (holding that policy change on internal review systems is not negotiable because "to require public officials to meet and confer with their employees regarding fundamental policy decisions . . . would place an intolerable burden upon fair and efficient administration of state and local government).

[61] Guild Opening Brief, p. 22 and 27.

county officers and their employees, build and repair public buildings and roads, care for county property and manage county funds, and prosecute and defend actions for and against the county.[62] When the County is faced with revenue shortages, by law it must reduce expenditures and operate with a balanced budget, which unfortunately necessitates reductions in staffing levels.

Because Kitsap County is a government entity that was facing a shortage of revenue and a statutory mandate to balance the budget, bargaining over budget shortfalls and layoffs would have been an intolerable burden on the County. The County's 14 bargaining units, all of which made adjustments which included layoffs, reduction in hours, increase in benefit costs, or program closings. The impact of the budget cutbacks are negotiated with every represented group including the corrections officers. However, if the County were required to bargain the *decision* on the allocation of the budget with every represented group, the results would be disastrous for everyone.

First, the County would not be able to implement an annual budget as required by statute.[63] The budget cycle begins in July with the call letter

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[62] RCW 2.28.139-.140; RCW 36.01.060 (county liable for certain court costs); RCW 36.16.090 (offices for county officers); RCW 36.17.010 (salaries of county officers); RCW 36.32.120 (enumerating the mandatory duties of county legislative authorities).
[63] *See,* Chapter 36.40 RCW.

to each department with the final budget adopted by the second week in December. For six months the County departments, including represented groups and the public, give feedback on the budget until its final adoption. After the County budget is adopted, each department implements its final budget. There is no place for collective bargaining concerning the budgetary decisions, only for the impact of those decisions.

If the Sheriff had to bargain with corrections officers concerning the allocation of the budget within the Sheriff's Office and jail, it could not begin bargaining until there is a budget which is only two weeks before its implementation.[64] The parties are obligated to bargain to impasse or to interest arbitration for the commissioned law enforcement units, which can take anywhere from one to four years.[65] Consequently, the Sheriff would not be able to operate within the budget allocated by the Board because it would have to operate at status quo during bargaining. By the time an arbitrator ruled on the issue, the budget year would be long past and the Sheriff and County would have incurred huge deficits for which the Sheriff would be personally civilly and criminally liable.[66]

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[64] RCW 36.40.071-.080.

[65] The recent interest arbitration award for Corrections Officers was for the contract 2010-2012; almost four years after bargaining began for that contract. CP 1179-1180.

[66] RCW 36.40.130, .240. *See also, Spokane Education Ass'n*, 83 Wn.2d at 377 (holding that a public entity cannot be expected to negotiate over subjects that have statutory deadlines).

Second, as courts have determined, budget allocation is simply not amenable to collective bargaining. The Sheriff had to cut approximately one million from the 2012 jail budget. After implementing a reduction in fleet expenses, services, and supplies, the Chief only as a last resort, laid off two corrections officers.[67] If bargaining is not successful, then the matter goes to interest arbitration. An arbitrator should not, and would not want to, determine the jail's budget or whether the jail should have cut in other areas, such as inmate food and medical care, before it laid off employees. The remedy would also be problematic because a budget cannot be retroactively implemented as expenses have already been incurred. Obviously, budgetary decisions, particularly for public entities, are not amenable to bargaining and arbitration.

Third, if bargaining layoffs due to budget cuts were mandatory, the County would have to choose between its duties to citizens and bargaining with the unions. As explained above, the Sheriff would have to bargain a mandatory subject to interest arbitration which will always take at least a year, long past the statutory date for budget implementation. If the Sheriff implements the budget short of interest arbitration, then the Sheriff would be subject to an unfair labor practice for its fait accompli in implementing

[67] CP 1335-1336

the budget.[68] Conversely, if the Sheriff bargains with the Guild to interest arbitration, then he will be in violation of his statutory duties and be civilly and criminally liable for the deficit. The County would be forced to make up the difference which would also be in violation of its duties to the taxpayers to operate within a balanced budget.

