Court of Appeals Case No. 43783-0-II
Thurston County Superior Court Case No. 11-2-02686-5

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a COMMUNITY TRANSIT,

Petitioner/Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION and AMALGAMATED TRANSIT UNION, LOCAL 1576,

Respondents/Appellees.

BRIEF OF APPELLANT

Sofia D. Mabee, WSBA #31679
Shannon E. Phillips, WSBA #25631
SUMMIT LAW GROUP, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
Attorneys for Petitioner/Appellant Community Transit
4840-4676-7121.3

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I. INTRODUCTION

The Public Employment Relations Commission ("PERC") enforces labor relations statutes that apply to all public employers in Washington State, including every city and county, and even Washington district and superior courts. In less than five pages of analysis, the PERC ruled that none of these employers can insist that unions bargain over proposals to include language in their labor contracts that gives the employer the ability to implement a change in working conditions when the need arises during the term of the contract. The question for PERC was not whether employers can require unions *to agree* to such language in their contracts, but merely whether employers can present their arguments in favor of the proposed contract language to a neutral arbitrator, who ultimately decides based on statutory criteria whether to include the language in the labor contract. The PERC's decision foreclosing employers from making their case to a neutral interest arbitrator must be reversed both as a matter of public policy and as a matter of law.

As a matter of public policy, the practical effect of PERC's decision is that public employers will either be hobbled from responding efficiently to unanticipated situations, or will be trapped into never-ending bargaining. A labor contract can last as long as six years. Unions often place a high value on fixed terms, such as hourly wages and set increases, which give employees certainty about their wages, hours, and working conditions. Employers know it is impossible to anticipate every

operational need or management priority that will arise over the contract term. They thus value contract terms that allow them to efficiently and effectively implement needed changes that the parties did not anticipate when bargaining the contract. In other words, in exchange for contract terms of value to employees, employers often bargain for contractual "waivers" that allow management to make changes in certain specified areas during the contract term without the obligation to engage in time-consuming bargaining first. This balance allows the parties to carve out areas in which management will be allowed to act flexibly during the contract term. The alternative is that every decision that impacts wages, hours, and working conditions must await completion of a full bargaining cycle.

The PERC's decision that waivers are a non-mandatory subject of bargaining strays too far from the public policy of encouraging employers to bargain written labor contracts and enters a world where public employers are required to bargain the operation of their enterprises on all levels at every moment in time despite having a written labor contract.

PERC's decision is not only harmful to public policy, it is erroneous as a matter of law. First, PERC failed to consider the parties' competing interests in this case. The Washington Supreme Court previously admonished the PERC for approaching questions regarding the duty to bargain summarily. PERC is required to balance the competing interests of the public employer and the employees in the case before it when deciding whether a particular subject must be bargained or not.

Here, both the employer and the union have strong interests in bargaining over whether the employer can adjust working conditions during the life of the contract. PERC failed to balance the interests of the parties, and its conclusion should be overturned on that basis.

Second, the PERC's decision contradicts its prior decision from almost two decades ago in *Pasco Police Officers Ass'n v. City of Pasco*, No. 4694-A, 1994 WL 900087 (Wash. Pub. Emp't Relations Comm'n Dec. 1994), which was affirmed in its entirety by the Washington Supreme Court. *Pasco Police Officers Assoc. v. City of Pasco*, 132 Wn.2d 450, 938 P.2d 827 (1997). The PERC attempts to distinguish *City of Pasco*, but its reasoning fails upon scrutiny. *City of Pasco* requires reversal of the PERC in this case.

Third, the PERC's decision is contrary to persuasive, settled federal authority on the issue in dispute. Under federal labor law going back to *NLRB v. American National Ins. Co.*, 343 U.S. 395 (1952), contract language that gives the employer the ability to change working conditions during the term of an agreement is a mandatory subject of bargaining. Employers can, and do, insist on such language at the bargaining table. The National Labor Relations Board ("NLRB") looks at the totality of circumstances before finding that a bargaining proposal goes too far. It does not apply a *per se* rule to contract language that operates as a waiver of the duty to bargain and it does not prohibit employers from bargaining such provisions into their contracts, as the PERC has done in

this case. PERC and Washington courts – and employers – have long relied on this authority, and the PERC erred by rejecting it now.

Labor contracts are a compilation of agreements on how to administer mandatory subjects of bargaining (wages, hours, and working conditions). Contract language that gives an employer the right to change certain working conditions during the term of the contract can be viewed either as an affirmative agreement that management has the right to change the specified working conditions (the topic is "covered by" the contract) or as an agreement that the union "waives" its right to bargain such changes during the life of the contract. Regardless of which terminology is used, the practical effect is the same: the employer can implement changes in agreed areas that it decides are necessary while the contract is in effect. Here, Article 18.2 of the labor contract between Community Transit and Respondent Amalgamated Transit Union, Local 1576 ("ATU") allows Community Transit to determine whether changes to its Standard Operating Procedures and other rules are necessary during the term of the labor contract. Any impacts flowing from its decisions remain bargainable. The fundamental issue in this case is whether it is lawful for a public employer in Washington to propose, to "impasse" and arbitration if necessary, contract language allowing it the freedom to make decisions concerning specific working conditions during the term of the labor contract. For all of the reasons below, such proposals are lawful and fully consistent with long-established practice and precedent, and the

Public Employment Relations Commission's decision to the contrary must be overturned.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error in the Trial Court.

No. 1: The trial court erred in entering its Order Denying Community Transit's Petition for Review of July 6, 2012, affirming the Public Employment Relations Commission's Decision 10647-A.

B. Assignments of Error by the Public Employment Relations Commission.

No. 1: The Public Employment Relations Commission erred in its Decision 10647-A, issued on November 21, 2011, in which it ruled that Article 18.2 of the parties' collective bargaining agreement is a non-mandatory subject of bargaining.

C. Issues Pertaining to Assignments of Error in the Trial Court.

No. 1: Did the PERC erroneously interpret and apply the law by failing to apply the *City of Richland*[1] balancing test in determining whether Article 18.2 is a mandatory subject of bargaining?

No. 2: Did the PERC erroneously interpret and apply the law by holding that all contract provisions that operate as a waiver of the duty to bargain during the term of the contract are non-mandatory subjects of bargaining?

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[1] *Int'l Ass'n of Fire Fighters Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 778 P.2d 32 (1989) ("*City of Richland*").

No. 3: Did the PERC erroneously interpret and apply the law by holding that Article 18.2 is a non-mandatory subject because it operates as a waiver of the duty to bargain, when PERC previously held language operating as a waiver is a mandatory subject and its decision was affirmed by the Washington Supreme Court?

No. 4: Did the PERC err by departing from persuasive federal law?

No. 5: Did the PERC exceed its authority by ruling that Article 18.2 is a non-mandatory subject of bargaining?

No. 6: Did the PERC issue an order that was arbitrary and/or capricious when it failed to consider Community Transit's need for Article 18.2, as required by *City of Richland*?

D. Issues Pertaining to Assignments of Error by the Public Employment Relations Commission.

No. 1: Did the PERC erroneously interpret and apply the law by failing to apply the *City of Richland* balancing test in determining whether Article 18.2 is a mandatory subject of bargaining?

