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 RESPONDENTS AMALGAMATED TRANSIT UNION, LOCAL 1576

Frank Freed Subit & Thomas, LLP
Beth Barrett Bloom, WSBA # 31702
705 Second Avenue, Suite 1200
Seattle, Washington 98104
(206) 682-6711

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I. INTRODUCTION

Washington law supports the right of public employees to bargain collectively with public employers concerning matters of direct concern to employees. State law requires public employers to confer and negotiate in good faith with employee bargaining representatives concerning personnel matters, including wages, hours and working condition. RCW 41.56.030(4).

The duty to bargain has limitations. Parties to the bargaining relationship have a duty to bargain concerning employee working conditions. Parties have a right to be free from bargaining on any other matters. Employers enjoy a sphere of control concerning their entrepreneurial endeavors. Unions are free to manage their internal affairs. State law prevents either party from demanding concessions from the other in matters within management or union prerogative.

The Public Employment Relations Commission ("PERC" or "the Commission") protects the interests of both parties in collective bargaining. It ensures that mandatory subjects are included in bargaining negotiations. It may also intervene to stop either party from seeking concessions on matters not required by statute.

In this case, Community Transit attempted to compel ATU to accept a contract provision that would replace the statutory bargaining

scheme with an alternative procedure. This provision required a broad waiver of the union's right to bargain collectively with the employer. PERC intervened to prevent submission of the disputed provision to interest arbitration. It found the disputed term, "Article 18.2," was a permissive subject of bargaining. Permissive subjects may not be bargained to impasse or interest arbitration.

PERC acted appropriately and within its authority. The agency plays a valuable role as gatekeeper in the collective bargaining process. In this case, PERC preserved the right of a bargaining representative be free from compelled bargaining on matters not required by statute. PERC also protects public employers when unions attempt to compel improper concessions. Like an umpire calling balls and strikes, the Commission plays a critical role as a neutral authority. PERC preserves public resources and encourages good faith bargaining by limiting matters subject to interest arbitration. Unhappy with the determination of the agency, Community Transit filed this appeal pursuant to RCW 34.05.570.

II. ISSUES ON APPEAL

Community Transit, a public employer, contends that the Washington Public Employment Relations Commission erroneously interpreted and applied the Public Employees Collective Bargaining Act,

RCW 41.56, *et. seq.*, exceeded its statutory authority, and that its decision was arbitrary and capricious when it held that the employer committed an unfair labor practice by bargaining to impasse a permissive subject of bargaining -- a waiver provision including a broad waiver of the union's statutory right to bargain.

III. FACTUAL AND PROCEDURAL BACKGROUND

Respondent Amalgamated Transit Union Local 1576 ("union" or "ATU") represents several hundred bus and transit employees who work for Petitioner Community Transit, a municipal corporation providing transit services to Snohomish and King Counties. Administrative Record 54, 58 ("AR"). The union and the employer have had a bargaining relationship for over 30 years. AR 1764.

A. Bargaining History [1]

In the fall of 2007, the parties began negotiations for a successor bargaining agreement. The parties' collective bargaining agreement states:

> **Section 18.2** The Employer agrees to notify the union of any changes in the Employee's Rule 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 the Employer

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[1] Decision of Commission 10647-A (Wash.Pub.Emp.Com. Nov. 21, 2011) (AR 1842-1848).

> administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor Agreement.
>
> **Section 18.3** The Union and/or employees may submit written comments and suggestions within five (5) calendar days of such notice. The Employer will consider such comments and suggestions in issuing such policies in final form.

Language similar to Article 18.2 has been in the parties' collective bargaining agreement since 1979. The same language, previously contained in Article 19.2, was the subject of an unfair labor practice complaint. *Amalgamated Transit Union, Local 1576 v. Community Transit*, Decision 6375, 1998 WL 1978452 (Wash.Pub.Emp.Rel.Com. July 23, 1998) (AR 164-169). In 1998, the employer argued that the provision was a waiver clause. The examiner agreed, holding that the clause waived the union's statutory right to bargain mid-term changes impacting wages, hours, and terms and conditions of employment. *Id.* The examiner found the provision established an alternative procedure for establishing employer rules and regulations. *Id.*

During subsequent contract bargaining, the union proposed changes to Article 18.2, and the employer proposed that the language continue. The parties sought the assistance of a mediator. During mediation, the union's position was that Article 18.2 was a permissive subject of bargaining. Neither party agreed to the other party's proposal.

On March 24, 2009, the mediator certified Article 18.2 as an issue for interest arbitration.

B. Procedural History

PERC ordered a hearing and suspended certification of Article 18.2. AR 5-6; 186-87. After a hearing, a second hearing examiner also found that Article 18.2 is a bargaining procedure, which extinguishes the union's statutory right to negotiate mid-term changes to employer policy manuals impacting mandatory subjects of bargaining. *Amalgamated Transit Union Local 1576 v. Community Transit,* Decision 10647, 2010 WL 235040 (Wash.Pub.Emp.Rel.Com.) (AR 1762-77).