This insurmountable burden on the employer has been recognized by the courts since *First Nat'l* when the Court stated that "the union's practical purpose in participating . . . will be to seek to delay or halt the closing."[69] The Washington Supreme Court also recognized the consequences of delaying a statutory budget cycle in *Spokane Education Ass'n.*[70] The Guild would hold all the cards in this situation because implementation of status quo would mean no layoffs or budget adjustments during bargaining. Therefore, as the *First Nat'l* and *Spokane* Courts anticipated, the Guild's goal would be to bargain in order to delay the inevitable layoffs, and hold the County budget hostage.

The Guild and PERC both claim that the Guild would have been willing to make economic concessions in order to prevent the reduction of two officers. This claim years after the fact of what they would have done

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[68] RCW 41.56.150(4) (unfair labor practice to refuse to engage in collective bargaining).
[69] *First Nat'l Maintenance v. National Labor Relations Board*, 452 U.S. 666, 679, 681 (1981).
[70] *Spokane Education Ass'n,* 83 Wn.2d at 377.

lacks sincerity. The Guild and County met numerous times over several months and the Guild never offered or even hinted at the possibility of any economic concessions – nothing was preventing them from bringing forward their labor saving ideas. In fact, the Guild could have presented their economic concessions as a permissive subject of bargaining,

B. The Guild's Demand to Bargain Layoffs Is In All Relevant Aspects, is a Demand to Bargain a Reduction in Budget, Operations and Staffing.

The Guild and PERC attempt to separate budget decisions from staff reduction, as if the budget decision is completely divorced from staff reductions. Staff reductions incidental to or because of a budget reduction are still budget decisions and therefore a managerial prerogative. It is obvious to the Washington Supreme Court that the employer "cannot be expected to negotiate for an unreasonable length of time or to delay decisions which must be made before statutory or other relevant deadlines."[71]

Because the balancing test is case by case and fact specific, the Court must go "beyond characterizations and labels to analyze the facts demonstrated by a full evidentiary record."[72] The Trial Court here did

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[71] *Spokane Education Ass'n,* 83 Wn.2d at 377.

[72] *City of Richland*, Decision 6120 (PECB, 1997) (noting that the employer's assertion that an issue of "staffing" was really skimming of bargaining work.)

analyze a full evidentiary record, twice, and found both times that there was no bargaining obligation, regardless of what label either side placed on the issue.

The Guild has also tried to label a budget decision a "policy decision" by the Board arguing that the budget cuts were not necessary.[73] This same budget/policy argument was considered and rejected by the Washington Supreme Court in *Spokane Education Ass'n.*[74] In *Spokane Education*, the voters rejected two school levies and as a consequence, the district laid off 214 certificated staff.[75] Like here, the staff argued that cuts should be made elsewhere in the district including buildings, maintenance, and transportation. The Court held that the district had not only a right to implement the budget cuts how it saw fit, but that it had a duty under statute to do so.[76] In addition, the Court explained the overlap of policy and budgets: "[w]e do not think that the budget of a school district can properly be considered a statement of policy, although many if not all of the items going into a budget reflect policy decisions."[77] Ultimately, the Court stated clearly that "such an organization has no right

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[73] Guild's Opening Brief, p. 7.
[74] 83 Wn.2d at 366.
[75] *Id.* at 369-371.
[76] *Id.* at 376.
[77] *Id.*

to demand that the budget itself be negotiated."[78]

Likewise, in our case, the Board's decision to reduce the budget in order to balance expenditures with revenues is both a policy and a budget decision, and by whatever terms it is couched, it is not subject to mandatory bargaining. Moreover, elected officials have both a right and a duty to set the budget, so it is clearly a managerial prerogative that lies at the core of entrepreneurial control.

C. The *First National* Balancing Test Recognizes That Economic Motivation is a Factor Weighing in Favor of Bargaining Only When Staffing is Reduced in Order to Contract Out the Same Work.

The balancing test to determine whether a subject is a mandatory subject of bargaining originated with two United States Supreme Court cases, *Fibreboard* and *First Nat'l.*[79] Although neither of these cases involved a public entity with a statutory mandate for a balanced budget, their instruction is informative for determining whether the layoffs must be bargained. Their holdings are limited to their distinctive factual context, layoffs due to contracting out employees, and layoffs due to an operational shutdown.