No. 2: Did the PERC erroneously interpret and apply the law by holding that all contract provisions that operate as a waiver of the duty to bargain during the term of the contract are non-mandatory subjects of bargaining?

No. 3: Did the PERC erroneously interpret and apply the law by holding that Article 18.2 is a non-mandatory subject because it operates as a waiver of the duty to bargain, when PERC previously held language

operating as a waiver is a mandatory subject and its decision was affirmed by the Washington Supreme Court?

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No. 6: Did the PERC issue an order that was arbitrary and/or capricious when it failed to consider Community Transit's need for Article 18.2, as required by *City of Richland*?

III. STATEMENT OF THE CASE

A. Factual Background.

Amalgamated Transit Union, Local 1576 ("ATU") and Community Transit have had a collective bargaining relationship for more than 30 years. Administrative Record ("AR") 1772. The parties' second labor contract, which went into effect in 1979, included a provision that gave Community Transit the right to make changes to its "Rules and Regulations" affecting employees in the bargaining unit. AR 192.

In 1997, the parties litigated an unfair labor practice complaint before the PERC in which ATU charged Community Transit with changing certain standard operating procedures ("SOPs") without bargaining. *Amalgamated Transit Union, Local 1576 v. Community Transit*, No. 6375, 1998 WL 1978452 (Wash. Pub. Emp't Relations Comm'n July 23, 1998); AR 164. In defense of the complaint, Community Transit asserted that Article 18.2 of the parties' labor contract

(then located in Article 19) operated as a "waiver" of the duty to bargain changes to SOPs. AR 167. The PERC dismissed the complaint, agreeing with Community Transit that when the parties' contract includes language allowing the employer to unilaterally make changes in a certain area, that establishes the defense of "waiver" to a charge of unlawful unilateral changes. AR 168.

Over the years, Community Transit from time to time exercised its contractual right under Article 18.2 to change SOPs based on issues that arose during a contract term. However, the record reflects that as soon as the contract expired and the parties returned to the bargaining table, ATU often exercised its right to bargain over that the specific SOP. For example, after Community Transit changed its accident policy, ATU proposed other changes to the policy when the contract expired. AR 48. Similarly, when Community Transit revised attendance rules, ATU later presented a proposal regarding absences when the contract expired. AR 49-50. Thus, Article 18.2 allowed Community Transit to implement changes that had not been anticipated by the parties when negotiating the contract; but the parties understood that the parties retained all bargaining rights on all subjects, so the Union would have the opportunity to revisit any changes during the next bargaining cycle.

The labor contract between Community Transit and ATU that led to the underlying unfair labor practice charge in this case expired on December 31, 2007. AR 109. Article 18.2 of that agreement stated:

> The Employer agrees to notify the Union of any changes in the Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except as to Employer administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor agreement.

AR 132.

Negotiations for a successor agreement began in November 2007. AR 28. Community Transit proposed retaining Article 18.2. AR 159. ATU proposed changing it. AR 162-163. ATU then told Community Transit that it believed Article 18.2 was a "permissive" subject of bargaining and that it was unlawful for Community Transit to continue bargaining for inclusion of the provision in the labor contract over ATU's objection. AR 183. Community Transit disagreed, insisting that it was a mandatory subject, which could be pursued for consideration by a neutral arbitrator. *Id.*

B. Procedural History.

On February 5, 2009, ATU filed an unfair labor practice complaint with the PERC alleging that Article 18.2 was a non-mandatory ("permissive") subject of bargaining and claiming that it was unlawful for Community Transit to pursue inclusion of Article 18.2 into the new contract. AR 1-3.

On February 25, 2009, while the complaint was pending, PERC certified the parties for interest arbitration.[2] AR 186. (See Section IV(B) for further discussion regarding interest arbitration.) By that point, the parties had been bargaining for more than two years. AR 28. On March 24, 2009, pursuant to WAC 391-55-265, PERC suspended interest arbitration proceedings regarding Article 18.2 until this case is resolved. AR 186-87.

The practical effect of suspending interest arbitration over Article 18.2 is that the parties proceeded to interest arbitration on the other sixty-one subjects in dispute, and the question of whether an arbitration panel can consider whether Article 18.2 can be pursued to interest arbitration is unresolved until this case concludes. In other words, if Community Transit succeeds in this appeal, all that it achieves is the opportunity to persuade an interest arbitration panel that Article 18.2 should remain in the contract – nothing more.

A PERC hearing examiner conducted a hearing on this unfair labor practice charge. On January 15, 2010, the examiner issued his order in *Amalgamated Transit Union Local 1576 v. Community Transit*, No. 10647, 2010 WL 235040 (Wash. Pub. Emp't Relations Comm'n Jan. 14, 2010). AR 1762. He determined that because Article 18.2 operated as a waiver of the duty to bargain, it was a non-mandatory subject of bargaining purely on that basis. Community Transit appealed. AR 1778.

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[2] PERC initially excluded Article 18.2 as an issue, but it later amended the certification to include Article 18.2. AR 184.

The PERC affirmed the examiner. *Amalgamated Transit Union Local 1576 v. Community Transit,* No. 10647-A, 2011 WL 6026156 (Wash. Pub. Emp't Relations Comm'n November 21, 2011). CP 10-15. In its decision, the PERC announced for the first time in half a century of well-settled federal labor law and almost 20 years of settled law in Washington State under *City of Pasco*, 132 Wn.2d 450 (1997), that any language that gives a party the contractual right to make changes to a mandatory subject without bargaining during the term of a contract is a permissive, non-mandatory subject that cannot be pursued to interest arbitration.

On December 20, 2011, Community Transit filed a Petition for Review in Thurston County Superior Court. CP 4. The PERC declined to participate in the case. CP 20. The trial court dismissed the Petition for Review on July 6, 2012. CP 102. The trial court concluded that there was no Washington authority addressing the issue of waiver and that the PERC's decision was entitled to deference. CP 105.

IV. ARGUMENT

A. Standard of Review

Agency actions are reviewed under the standards set forth in the Administrative Procedure Act ("APA"), chapter 34.05 RCW. Appellate courts sit in the same position as the superior court and apply the standards of review under the Washington Administrative Procedure Act ("APA"), chapter 34.05 RCW directly to the record before the administrative

agency. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003).

Orders in adjudicative proceedings are reviewed pursuant to RCW 34.05.570(3). Thus, a petitioner is entitled to relief if the PERC erroneously interpreted or applied the law, acted outside its statutory authority or jurisdiction conferred by any provision of law, or issued an order that is arbitrary or capricious. RCW 34.05.570(3)(b),(d), (i).