Contrary to the Guild's and PERC's argument that all economic

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[78] *Id.*

[79] *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 218 (1964); *First Nat'l* , 452 U.S. 666.

decisions to reduce staffing are subject to mandatory bargaining, Justice Stewart stated in his concurrence in *Fibreboard*: "The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain."[80] The *Fibreboard* Court further emphasized that every case must be considered on its own facts.[81]

Seventeen years after *Fibreboard*, the United States Supreme Court engaged in a more nuanced balancing test to determine whether the decision to terminate part of a business operation was a mandatory subject of bargaining.[82] The Court considered three types of management decisions, determined that the business decision to layoff employees fell into the third category, and as such required a balancing of the employer's need for relatively unfettered business judgment as well as the policies of the National Labor Relations Act, holding that:

> [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.[83]

The *First Nat'l* Court extensively cites to its previous decision in

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[80] *Fibreboard,* 379 U.S. at 318.
[81] *Id.*
[82] *First Nat'l Maintenance*, 452 U.S. at 679.
[83] *Id.*

Fibreboard where it determined that contracting out that resulted in layoffs was a mandatory duty, whereas in *First Nat'l*, "an economically motivated decision to shut down part of a business" did not benefit the collective bargaining process and would be a burden on the employer if ordered to bargain.[84] Since *First Nat'l*, courts, the NLRB and state administrative boards have utilized *First Nat'l*'s balancing of employer burdens and collective bargaining benefits which are particularly helpful for a business shutdown, but are less helpful in the present case involving a public entity with a budget crises.

In addition, because the balancing test originated with two U.S. Supreme Court cases, *Fibreboard* and *First Nat'l*, the factors focus on the issues specific to private employers when examining the burden placed on an employer. In *First Nat'l*, the Court considered management's need for "speed, flexibility, and secrecy in meeting business opportunities . . . timing of a plant closure, . . . the publicity . . . may injure the possibility of a successful transition" in holding that the burden of bargaining outweighed any benefit.[85] Whereas in *Fibreboard*, the Court held that there is a duty to bargain when the employer replaced existing employees

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[84] *Id.* at 680 (*quoting Fibreboard*, 379 U.S. at 213).
[85] *Id.* at 682-83.

with independent contractors to achieve labor savings.[86]

Since these two seminal U.S. Supreme Court cases, it has been well established that replacing bargaining unit employees with independent contractors, as in *Fibreboard*, would likely result in a duty to bargain because it is the type of issue that is amenable to a solution in bargaining.[87]

The Guild and PERC mischaracterize the holdings in *Fibreboard* and *First Nat'l* when they assert that the County's reduction in staffing to meet a balanced budget is economically motivated so it must be bargained.[88] Of course employers have an economic motivation to balance a budget, so their argument borders on the ridiculous when applied to a

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[86] 379 U.S. at 214.

[87] *See, Rialto Police Benefit Ass'n v. City of Rialto*, 155 Cal.App. 4th 1295, 66 Ca. Rptr. 3d 714 (2007) (holding that city's contracting with county for law enforcement is a mandatory subject of bargaining); *Detroit Police Officers Ass'n v. City of Detroit*, 428 Mich. 79, 404 N.W.2d 595 (1987) (holding that city's contracting out of courtroom security work was a mandatory subject of bargaining); *Amcar Division, ACF Industries, Inc. v. National Labor Relations Board*, 592 F.2d 422 (8th Cir. 1979) (holding that the company was required to bargain with the union prior to contracting out trailer hitch work); *Torrington Construction Company, Inc.*, 198 NLRB. No. 170 (1972) (holding that there was discrimination against union because the employer failed to rehire laid off employees unless they rejected the Union); *Assonet Trucking Co., Inc*, 156 NLRB No. 35 (1965) (holding that contracting out work done by union employees was an unfair labor practice); *but see, Furniture Renters of America v. National Labor Relations Board*, 36 F.3d 1240, 1246 (3rd Cir. 1994) (remanding back to NLRB to use correct standard and noting that "subcontracting may be a mandatory subject of collective bargaining under the Act, but it is not necessarily so").

[88] Guild's Opening Brief, p. 22; PERC's Opening Brief, p. 28.

County budget crises. Moreover, the Guild and PERC take the holdings out of context because the "labor savings" motivation comes directly out of a contracting out situation, not any time an employer makes an economically motivated decision to reduce staffing.

When it is not a contracting out issue and there is no anti-union motivation, as in *First Nat'l,* the courts have generally held that the decision to lay off employees is not a mandatory bargaining issue.[89] The present case is more similar to the *First Nat'l* line of cases than with the *Fibreboard* cases because corrections officer positions were not replaced with outside contractors or non-union workers. And like in *First Nat'l*, the jail had to eliminate positions because of a reduction in jail revenue from the loss of the SCORE contract. Consequently, the balance here weighs in favor of the County with no duty to bargain the decision to eliminate correctional officer positions particularly in light of the unique statutory duties of a public agency regarding its budget allocation.

D. PERC's Recent Decisions Provide a List of Factors Based on *Fibreboard* and *First Nat'l* to Consider in a Balancing Test Which Weigh in the County's Favor.

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[89] *See, I.A.F.F., Local 188, AFL-CIO v. Public Employment Relations Board*, 51 Cal.4th 245, 259 P.3d 845 (2011) (decision to lay off firefighters because of budget cuts is not a mandatory subject of bargaining); *Arrow Automotive Industries v. National Labor Relations Board*, 853 F.2d 223 (4th Cir. 1988) (plant closure not subject to mandatory bargaining); *Local 2179, United Steelworkers v. National Labor Relations Board*, 822 F.2d 559 (5th Cir. 1987) (affirming the NLRB's decision that plant relocation is not a mandatory subject of bargaining).

PERC has addressed whether layoffs are a mandatory subject of bargaining in a number of contexts with a variety of conclusions. This uncertainty of whether layoffs are a mandatory subject was predicted in *First Nat'l* when the Court stated that a "labor cost" analysis is too ambiguous and would result in employers having "difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain."[90] Because the County was also faced with the same difficulty predicted by the Supreme Court, the County sought a Declaratory Judgment in this matter.

A comparison of 10 PERC decisions from 1990 to the present demonstrates that in eight cases PERC ruled that a reduction in staffing was not a mandatory subject of bargaining,[91] and in two cases ruled that there was a duty to bargain.[92] PERC and the Guild rely heavily on *King County* where PERC held that furloughs must be bargained; however, furloughs are not a staff reduction but a *wage* reduction which arguably is

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[90] *First Nat'l,* 452 U.S. at 684.

[91] PERC ruled there was no duty to bargain layoffs in the following decisions: *Wenatchee School District*, Decision 3240-A (PECB, 1990); *North Franklin School District*, Decision 5945-A (PECB, 1998); *City of Anacortes*, Decision 6830-A (PECB, 2000); *Tacoma-Pierce County Health Dept.*, Decision 6929-A (PECB, 2001); *State Attorney General*, Decision 10733 (PSRA, 2010); *State Corrections*, Decision 11060 (PSRA, 2011); *City of Kirkland*, Decision 10883-A (PECB, 2012); *City of Bellevue*, Decision 10830-A (PECB, 2012).

[92] In the following cases, PERC ruled that there was a duty to bargain layoffs: *City of Centralia*, Decision 5282-A (PECB, 1996); and, *Griffin School District*, Decision 10489-A (PECB, 2010).

a mandatory subject of bargaining.[93]

In 2010, hearing examiners for PERC heard nearly identical cases and ruled exactly opposite on the duty to bargain issue. The cities of Bellevue and Kirkland laid off their dispatchers because of the formation of NORCOM for centralized dispatching services and the unions argued that the decision to layoff dispatchers was a mandatory subject of bargaining. In *City of Bellevue*, the hearing examiner ruled that the decision to layoff dispatchers "had a major impact on employees' terms and conditions of employment" and therefore was a mandatory subject of bargaining. However, in *City of Kirkland*, the hearing examiner ruled that the decisions concerning staffing are within the managerial prerogatives of public employers and as such, it was a permissive issue. In 2012, PERC reversed the hearing examiner in *City of Bellevue* and affirmed the hearing examiner's decision in *City of Kirkland* in determining that a reduction in staffing is not a mandatory bargaining issue.[94]

PERC's earlier inconsistent decisions lie in its distinction between "saving labor costs" which comes from *Fibreboard* and "economic shut

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[93] *Technical Employees Association v King County*, Decisions 10576-A, 10577-A, 10578-A (PECB, 2009) (PERC focused solely on the "labor savings" motivation for furloughs, however, it clarified in *City of Bellevue* several years later that "labor savings" is a major factor when the work was contracted out).