Conclusions of law are reviewed by the error of law standard, and "the court may substitute its interpretation of the law for that of PERC." *City of Pasco*, 132 Wn.2d at 458; *Int'l Ass'n of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235, 239, 967 P.2d 1267 (1998). While great deference is usually given to PERC's interpretation of the law it administers, "the court may reverse a PERC decision where it unduly limits the RCW 41.56 right to bargain." *City of Seattle*, 93 Wn. App. at 239, *citing Municipality of Metro. Seattle v. Department of Labor & Indus.*, 88 Wn. 2d 925, 568 P.2d 775 (1977). Deference to PERC's expertise is also not necessary when the statute in dispute is unambiguous. *King County v. Public Employment Relations Commission*, 94 Wn. App. 431, 437 at n. 4, 972 P.2d 130 (1999). In this case, neither party is arguing that the statute defining the duty to bargain is ambiguous; therefore, deference to PERC is not necessary. *Id.*

B. The Context of This Dispute: The Duty to Bargain

The Washington State Legislature created the PERC in 1975 to enforce and administer five labor relations statutes. Jane Wilkinson, *Practice and Procedure Before the Washington State Public Employment Relations Commission*, 24 Gonz.L.Rev. 213, 213 (1989); *see* RCW 41.58.010 *et seq.* One of the statutes enforced by the PERC is the Public Employees' Collective Bargaining Act ("PECBA" or "Act"), chapter 41.56 RCW. *Id.* at 214. The Act applies to county and municipal corporations and political subdivisions of the state such as police, sheriff and fire departments, public school districts, municipal transit systems, public libraries, and public utility districts. *Id.* The Act also applies to district and superior courts. *Washington State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 167, 86 P.3d 774 (2004) (judges must bargain with court employees over non-wage matters).

The Act creates two bargaining processes for different categories of employees: those entitled to interest arbitration and those not entitled to interest arbitration. Employees of public passenger transportation systems, such as Respondent Amalgamated Transit Union, Local 1576's ("ATU") members, are entitled to interest arbitration. That means that employers and employees have the right to demand bargaining over all mandatory subjects of bargaining for an initial period of at least three months. RCW 41.56.492(1). After three months, the parties may call in a mediator. *Id.* If the mediator cannot reach a resolution after a statutorily-required "reasonable" period, the dispute is submitted to interest

arbitration. *Id.*; RCW 41.56.450; RCW 41.56.492; *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 377, 831 P.2d 738 (1992).

The interest arbitration process is time-consuming. The PERC first certifies the list of issues in dispute. RCW 41.56.450. Each party then appoints a partisan arbitrator, who attempt to agree on a neutral arbitrator. *Id.* Once the neutral arbitrator is selected, the panel schedules a hearing and receives testimony and other evidence. *Id.* Following the hearing, the neutral arbitrator prepares a written decision, which is final and binding. *Id.* From beginning to end, the bargaining process can take at least nine to twelve months, and in reality, often takes years.[3] AR 54-55.

For example, in this case, the parties bargained for more than two years (November 2007 to February 2009) before even reaching the interest arbitration phase of the process. At that point, there were sixty-one issues in dispute for litigation before the arbitration panel. The entire process likely took close to three years to reach conclusion.

1. Mandatory, Permissive, and Illegal Subjects in General.

The duty to bargain derives from the statutory definition of collective bargaining:

[3] Non-interest arbitration eligible employers (including superior and district courts) have a statutory right to implement their last and best offer following at least one year of bargaining. RCW 41.56.123. However, the definition of mandatory subjects of bargaining is the same for all public employers subject to the PECBA, therefore, the outcome of this case directly impacts the kinds of proposals that can be pursued by every public employer subject to the Act.

> [T]he performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.030(4) (emphasis added). It is an unfair labor practice for an employer or a union to refuse to bargain about "mandatory" subjects. RCW 41.56.140-150.

Court and PERC precedent have divided the range of possible subjects of bargaining into three categories: mandatory, permissive, and illegal subjects. AR 1843. Mandatory subjects of bargaining are those about which the parties have an obligation to bargain and, if necessary, submit to interest arbitration for a binding decision about whether they should be included in the collective bargaining agreement. *City of Pasco*, 132 Wn.2d at 460. Permissive subjects are those that either side can refuse to bargain. *Klauder*, 107 Wn.2d at 341-342, 345. Illegal subjects are those the parties can never agree on due to statutory or constitutional prohibitions. *See Int'l Ass'n of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235, 967 P.2d 1267 (1998); AR 1843.

The PERC is required adjudicate questions regarding the mandatory nature of a subject of bargaining on a case-by-case basis. *Int'l Ass'n of Firefighters Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 203, 778 P.2d 32 (1989) ("*City of*

Richland"). Mandatory subjects of bargaining are "grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions." *See City of Richland*, 113 Wn.2d at 200; RCW 41.56.030(4). "The scope of mandatory bargaining thus is limited to matters of direct concern to employees." *Id.*

Permissive/non-mandatory subjects are "[m]anagerial decisions that only remotely affect 'personnel matters', and decisions that are predominantly 'managerial prerogatives'" such as the employer's decision as to what services to provide. *Id.*; *Anacortes Police Guild v. City of Anacortes,* No. 6830-A, 2000 WL 1448857 at *4 (Wash. Pub. Emp't Relations Comm'n July 5, 2000).

In addition to the duty to bargain the decision to change mandatory subjects of bargaining, employers also have a duty to bargain the effects or impacts of those decisions on mandatory subjects of bargaining. *See Technical Employees Ass'n v. King County*, Nos. 10576-A, 10577-A, 10578-A, 2010 WL 2553113 at * 5 (Wash. Pub. Emp't Relations Comm'n June 22, 2010) ("[t]he bargaining obligation is applicable to a decision on a mandatory subject of bargaining and the effects of that decision"). Alternatively, even if a decision itself is not a mandatory subject of bargaining, employers still have a duty to bargain any material and substantial effects of that decision on wages, hours, or working conditions. *Id.; City of Richland*, 113 Wn.2d at 201. "Thus, for example, while an employer need not bargain with its employees' union concerning an economically motivated decision to terminate a services contract (a

nonmandatory subject), it must bargain over how the layoffs necessitated by the contract's termination will occur." *City of Richland*, 113 Wn.2d at 201. The duty to bargain effects includes a duty to submit disputed effects to interest arbitration. *King County*, 2010 WL 2553113 at * 8.

2. Contractual Waivers of the Duty to Bargain.

"Once a contract is signed, the parties have met their obligation to bargain as to the matters set forth in the contract, relieving the parties of their obligation to bargain for the life of the agreement. No unfair labor practice will be found if a party makes changes in a manner consistent with the contract." *Mountlake Terrace Police Guild v. City of Mountlake Terrace*, No. 10734, 2010 WL 1644962 at *3 (Wash. Pub. Emp't Relations Comm'n April 20, 2010). Thus, written contract language creates an exception to the duty to bargain because the parties have agreed about what will happen during the contract term. *Washington State Council of County and City Employees, Local 120 v. Tacoma-Pierce County Health Department*, No. 6929-A, 2001 WL 1069585 at *12 (Wash. Pub. Emp't Relations Comm'n April 26, 2001). That can include the right of an employer to unilaterally make changes:

> A contractual waiver is language in a valid collective bargaining agreement which gives a party the right to take an action without further bargaining. The general idea is that bargaining has already occurred on the subject during contract negotiations, and the binding agreement is codified in the collective bargaining agreement. If the employer's action is consistent with the waiver language in the collective bargaining agreement, no unfair labor practice will be found.

Bellevue Police Support Guild v. City of Bellevue, No. 10830, 2010 WL 3283656 at *12 (Wash. Pub. Emp't Relations Comm'n Aug. 12, 2010) (citations omitted).