[94] *City of Kirkland*, Decision 10883-A (PECB, 2012); *City of Bellevue*, Decision 10830-A (PECB, 2012).

down" which comes from *First Nat'l.*[95] However in 2012, in *City of Bellevue*, PERC separates the factors in a balancing test for when an employer shuts down part of its business citing to *First Nat'l*, and for when it is contracting out the work citing to *Fibreboard.*[96] The Guild and PERC argue as if all staff reductions must neatly fit into the category of "labor savings" which is specific to contracting out labor, or in the category of an operational shutdown. It is a false dichotomy because there are many other reasons for staff reductions including the one in this case – a public entity's statutory budget obligations.[97] Indeed, PERC and Courts have emphasized that the analysis is fact intensive so every situation cannot neatly fit one category or the other or be oversimplified.[98]

PERC provides a "non-exclusive list of relevant factors" primarily from *City of Bellevue.*[99] However, PERC and the Guild focus on whether the employer had an economic motivation to layoff corrections officers,

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[95] *Compare Wenatchee School District*, Decision 3240-A (PECB, 1990); *City of Anacortes*, Decision 6830-A (PECB, 2000); and, *State Corrections*, Decision 11060 (PRSA, 2011); *with City of Centralia*, Decision 5282-A (PECB, 1996); and *Technical Employees Association v King County*, Decisions 10576-A, 10577-A, 10578-A (PECB, 2009).

[96] *City of Kirkland*, Decision 10883-A (PECB, 2012); *City of Bellevue*, Decision 10830-A (PECB, 2012) (distinguishing between the decision to go out of business and the decision to contract out work).

[97] This case was remanded to Superior Court to do a detailed factual analysis of the entire record, not to neatly fit the layoffs into one of two categories.

[98] PERC Opening Brief, p. 26 (The determination of a mandatory subject of bargaining is fact-intensive. . .")

[99] PERC Opening Brief, p. 21-26

and do not consider the other factors.[100] The emphasis on this single factor is not appropriate when the layoffs are the consequence of a budget reduction. In *City of Bellevue,* PERC clarified that the employer's reason for layoffs is a factor for either scenario, but "labor savings" is a significant factor when the employer contracts out work.[101]

The Trial Court allowed PERC to intervene on remand in order to assist the court in determining what factors should be considered in a balancing test.[102] Although PERC provided factors for the Court to consider, it neglected to apply the *First Nat'l* factors. We do so below:[103]

1. "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?"[104]

In determining which issues should be bargained, "Congress had no expectation that the elected union representative would become an

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[100] *City of Bellevue*, Decision 10830-A (PECB, 2012) (In determining whether contracting out gave rise to a duty to bargain, the Court in *Fibreboard* found the following factors to be significant: 1. What was the employer's level of control and interaction with the new workforce? 2. What was the employer's reason for the decision to contract out the work? 3. What was the fee arrangement? 4. What is the effect on the basic operation of the company? 5. What effect would bargaining have on the employer's ability to manage the company? The Court found the motivation to reduce labor costs to be significant.")

[101] *Id.* (Significant factors under the *First Nat'l* "operational shutdown" situation "1. Would bargaining over this sort of decision advance the process of resolving conflicts between labor and management?. . .2. What was the reason for the decision? . . .3. What control does the union have over the cause of the decision? . . . ")

[102] RP 7/7/2014 p. 19 and 22. PERC is not due special deference in this case because the Court is not reviewing a PERC decision; PERC is a party with a limited role.

[103] PERC Opening Brief, p. 28-29.

[104] PERC Opening Brief, p. 21-22.

equal partner in the running of the business enterprise in which the union's members are employed."[105] The Washington Supreme Court recognized that reduction in budget and staffing are essential managerial prerogatives and not amenable to bargaining. However, the impact of the staff reductions was amenable to bargaining and was bargained by the parties.

As has already been demonstrated, bargaining the budget would put the Sheriff and Board in an impossible situation between the taxpayers and the unions which would frustrate the collective bargaining process. Furthermore, collective bargaining over budgetary decisions "could be a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."[106]

PERC and the Guild present an unrealistic scenario of the parties sitting down together as equal partners to solve the County's budgetary crisis. In *Bay City Education Ass'n,* the court squarely addressed this argument in holding that bargaining over allocation of the budget is "not the type of situation where labor concessions may have alleviated the employer's economic considerations."[107]

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[105] *First Nat'l.* 452 U.S. at 676.
[106] *Id.* at 683.
[107] *Bay City Education Ass'n* 430 Mich. at 382.