If a union contends that an employer unlawfully made a unilateral change to a mandatory subject, a "waiver by contract" of the duty to bargain may be asserted as an affirmative defense to unilateral change unfair labor practices. *City of Pasco*, 132 Wn.2d at 463. PERC has established a high bar to finding that contract language constitutes a waiver: the language and relevant evidence must be carefully scrutinized to evaluate its intent and "each case must be examined on its individual merits." *Int'l Ass'n of Firefighters, Local 453 v. City of Wenatchee,* No. 8802, 2004 WL 3058183 (Pub. Emp't Relations Comm'n December 10, 2004) at *10.

"Management rights" clauses often provide a basis for the affirmative defense of waiver by contract. *See Int'l Ass'n of Fire Fighters Local 3266 v. Port of Bellingham*, No. 6017, 1997 WL 584245 (Pub. Empl't Relations Comm'n Aug. 22, 1997) at *5 ("Contractual management rights clauses are a mandatory subject of bargaining under *City of Pasco*....[a]t the same time, contractual management rights clauses are a 'waiver' by the union of bargaining rights on specifically identified issues..."); *City of Bellevue*, 2010 WL 3283656 (management rights provision waived the union's right to bargain layoffs); *Public School Employees of Washington, v. Franklin School District*, No. 5945-A, 1998

WL 84382 (Wash. Pub. Emp't Relations Comm'n Feb. 1998) (management rights provision waived the union's right to bargain layoffs).

However, any section of a labor contract can establish a waiver defense, according to the PERC, if it evidences the parties' agreement that the contract "covers" the subject in question, relieving the employer of its duty to bargain over that subject during the term of the contract.

> The duty to bargain, however, continues during the term of a collective bargaining agreement as to any and all mandatory subjects of bargaining that are not covered by the specific terms of the collective bargaining agreement.

City of Wenatchee, 2004 WL 3058183 at *4 (emphasis added).

Examples of contract language operating as a waiver of the duty to bargain by "covering" a subject are numerous. *See Tacoma-Pierce County Health Department*, 2001 WL 1069585 at *17 (management rights provision and other contract language constituted a waiver of the duty to bargain layoffs and other mandatory subjects by covering those subjects in the contract); *Washington State Social and Health Services*, 2008 WL 5369618 at *4 (a clause addressing hours of work constituted a waiver of the duty to bargain regarding schedule changes); *Edmonds Police Officers Ass'n v. City of Edmonds*, Nos. 8798 and 8799, 2004 WL 3058182 (Wash. Pub. Emp't Relations Comm'n December 10, 2004) (contract language stating that medical benefits will be "substantially" the same operated as a contract waiver regarding a change in employee co-pays).

As noted by the Commission in *Washington State Social and Health Services*, 2008 WL 5369618 at *4, "Collective bargaining agreements often include terms designed to give either the employer or the union a degree of freedom to act within a particular area." This contractual flexibility is necessary because a "collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *See Chelan County v. Chelan County Deputy Sheriff's Ass'n*, 162 Wn. App. 176, 183, 252 P.3d 421 (2011), *quoting, United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-80, 80 S.Ct. 1347, 4 L.Ed2d 1409 (1960) (citation omitted).

C. PERC Erroneously Interpreted and Applied the Law When it Held That Article 18.2 is a Non-Mandatory Subject of Bargaining.

Under the error of law standard, a court may substitute its interpretation of the law for that of PERC. RCW 34.05.570(3)(d); *City of Pasco*, 132 Wn.2d at 458. The PERC's conclusion that Article 18.2 is a non-mandatory subject is bargaining is erroneous as a matter of law because the PERC failed to apply the *City of Richland* balancing test and ignored its own prior decision in *City of Pasco*, which was affirmed by the Washington Supreme Court. Further, Article 18.2 is clearly a mandatory subject of bargaining under federal labor law, which Washington courts follow on questions regarding the duty to bargain.

1. PERC Did Not Apply the Balancing Test.

The Commission is empowered to adjudicate questions regarding the mandatory nature of a subject of bargaining on a case-by-case basis. *Int'l Ass'n of Firefighters Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 203 (1989) ("*City of Richland*"). This process ensures that the PERC balances two competing interests: (1) wages, hours, and working conditions, which are a "direct concern to employees" and constitute mandatory subjects; and (2) subjects lying at the core of entrepreneurial control/management prerogatives, which are reserved to the employer's exclusive control and are non-mandatory subjects of bargaining. *See, Id.* "Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates." *Id.*

In *City of Richland*, the Supreme Court reversed PERC's decision that firefighting staffing levels were a non-mandatory subject of bargaining and remanded the case back to PERC. *City of Richland*, 113 Wn.2d at 204. The Court held that PERC's "summary disposition" of a scope-of-bargaining question did not reflect the "particularity and sensitivity" the task requires. *Id.* at 203. The Court admonished the PERC for neglecting to balance the employer's need for managerial control with employees' concerns with working conditions:

> PERC's facile characterization of the substance of Local 1052's contract proposal as "a subject that has previously been held to be a permissive subject of bargaining", is inappropriate under the law. Scope-of-bargaining questions cannot be resolved so summarily. Every case presents unique circumstances, in which the relative

> strengths of the public employer's need for managerial control on the one hand, and the employees' concern with working conditions on the other, will vary.

Id. at 207 (citation omitted); *accord, King County v. Public Employment Relations Commission*, 94 Wn. App. at 439 (1999) ("The interests of the employer must be weighed against those of the union before we can impose a duty to bargain.")

Here, the PERC completely failed to balance Community Transit's interests in the ability to efficiently change operational rules with union members' interests in those rules that impact working conditions. Just as it did in *City of Richland*, the Commission resolved the case "summarily," holding that since it found a contractual waiver to be permissive in a prior case, Article 18.2 must also be permissive. CP 14. The Commission's decision is devoid of any discussion whatsoever of the parties' competing interests regarding Article 18.2. CP 10-15. Indeed, the examiner's decision contains no findings of fact regarding the employer's need for Article 18.2 or the union's concerns with the impact on working conditions if the employer retains the right to unilaterally change operational rules when issues arise. AR 1771-1772. The PERC's "facile characterization" of Article 18.2 as a waiver and, therefore, a subject previously held to be non-mandatory, is "inappropriate under the law" and requires reversal of the PERC.[4] *See City of Richland* at 207.

[4] Community Transit raised this argument before the trial court. CP 48. However, the court did not address it. CP 110-114.

2. Article 18.2 is a Mandatory Subject Under the Balancing Test.

In *City of Richland*, the Supreme Court applied its new balancing test to the question whether firefighter staffing levels are a mandatory subject of bargaining and held that firefighter staffing levels can trigger a duty to bargain. *City of Richland,* 113 Wn.2d at 207. The court explained,

> When staffing levels have a demonstratedly direct relationship to employee workload and safety, however, we believe that, under appropriate circumstances, requiring an employer to bargain over them will achieve the balance of public, employer and union interests that best furthers the purposes of the public employment collective bargaining laws.

Id. at 204. In other words, the court weighed the employer's interest in deciding how many firefighters should be on duty at a given time against the employees' interest in safety to determine whether bargaining on the subject was required.

In *King County* , 94 Wn. App. 431, the court affirmed PERC's decision that a policy regarding whether jail employees must reveal their full names on identification badges is a mandatory subject. The court weighed the county's operational need for the badges against the impact on employee safety and concluded that the policy was a mandatory subject because the employees' safety concerns were legitimate and significantly aggravated by the policy. *Id.* at 440. Citing the National Labor Relations Board ("NLRB"), the court noted that "if a proposed change is of 'legitimate concern' to the union, the employer should be required to bargain." *Id.* (citation omitted).

Application of the *City of Richland* balancing test to Article 18.2 leads to the conclusion that Article 18.2 is a mandatory subject because Community Transit has a strong interest in having the ability to nimbly change standard operating procedures during a contract term, while the union has an interest in being able to bargain any decisions that impact working conditions.

> Article 18.2 states:
> The Employer agrees to notify the Union of any changes in the Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except as to Employer administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor agreement.

AR 132. It is undisputed that Community Transit's Rules and Regulations, SOPs and Performance Code address various bus driver working conditions, including road procedures, customer procedures, attendance requirements, uniform requirements, overtime, accidents, and progressive disciplinary rules. AR 30-31. ATU concedes that the Rules and Regulations, SOPs and Performance Code "are or contain mandatory subjects of bargaining." AR 2, ¶ 5-6. In fact, the PERC made a Finding of Fact that the policies in Article 18.2 "address numerous mandatory subjects of bargaining, for example hours of work, work rules, attendance, accident policies, and discipline." Finding of Fact No. 4, AR 1772, adopted by the Commission, CP 15. Based on the PERC's 1997 decision, Article 18.2 gives Community Transit the right to change those working

conditions during the term of the contract without bargaining the decision to do so (while preserving the duty to bargain the impacts or effects of the decision.) Under these circumstances, there can be no reasonable dispute that Article 18.2 impacts employee working conditions in a direct manner and is a legitimate concern to employees.

Additionally, there is no dispute that the subject of grievance procedures is a mandatory subject of bargaining. *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504, 833 P.2d 381 (1992). Not only does the first sentence of Article 18.2 directly relate to employee working conditions, but the second sentence of Article 18.2 directly relates to the parties' grievance procedure. The second sentence states that employees may not file a grievance over any changes in Rules and Regulations, SOP's and the Performance Code.

In sum, Article 18.2 has a demonstrated direct relation to numerous employee working conditions, as well as to the parties' grievance procedure, all of which are mandatory subjects. Therefore, Article 18.2 is a mandatory subject of bargaining under the *City of Richland* balancing test unless Article 18.2 lies at the "core of entrepreneurial control."

Clearly, Article 18.2 does not lie at the core of Community Transit's entrepreneurial control. Article 18.2 is a contractual agreement that Community Transit can exercise authority in areas that are *not* at the core of its entrepreneurial control: employee working conditions. As a

result, Article 18.2 is a mandatory subject of bargaining under the *City of Richland* balancing test.[5]

3. Article 18.2 is a Mandatory Subject Under *City of Pasco.*

Almost twenty years ago, in 1994, the PERC decided that contractual waivers that address mandatory subjects of bargaining are themselves mandatory subjects of bargaining. The PERC's decision was appealed to the Washington Supreme Court, which affirmed PERC in its entirety. Although the trial court and the Commission have attempted to minimize and distinguish *City of Pasco* from this case, that effort fails. The facts of *City of Pasco* are not meaningfully different from the facts in this case. The authority and logic underlying the *City of Pasco* decision lead to the same conclusion here that waivers can be a mandatory subject of bargaining. The Supreme Court's decision affirming the PERC's decision on that point cannot be ignored.

a. PERC's decision in *City of Pasco.*

The *City of Pasco* case involved a situation, like the situation involving the parties here, in which a union informed the employer during bargaining that it viewed certain proposals as waivers and as such, non-

[5] A PERC ruling confirming that provisions that operate as contractual waivers are a mandatory subject of bargaining will not lead to employers forcing unions to accept such provisions any more than employers are required to accept union requests for wage increases. Instead, it would allow employers to insist that unions at least bargain over them at the bargaining table. Whether unions ultimately agree to the proposals – like whether employers agree to wage increase proposals – will be determined by the reasonableness of the proposal, the back and forth of the bargaining process, and potentially by an neutral interest arbitrator persuaded by the employer's need for such a provision.

mandatory subjects of bargaining that had to be withdrawn. *City of Pasco*, 132 Wn.2d at 456-57. The two provisions at issue in *City of Pasco* were a "management rights" clause and an "hours of work" proposal. The management rights clause established the employer's right during the contract term to change a long list of working conditions without bargaining, including laying off employees, scheduling employees, and determining the "mission, policies, and all standards of service offered to the public." *Id.* at 456. When the employer refused to withdraw the proposals, the union filed an unfair labor practice complaint in which it asserted that the proposals were non-mandatory subjects of bargaining.

The complaint first went to a hearing examiner. The examiner issued a written decision stating, "The precise issue to be resolved in this case is whether, after bargaining in good faith to an impasse, an employer may seek interest arbitration on proposed 'management rights' and 'hours' provisions which contain waivers of union bargaining rights on mandatory subjects of bargaining." *Pasco Police Officers Ass'n v. City of Pasco*, No. 4694, 1994 WL 900086 (Wash. Pub. Emp't Relations Comm'n April 26, 1994) (emphasis added).

The examiner engaged in a thoughtful and comprehensive balancing of the competing interests between employers and unions regarding waivers. *Id.* at *15-16. For example, he noted that although waivers imposed on a union through interest arbitration could result in "substantial mischief," he found it is in both parties' interest for an employer to have some flexibility to manage operations. *Id.* He also

observed that without the ability to pursue waivers to impasse, the law would "trap the employer and union in a continuous round of bargaining." *Id.* at *16. After reviewing federal law and balancing the competing interests, the examiner concluded that because an interest arbitrator would ultimately decide whether a waiver was reasonable and appropriate, waiver clauses are a mandatory subject that can be pursued to impasse. *Id.* The examiner included a Finding of Fact that the proposals waived the union's statutory bargaining rights on certain matters for the life of the contract. Finding of Fact No. 4, *Id.* at *17.

The union appealed to the Commission. The PERC affirmed examiner's findings of fact and conclusions of law. *Pasco Police Officers Ass'n v. City of Pasco*, No. 4694-A, 1994 WL 900087 (Wash. Pub. Emp't Relations Comm'n Dec. 1994) at *10. The PERC acknowledged that employers make concessions to obtain waivers of bargaining rights in order to gain greater flexibility in administering labor contracts. *Id.* at 8. The Commission also acknowledged that federal case law was "well-settled" and favored the employer. *Id.* at 9. The Commission distinguished between waivers that address wages, hours, and working conditions (which it found to be mandatory) from waivers that address other things such as employee activities outside the workplace, the employer's religious mission, or the use of court reporters in bargaining sessions. *Id.* at 9. The Commission wrote:

> The crux of the issue in this case would seem to be one of perspective: The employer sees its "management rights" and "hours" proposals as fulfilling its statutory duty to

> bargain on the subjects covered for the life of the contract; the union views the same proposals as waivers of its right to bargain specific "management rights" or "hours" issues as they may arise during the life of the contract.

City of Pasco, 2004 WL 900086 at *9. The Commission concluded that the issue of whether the waivers were mandatory was determined by the "particular subject matter" addressed. *Id.* If the waiver addressed mandatory subjects (*i.e.*, wages, hours or working conditions), then the waiver itself was a mandatory subject.