2. "What control does the union or the employer have over the cause of the decision?"[108]

As the facts indisputably demonstrate here, the cause of the decision to reduce the budget was declining tax revenues, increasing costs, loss of contracts, and annexations. Neither party can control the revenues the County receives. Chief Newlin and the Sheriff had no choice in making cuts in every area possible in order to cut the budget by nearly $1 million and only as a last resort, reduced staffing by two officers.

The Guild and PERC claim that the Guild has control over its wages and could have made economic concessions and the parties should have at least tried to bargain the decision. The Guild and PERC miss the point of this factor, because having control over wage concessions is not the same as having control over the cause of the decision. And because neither had control over declining revenues, rising expenditures, and the adopted budget, it is not appropriate for collective bargaining.

In addition, the Guild claims that it not only wanted to bargain about making economic concessions but wanted to bargain over the employer's business decisions:

> [The Guild] may be able to analyze the employer's budget situation and suggest alternative solutions to achieve the required budgetary savings. Alternatively, the Guild may be able to offer ideas to achieve certain operational efficiencies that may permit

[108] PERC Opening Brief, p. 24.

> the employer to achieve some, or all, of the required savings without the need for layoffs.[109]

As the Supreme Court has recognized, a union is not an equal business partner in the running of the business, so the employer does not have to bargain or analyze its budget allocation with the union. To mandate that an employer bargain with the union over budget allocation and "operational efficiencies" would completely abridge the employer's prerogative to manage its business. This is addressed more fully in the next factor below.

3. "Would bargaining about the matter significantly abridge the employer's freedom to manage the public's business?"[110]

This factor was recognized by the Trial Court as the most critical in this case given that the County has a duty to implement a budget. PERC concedes that "it is generally recognized that an employer has no duty to bargain concerning a decision to reduce its budget." Furthermore, PERC states that "the number of staff assigned to a shift is generally considered to be a management prerogative."[111] PERC further admits that the County's argument that the "importance and fundamental political nature of the County budget process" is supported in the

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[109] Guild Opening Brief, p. 32.
[110] PERC Opening Brief, p. 24-25.
[111] *Id.*

record.[112] And indeed, the County has shown in detail how bargaining over the budget would severely abridge the employer's freedom to manage its business and its duty to the taxpayers and that budget allocation lies at the core of entrepreneurial control.

In *City of Bellevue,* PERC clarified which factors are significant in two situations: where the employer replaces union workers with contract workers, and where the employer shuts down part of its business. Although this case does not fit neatly in either category it is more akin to an operational shutdown and therefore a permissive subject of bargaining. Considering the totality of the circumstances including County mandated budget cuts of which the parties had no control and which no amount of bargaining can resolve, there can be no mandatory duty to bargain layoffs.

E. The Guild Has Waived Its Right to Bargain Over Layoffs When It Agreed to Adopt by Reference Civil Service Rules That Dictate the Layoff Process.

Whether permissive or mandatory, the Guild waived its right to bargain over layoffs when it agreed to adopt the Civil Service Rules which detail when and how layoffs happen. PERC, the NLRB, and the courts have recognized that an employer does not have to bargain over a contractual provision which has already been explicitly and knowingly

[112] *Id.* at p. 28.

negotiated by the parties.[113] The County asserts an affirmative defense of waiver *by* contract which should not be confused with a contract waiver provision *in* a contract.

This critical but often confused distinction was explained by the Washington Supreme Court in *Pasco Police Officers Ass'n*: "Waivers 'most often arise during the pendency of a collective bargaining agreement and focus on whether a union has given its assent (or waived objections) to unilateral employer action.'"[114] Waivers are generally a permissive subject because they are "a subject a labor organization freely chooses to place on the table," and as such, the employer cannot insist that the union bargain a waiver.[115]

The *Pasco* Court distinguishes a contract waiver from the affirmative defense of waiver by contract. "Waivers are defenses used by *employers* to a charge that they have acted unilaterally without satisfying their obligation to bargain with the union."[116] In *Pasco,* the Court determined that a management rights clause was a mandatory subject of bargaining because most of the terms of the clause addressed mandatory