Applying this rule, the Commission concluded that both proposals (which the examiner found contained waivers) addressed wages, hours, and working conditions and were therefore mandatory subjects. *Id.* The union appealed to the Washington Supreme Court.

b. The Washington Supreme Court affirms PERC in its entirety.

The Washington Supreme Court affirmed PERC's decision in its "entirety." *City of Pasco*, 132 Wn.2d 450, 471 (1997).

The Court initially reiterated that the issue to be determined was whether the proposals were mandatory subjects that could be pursued to impasse. *Id.* at 457. The union argued that waivers could not be imposed by an arbitrator; that waivers are merely a procedure for bargaining; and that waivers are not themselves wages, hours, or working conditions. *Id.* at 462-63. The Court rejected that framing of the issue.

The Court explained that this was not an unfair labor practice complaint involving a union claiming a unilateral change to a mandatory subject of bargaining where the employer was raising the affirmative

defense of "waiver by contract." Instead, this was an "impasse" case in which the sole question was whether proposed contract language constitutes a mandatory subject, such that the party making the proposal can insist that it be considered in bargaining up to interest arbitration. *Id.* at 463. The Court concluded that the union's concerns about the language constituting a waiver of its bargaining right had no merit in that context because the union had not waived anything; it had fully exercised its right to bargain by bargaining about the management rights and hours of work proposals. The Court explained:

> Under Washington law, a public sector employer cannot unilaterally impose the management or hours of work clauses on uniformed personnel: it may only insist on them until impasse, at which point they become the subject of interest arbitration. When an employer has insisted upon such clauses, it procedurally cannot defend itself by saying the union waived its rights on those subjects because the employer has, by insisting to impasse, already bargained with the union. This makes this case an "impasse" case and not a "waiver" case. Procedurally, the Association cannot claim in this case that the proposal waives its collective bargaining rights because it has already exercised these rights. The Association has fulfilled its statutory duties and rights to collectively bargain with the City by bargaining to impasse on the issue and then going to interest arbitration.... We therefore conclude that the management rights and hours of work proposals in this case did not waive the Association's statutory right to collectively bargain.

Id. at 464 (emphasis added). Thus, the Court held that both parties fulfilled their duty to bargain by making proposals and proceeding to interest arbitration. The Court then shifted its analysis to determine

whether the proposals were a mandatory subject that could be pursued beyond impasse.

Looking first to federal precedent, the Court found that "federal case law upon this subject is uniform, well-settled and completely contrary" to the union's position. *Id.* at 465. The Court recognized that under federal law an employer may lawfully insist to impasse on contract provisions that enable it to exercise operational flexibility during the term of a contract. The Court cited *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), in which the employer insisted to impasse on a clause ("Functions and Prerogatives of Management") that explicitly allowed it to "determine the schedules of work." Recognizing that schedules are a "condition of employment," the U.S. Supreme Court held, "whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the [National Labor Relations] Board." *Id.* at 409. The U.S. Supreme Court thus embraced the concept that an employer can lawfully insist upon achieving operational flexibility through a clause that effectively waives the union's right to bargain such matters during the term of the contract.

The union argued to the Washington Supreme Court that federal precedent was inapplicable because the waiver under Washington law could be achieved by an employer through interest arbitration, thus potentially requiring a union to waive the right to bargain during the contract without affirmatively agreeing to the waiver. The Washington

Supreme Court rejected that argument and noted that employers cannot unilaterally impose such clauses, they may only insist on them to impasse, at which point they become the subject of interest arbitration. *Id.* at 464. Indeed, the existence of interest arbitration protects a union from having an overly ambitious clause inserted in the contract. *Id.* at 467. In interest arbitration, the employer is required to convince a neutral arbitrator to achieve the clause, thus providing the union with assurance that any asserted waiver will be reasonable. *Id.*

At the same time, the *City of Pasco* Court made clear that the duty to bargain in good faith does impose limits on the scope of a waiver. It explained that such clauses "can go only so far." *Id.* at 466. "Under the NLRA, such clauses cannot invade a union's statutory right and duty to be the exclusive representative of the relevant employees." *Id.* The Court pointed to *Toledo Typographical Union No. 63 v. N.L.R.B.*, 907 F.2d 1220 (D.C. Cir. 1990) ("*Toledo Blade*") as an example of this doctrine. In *Toledo Blade*, the employer sought not only to make unilateral operational decisions during the term of the agreement, but also to bargain directly with employees over retirement. *Toledo Blade*, 907 F.2d at 1221. The Washington Supreme Court recognized that there is a fundamental distinction between a proposal seeking to attain the ability to act unilaterally in specific areas during the term of a contract from proposals that seek to emasculate or circumvent the right of the union to represent its members, such as "a direct dealing clause like the one in *Toledo Blade.*" *City of Pasco* at 468. The *City of Pasco* Court concluded that the *Toledo*

Blade clause "does not, therefore, merely retain for the employer unilateral authority to set terms and conditions of employment." *Id.* at 466.

The Washington Supreme Court concluded that *American Nat'l Ins. Co.*, 343 U.S. 395 (1952) and its progeny apply in Washington State. *City of Pasco* at 467. It then held that the employer's proposals were a mandatory subject of bargaining. *Id.* at 470. The Court explained,

> In the case before this court, practically every item listed in the clause addresses either wages, hours, or working conditions, *i.e.*, mandatory subjects of bargaining. Nor does the management rights proposal circumvent the right of the union to represent its members, as would, for example, a direct dealing clause like the one in *Toledo Blade*.

Id. at 468.

c. *City of Pasco* applies to this case.

This case is substantively identical to *City of Pasco*. In both cases, the union argued that contract provisions were a non-mandatory subject of bargaining because they contained "waivers." As recognized in *City of Pasco*, the question here is not whether Article 18.2 contains a "waiver" but whether the clause addresses mandatory subjects, such that it is a mandatory subject that the employer can pursue to interest arbitration.

The legal standard under *City of Pasco* for determining whether Article 18.2 is a mandatory subject is whether the items in the clause address wages, hours, or working conditions or whether the clause allows the City to engage in "direct dealing" as in *Toledo Blade*. *City of Pasco* at 468. As discussed above, Article 18.2 lists working conditions that Community Transit can change during the term of the contract, just like

the proposals at issue in *City of Pasco.* Article 18.2 does not permit Community Transit to bargain directly with employees over their working conditions, as did the clause in *Toledo Blade*. Therefore, *City of Pasco* applies to this case, and Article 18.2 is a mandatory subject of bargaining under the Supreme Court's analysis.

The trial court and PERC attempted to minimize and distinguish *City of Pasco* from this case, reasoning that the Supreme Court did not reach the question of whether waivers are a mandatory subject. CP 105 ("There is no Washington authority addressing the issue of waiver as presented in this appeal.") This is not correct as a matter of fact or law.

The examiner in *City of Pasco* issued a Finding of Fact stating that the employer had made proposals for a management rights and hours of work clauses "by which the union would waive its statutory bargaining rights on certain matters for the life of the collective bargaining agreement." Finding of Fact No. 4, *City of Pasco* 1994 WL 900086 a *17. The PERC affirmed and adopted that Finding of Fact. *City of Pasco*, 1994 WL 900087 at *10. The Supreme Court then affirmed the PERC's order "in its entirety." *City of Pasco* at 471.