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[113] *See, Pasco Police Officers' Assn. v. City of Pasco*, 132 Wn.2d 450, 462-63, 938 P.2d 827 (1997) (extensive discussion by the Washington Supreme Court of the history of contract waivers in collective bargaining).
[114] *Id.* at 462 *citing N.L.R.B. v. McClatchy Newspapers Inc.,* 964 F.2d 1153, 1157 (D.C. Cir. 1992).
[115] *Id.* at 463.
[116] *Id.*

subjects of bargaining.[117]

The contract provision at issue is not a waiver but a bargained provision adopting Civil Service Rules:

> Except as expressly limited by its terms, nothing in this Agreement shall supersede any matter delegated to the Kitsap County Civil Service Commission by State law or by ordinance, resolution or laws of or pertaining to the County of Kitsap and such Commission shall continue to have primary authority over subjects within the scope of its jurisdiction and authority. If there then should be a conflict between any provisions of this Agreement and Civil Service, then the provisions of this Agreement shall govern.[118]

Thus, the parties negotiated a process for layoffs by adopting by reference the Civil Service Rules.[119]

Once the parties have bargained and agreed on a contract term, they waive bargaining on that term (a waiver *by* contract), but that does not transform every agreed term in an agreement to a contract waiver otherwise, by definition, every negotiated term in the contract would be a waiver which is an absurd result. For example, a contract waiver[120] in this case would be the Guild relinquishing its right to bargain layoffs altogether, essentially allowing the County to take unilateral action on

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[117] *Id.* at 467-68.

[118] CP 1158

[119] CP 1163-1164 ("The Appointing Authority may layoff any employee . . . whenever such action is made necessary by reason of a shortage of work or funds . . . layoff of probationary or regular employees shall be made in reverse of seniority . . .")

[120] Waiver is defined as "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." Black's Law Dictionary, 8th Ed.

how and when to layoff employees. Instead, the parties satisfied their duty to bargain layoffs by agreeing to the process for layoffs in the Civil Service Rules.

Consequently, if the Court determines that layoffs are a mandatory subject of bargaining, the above provision does not expire and remains status quo.[121] Because the Management Rights[122] and Civil Service provisions remain in effect at the expiration of the contract, the County has a valid claim of waiver by contract. The Guild cannot have it both ways claiming provisions are permissive because they are a waiver and expire with the contract, but also that the provisions are a mandatory subject of bargaining. Moreover, if the Court determines that it is a waiver and expires, then the Civil Service Rules would be applicable because the Rules do not conflict with the Collective Bargaining Agreement.

Even putting aside the issue of the expired agreement and waivers, the Civil Service Rules are valid whether or not the parties specifically adopt them in a Collective Bargaining Agreement because corrections officers are classified civil service employees.[123] The County followed the agreed upon "when and how" of layoffs exactly as detailed in the Civil

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[121] RCW 41.56.470, *See also, Pasco Police Officers' Assn.* 132 Wn.2d at 467.
[122] CP1158 – Management Rights provision establishes the employer's right to eliminate jobs and positions.
[123] RCW 41.14.070.

Service Rules in 2011, as well as in 2009 when the County had laid off four corrections officers. [124]

This Court previously assumed that the provision adopting Civil Service Rules was a waiver, a permissive subject, and therefore expired with the contract so the County cannot claim the affirmative defense of waiver.[125] The County urges the Court to reconsider whether the provision is a waiver in light of the above discussion and whether the County's affirmative defense of waiver is valid.

F. The Remedy That Most Effectuates the Purposes of the Collective Bargaining Statute is a Declaratory Judgment Clarifying the Parties' Obligations to Bargain.

The only remedy sought by the County was a Declaratory Judgment whether the Guild committed an unfair labor practice by insisting to impasse on a permissive subject of bargaining. PERC and the Court may consider any remedial order necessary to "effectuate the purposes of the collective bargaining statute." [126] For the County's purposes, a declaratory judgment to help the parties clarify their bargaining obligations is sufficient, whereas additional penalties involving reading and posting notices are unnecessary. The Declaratory Judgment

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[124] CP 1330-1332

[125] *Kitsap County v. Kitsap County Correctional Officers Guild,* 179 Wn.App 987, 996, 320, P.3d 70 (2013).

[126] *Municipality of Metropolitan Seattle v. Public Employment Relation Commission,* 118 Wn.2d 621, 633, 826 P.2d 158 (1992).

suffices as a "cease and desist" order for whichever party is found in violation. However, the County does not dispute that if the Court were to award any other remedy, it should be consistent with remedies awarded by PERC in unfair labor practice violations.