Community Transit concedes that the Supreme Court's decision contains a statement that the Court "need not determine" whether waivers are mandatory subjects or not (*City of Pasco* at 463); however, this statement must be read in the context of the Court's reasoning that the term "waiver" is misplaced in a case asking whether something is a mandatory subject of bargaining. Under the Court's analysis, a union does

not waive anything when the employer is entitled to pursue a proposal on a mandatory subject in bargaining, because it "fulfills its statutory duties and rights to collectively bargain with the City by bargaining to impasse on the issue and then going to interest arbitration." *City of Pasco* at 464. Therefore, the Court concluded that the proposals at issue in the case "did not waive" the union's rights to collectively bargain. *Id.* The rest of the Court's opinion, analyzing federal labor law that gives employers the right to bargain for language allowing them to change working conditions during the term of the contract, clearly signals that the Court understood that, if included in the contract, the proposed language could support a waiver by contract defense during the contract term. The Court merely rejected the label of "waiver" in the context of the dispute in front of it.[6]

The Washington Supreme Court's rejection of the "waiver" label is consistent with the view of other courts, including the Federal Circuit Court of Appeals for the District of Columbia. The District of Columbia Circuit rejects the "waiver" label and views labor contract language giving an employer the right to make changes during the term of a contract like any other provision of a labor contract "covering" the subject. *See B.P. Amoco Corp. v. NLRB*, 217 F.3d 869, 873 (D.C. Cir. 2000) ("A waiver

[6] It is not reasonable for PERC - or ATU - to assert that the management rights proposal at issue in *City of Pasco* was not a waiver. One of the rights listed in the proposal was the right "to layoff" employees. *City of Pasco* at 456. The decision to layoff is a mandatory subject of bargaining, and public employers routinely rely on contract waivers in the form of a management right to layoff as a waiver of the duty to bargain layoffs. *City of Bellevue*, 2010 WL 3283656 at *14.

occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.") (emphasis in original), *quoting*, *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993).

In *City of Pasco*, the PERC ruled that language giving an employer the right to change working conditions during the term of an agreement (whether labeled a "waiver" or viewed as simply "covering" the subject) is a mandatory subject of bargaining. The Washington Supreme Court affirmed the PERC's decision, relying on federal law that allows employers to bargain for such flexibility, including *American Nat'l Ins. Co.*, 343 U.S. 395 (1952). If the City of Pasco can bargain for the right to lay off employees without bargaining, Community Transit can bargain for the right to change Standard Operating Procedures without bargaining, without offending the PECBA.

4. Article 18.2 is a Mandatory Subject Under Persuasive Federal Labor Law.

"Collective bargaining as defined in RCW 41.56.030(4) is patterned after section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158." *Int'l Ass'n of Firefighters, Local 469 v. Public Employment Relations Commission*, 38 Wn. App. 572, 577, 686 P.2d 1122 (1984). Therefore, it is "logical" to follow federal labor law on questions involving the duty to bargain. *Id.; Klauder v. San Juan County Deputy*

Sheriffs' Guild, 107 Wn.2d 338, 728 P.2d 1044 (1986) (the definitions of collective bargaining under the NLRA and PECBA are "parallel").

A long line of well-reasoned cases from federal courts and the NLRB hold that proposals giving an employer the right to make changes to mandatory subjects of bargaining during the term of the labor contract are themselves mandatory subjects of bargaining. *See, e.g., American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 878 (9th Cir. 1978); *NLRB v. Salvation Army of Mass. Dorchester Day Care Ctr.*, 763 F.2d 1, 7 (1st Cir. 1985); *Gulf States Mfrs., Inc. v. N.L.R.B.*, 579 F.2d 1298, 1318 (5th Cir 1978); *Coastal Elec. Co-op.*, 311 NLRB 1126 (1993); *Commercial Candy Vending Div.*, 294 NLRB 908 (1989); *Houston County Elec. Co-op. Inc.*, 285 NLRB 1213 (1987); *Rescar, Inc.*, 274 NLRB 1 (1985). The Washington Supreme Court expressly acknowledged this in *City of Pasco*. *City of Pasco*, 132 Wn.2d at 465-467 ("[F]ederal case law on this subject is uniform, well settled and completely contrary to [the union's] position").

There is no dispute that Article 18.2 operates to give Community Transit the right to make changes to mandatory subjects of bargaining during the term of the labor contract. Therefore, under persuasive federal labor law, it is a mandatory subject of bargaining. In *City of Pasco*, both the PERC and the Washington Supreme Court determined that Washington State followed this federal law. The PERC has offered no reasoned basis for its departure, in this case, from persuasive federal law.

5. Article 18.2 is a Mandatory Subject Under *Whatcom County.*

Consistent with the Supreme Court's conclusion in *City of Pasco* that management rights clauses can "only go so far," the PERC previously found that certain contractual waivers are non-mandatory because they were excessive in the extreme (overly broad). *Whatcom County Deputy Sheriff's Guild v. Whatcom County*, No. 7244-B, 2004 WL 725698 (Wash. Pub. Emp't Relations Comm'n February 11, 2004).

In *Whatcom County*, the employer proposed substantial revisions to two clauses of the contract: its management rights and rules of operation. The employer's negotiator testified that the management rights proposal would have allowed the employer to unilaterally change anything that was not addressed in the contract. *Whatcom County*, 2004 WL 725698 at *11. The PERC found, "These employer proposals would have substantially altered the collective bargaining system provided for in the statute, by eliminating the role of the 'representative' chosen by the employees in any matters not specifically covered by the terms of the contract." *Id.* at *5 (emphasis added).

Whatcom County does not mandate an outcome in favor of ATU in this case. First, the PERC is prohibited from approaching mandatory/non-mandatory bargaining questions "summarily." *City of Richland*, 113 Wn.2d at 207. "Every case presents unique circumstances, in which the relative strengths of the public employer's need for managerial control on the one hand, and the employees' concern with working conditions on the other, will vary." *Id.* PERC is charged with engaging in the "delicate task

of accommodating the diverse public, employer and union interests at stake in public employment relations" before ruling on whether a proposal is a mandatory subject or not. *Id.* at 203. Therefore, superimposing the conclusions from *Whatcom County* into this case without considering Community Transit's special needs for operational flexibility as a public transportation provider competing for passengers, which are vastly different from a county government, is improper.

Moreover, the PERC was careful to limit its holding in *Whatcom County*: "All we are saying here is that an employer cannot insist to impasse on a broad waiver of statutory rights."[7] *Whatcom County* at *7 (emphasis added). The facts of the case demonstrated that Whatcom County's proposed waivers were too broad. Article 18.2 is not.

The management rights proposal at issue in *Whatcom County* was intended to operate as a waiver for anything not listed in the contract. *Whatcom County*, Finding of Fact. No. 10 ("As explained by employer's negotiator in face-to-face discussions between the parties, the employer's intention was that the proposed language would permit the employer to unilaterally implement any change it desired during the term of the proposed agreement on any matter not covered in the parties' contract, by adopting or amending a rule.") Article 18.2 does not do this. Article 18.2

[7] The PERC carefully limited its holding in *Whatcom County* in this sentence. Should ATU argue that *Whatcom County* established a *per se* rule that all waivers of the duty to bargain are non-mandatory subjects, *Whatcom County* cannot stand in light of *City of Pasco*, in which the right to layoff was held to be a mandatory subject of bargaining. *Whatcom County* was never appealed.

gives Community Transit the ability to make changes to subjects specifically listed in Article 18.2 (Rules and Regulations, SOPs and Performance Code).

Nor is Article 18.2 like the rules of operation proposal in *Whatcom County*, which proposed a procedural alternative to PERC itself: an agreement that disputes over whether the employer had changed a mandatory subject would go to a private labor arbitrator instead of PERC. The rules of operation proposal in *Whatcom County* stated:

> The Department shall adopt reasonable written rules of operating the Department and the conduct of employees provided, however, before such rules are posted, a copy shall be furnished to the Guild. The Guild shall be allowed not less than thirty (30) days in which to make known any objection they may have concerning such rules, except in the case of emergency.
>
> Any unresolved objection regarding the reasonableness of any new or revised rule that involves a material change on bargaining unit employee in a mandatory subject of bargaining within the meaning of RCW 41.56., *i.e.*, "wages, hours or working conditions", may be submitted to arbitration by the Guild pursuant to Article 23 of this Agreement. The arbitrator's jurisdiction and authority in such cases shall be limited to deciding whether the Department has made a material change in a mandatory subject of bargaining and, if so, whether the new or revised rule is reasonable. If the arbitrator decides that the rule is not reasonable, he/she may as an exclusive remedy order the County to rescind the rule and restore the status quo ante. The arbitrator shall have no authority to otherwise alter or modify the Department's rules.

Finding of Fact No. 10, *Whatcom County* at *10.

The Commission described the rules of operation proposal as the employer's attempt to "establish bargaining procedures to be followed in the event it wanted to make mid-term changes" under which the union was to have "the right to object within 30 days, and to submit the issue to arbitration for a determination limited to whether the change was 'reasonable.'" *Id.* at *5.

Article 18.2 does not establish a procedure involving private labor arbitration, usurping the statutory process for refusal to bargain unfair labor practices. It states that Community Transit must give ATU notice of any changes it makes and that employees cannot grieve those changes. AR 132. It does nothing more. Article 18.2 is more like the list of subjects the City of Pasco could change in its management rights provision in *City of Pasco*. Whatcom County's proposed waivers were too "broad;" Community Transit's is not.

D. PERC Exceeded its Statutory Authority by Prohibiting Community Transit from Pursuing a Mandatory Subject of Bargaining to Impasse.

Although Washington courts generally accord great deference to PERC's interpretation of the law it administers, PERC has no more authority than is granted to it by the Legislature. *Local 2916 IAFF v. Public Employment Relations Commission*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995). PERC derives its authority from chapter 41.58 RCW, the statutory scheme that creates the Commission, and chapter 41.56 RCW, the Public Employees' Collective Bargaining Act. *Municipality of Metro.*

Seattle v. Public Employment Relations Commission, 118 Wn.2d 621, 633, 826 P.2d 158 (1992). The power to determine the extent of that authority is a question of law ultimately vested in the courts. *Local 2916 IAFF* at 379. The Washington Supreme Court has explained that the Legislature only granted PERC "limited authority." *Id.* at 383. "[PERC] was not created as a court of general jurisdiction, and thus it has no authority to decide whether an act is an unfair labor practice unless the right that is affected is guaranteed by statute." *Id.*

As detailed above, the Washington Supreme Court, relying on long-settled federal precedent, decided that an employer's proposal to give itself the ability to make changes to mandatory subject during a contract term is itself a mandatory subject of bargaining. *See NLRB v. American National Ins. Co.*, 343 U.S. 395 (1952). PERC's decision establishing a new unfair labor practice for pursuing such clauses to impasse is inconsistent with these interpretations of the law. PERC thereby exceeded its statutory authority pursuant to RCW 34.05.570(3)(b). It is not unlawful for an employer to pursue contract provisions giving it the right to make changes to specified working conditions during the term of a labor contract to impasse.

E. PERC's Decision is Arbitrary and Capricious Because PERC Willfully Disregarded the Attending Facts and Circumstances of the Case Before It.

Agency action is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d

139 (1997). PERC's decision is arbitrary and capricious because PERC failed to consider Community Transit's specific needs for Article 18.2, which it was required to do under the *City of Richland* balancing test.

V. CONCLUSION

Under the breathtakingly broad approach adopted by the Commission in this case, any purported waiver of the right to bargain, regardless of scope or subject matter, is non-mandatory and thus bargaining may not be required. The Commission's decision, rewriting public sector labor law in Washington, should be categorically rejected.

For the reasons discussed above, Community Transit respectfully requests that this Court invalidate the PERC's Decision 10647-A.

DATED this 19th day of October, 2012.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By: _____ #40578 for
Sofia D. Mabee, WSBA #31679
Shannon E. Phillips, WSBA #25631

Attorneys for Appellant Community Transit

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Brief of Appellant to be served by hand delivery, addressed to the following:

Beth Barrett Bloom
Frank Freed Subit & Thomas, LLP
705 Second Ave., Suite 1200
Seattle, WA 98104

Office of the Attorney General
State of Washington
1125 Washington Street SE
Olympia, WA 98504-0100

Michael P. Sellars, Executive Director
Marilyn Glenn Sayan, Chairperson
Public Employment Relations Commission
112 Henry Street NE, Suite 300
Olympia, WA 98506

DATED October 19, 2012, at Seattle, Washington.

Kimberly Handley

Kimberly Handley

Court of Appeals Case No. 43783-0-II
Thurston County Superior Court Case No. 11-2-02686-5

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a COMMUNITY TRANSIT,

Petitioner/Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION and AMALGAMATED TRANSIT UNION, LOCAL 1576,

Respondents/Appellees.

ERRATA

Sofia D. Mabee, WSBA #31679
Shannon E. Phillips, WSBA #25631
SUMMIT LAW GROUP, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
Attorneys for Petitioner/Appellant Community Transit

TO: CLERK OF THE COURT; and

TO: All Counsel of Record.

PLEASE TAKE NOTICE that Brief of Appellant, filed on October 19, 2012, did not include a table of authorities. Please add the table of authorities to the Brief of Appellant which is attached to this Errata.

DATED this 12th day of November, 2012.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By: _____
Sofia D. Mabee, WSBA #31679
Shannon E. Phillips, WSBA #25631

Attorneys for Appellant Community Transit

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Errata to be served by hand delivery, addressed to the following:

Beth Barrett Bloom
Frank Freed Subit & Thomas, LLP
705 Second Ave., Suite 1200
Seattle, WA 98104

Office of the Attorney General
State of Washington
1125 Washington Street SE
Olympia, WA 98504-0100

Michael P. Sellars, Executive Director
Marilyn Glenn Sayan, Chairperson
Public Employment Relations Commission
112 Henry Street NE, Suite 300
Olympia, WA 98506

DATED November 13, 2012, at Seattle, Washington.

Kimberly Handley

TABLE OF AUTHORITIES

Cases

Statutes

Treatises