PERC and the Guild posit that reinstatement and back pay are appropriate remedies if the County refused to bargain a mandatory subject. However, PERC concedes in a footnote that the "unique procedural status" of this case impacts the appropriateness of back pay and reinstatement.[127] Reinstatement and back pay are problematic as the employees have either been reinstated under the Civil Service Rules or moved on to other jobs. In addition, as PERC has implicitly pointed out, the County has prevailed to this point so back pay and reinstatement are not appropriate remedies.

The Guild also asks for attorney fees if it prevails on appeal while also acknowledging that attorney fees are an extraordinary remedy for situations involving egregious conduct.[128] The Guild attempts to paint the County's efforts to determine its bargaining obligations in Superior Court instead of PERC as a "convoluted legal strategy" and "an amazing attempt

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[127] PERC Opening Brief, p. 41, FN 22.
[128] Guild Opening Brief, p. 42

to circumvent its clear bargaining obligations."[129] Ironically, the County brought the issue to Superior Court as a way to expedite the process assuming that any matter before PERC would likely end up in Superior Court anyway, and only sought a Declaratory Judgment to clarify its bargaining obligations. There is no evidence of any egregious conduct by the County.

In addition, the Guild asks for attorney fees under the wage withholding statute, RCW 49.48.030 citing to *I.A.F.F.*[130] However, the *I.A.F.F.* holding was clarified in a recent case in which a union prevailed before PERC but was not granted attorney fees, so the union filed a separate action in Superior Court under RCW 49.48.030.[131] The court in *Int'l Union of Police Ass'n* held that RCW 49.48.030 may apply to grievance hearings as in *I.A.F.F.*, but it does not apply to unfair labor practice hearings, even when the party filed a new lawsuit in Superior Court for attorney fees.[132] Thus, RCW 49.48.030 is not a basis for an award of fees here.

The only remedy which would effectuate the purposes of the

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[129] *Id.*
[130] *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,* 146 Wn.2d 29, 42 P.3d 1265 (2002).
[131] *International Union of Police Association, Local 748 v. Kitsap County,* 183 Wn.App. 794, 333, P.3d 524 (2014).
[132] *Id.* at 798.

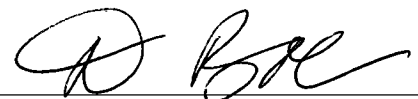
Public Employees Collective Bargaining Act is a Declaratory Judgment regarding the parties bargaining obligations.

IV. CONCLUSION

Considering the undisputed facts concerning the County's fiscal condition in 2011, the legal mandates of Chapter 36.40 RCW, and the County's action in bargaining the impacts of its decision to eliminate positions, the Trial Court was correct in its conclusion that the County's decision lies at the core of entrepreneurial control and management prerogative and that bargaining on the decision cannot be fruitful. The County respectfully requests that the Court affirm the Trial Court's ruling on remand that the reduction in staff due to budget constraints was a permissive subject of bargaining. If the Court reverses the Trial Court and finds that the decision was a mandatory subject of bargaining, then the Court should conclude that the Guild waived bargaining for the reason that the Civil Service Rules governed the issue.

RESPECTFULLY SUBMITTED this 11th day of February, 2015.

TINA R. ROBINSON
Kitsap County Prosecutor



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CERTIFICATE OF SERVICE

I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On February 11, 2015, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Christopher J. Casillas Cline & Casillas 2003 Western Avenue, Suite 550 Seattle, WA 98121 [X] Via U.S. Mail [X] Via E-mail: ccasillas@clinelawfirm.com
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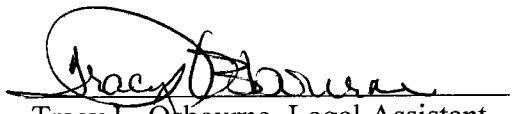
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED February 11, 2015, at Port Orchard, Washington.



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KITSAP COUNTY PROSECUTOR

February 11, 2015 - 2:08 PM

Transmittal Letter

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Case Name: Kitsap County Correctional Officers Guild v. Kitsap County
Court of Appeals Case Number: 46735-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tracy L Osbourne - Email: tosbourn@co.kitsap.wa.us

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