The examiner found Article 18.2 was a waiver clause, which required a broad waiver of the union's statutory rights. *Id.* at *3. It would "affect the relationship between the employer and union, by enabling the employer to change work rules without having to deal with the union." *Id.* citing *Whatcom County Deputy Sheriff's Guild v. Whatcom County,* Decision 7244-B, 2004 WL 725698 (Wash.Pub.Empl.Rel.Com. Feb. 11, 2004) ("*Whatcom County*"). As a waiver provision governing the relationship between the union and the employer, Article 18.2 is a permissive subject of bargaining. *Id.* at *3. The examiner found Community Transit had committed an unfair labor practice by bargaining

a permissive subject to impasse and seeking interest arbitration. *Id.* Community Transit filed an appeal.

The Commission affirmed the examiner's decision without modification. *Amalgamated Transit Union Local 1576 v. Community Transit,* Decision 10647-A, 2011 WL 6026156 (Wash.Pub.Emp.Rel.Com Nov. 11, 2011) (AR 1842-1848). PERC found Article 18.2 excused the employer from what would otherwise be its legal duty to bargain with the union mid-term changes concerning mandatory subjects of bargaining. Like the waiver in *Whatcom County,* Article 18.2 did not directly involve employees' day-to-day responsibilities or the relationship between the employer and the employees. *Id.* at *3.

PERC held that Article 18.2 was a broad waiver of statutory rights, a permissive subject of bargaining, which could not be bargained to impasse. AR 1846. The Commission directed the employer to withdraw its proposal. AR 1774; 1846-47. Reiterating its holding in *Whatcom County*, PERC concluded "it is simply inconsistent with the purpose of the statute to permit an employer to insist to impasse on the exclusion of the employees' statutory representative from the bargaining process." *Id.* at *4.

Community Transit filed this appeal pursuant to RCW 34.05.570 of the Washington Administrative Procedure Act. CP __ *Petition for*

Review (Dec. 20, 2011). The parties submitted additional briefing and appeared for oral argument before Judge James J. Dixon of Thurston County Superior Court. Judge Dixon affirmed PERC's decision. CP ___ *Order Denying Community Transit's Petition for Review* (July 6, 2012).

IV. LEGAL ARGUMENT AND AUTHORITY

A. Standard of Review.

Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Washington Administrative Procedures Act ("WAPA"). *City of Pasco*, 132 Wn.2d, at 827, 832. An appellate court reviews agency action under the same WAPA standards as the Superior Court. *E.g., Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003).

RCW 34.05.570(3)(d) permits relief from an agency order if the agency erroneously interpreted or applied the law. Under the error of law standard, the court may substitute its interpretation of the law for that of PERC. *City of Pasco*. The burden of demonstrating the invalidity of agency action is on the party asserting the impropriety. RCW 34.05.570(1)(a); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 587, 593, 90 P.3d 659 (2004).

The Washington Legislature has charged PERC with the administration and enforcement of the PECBA, RCW 41.56., *et. seq., City of Pasco v. PERC*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992) (*"City of Pasco v. PERC")*. The Legislature has directed the governor to appoint to PERC "persons knowledgeable in the area of labor relations in the state." RCW 41.58.010(2). PERC has expertise in Washington public sector labor relations, not the courts. *Maple Valley Firefighters*. "Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment." *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987) (internal quotation omitted).

Courts give "great weight" and "deference" to PERC's resolution of textual ambiguities within the PECBA. *City of Pasco v. PERC*; *Maple Valley Firefighters*. A court should uphold an agency's interpretation of a statute it administers if the construction is plausible and not contrary to legislative intent. *Pitts v. DSHS*, 129 Wn. App. 513, 523, 119 P.3d 896 (2005). Likewise, an agency's findings of fact are granted deference. *Mader v. Health Care Authority*, 149 Wash.2d 458, 470, 70 P.3d 931, 936 (Wash.,2003)

The Employer claims that PERC's decision in this case was (1) outside of the Commission's authority; (2) legally erroneous; and (3)

arbitrary or capricious. *Petition for Review.* (citing RCW 34.05.570 (3)(b),(d), (i)). The employer has not met its burden of proof with respect to any of these grounds.

B. The Public Employment Duty To Bargain.

The Public Employees' Collective Bargaining Act (PECBA) empowers public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers. RCW 41.56.010. The intent of RCW 41.56 is to:

> ... promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010.

Under the PECBA, a public employer has a duty to engage in collective bargaining with the employees' exclusive bargaining representative. RCW 41.56.100(1). It is an unfair labor practice for a public employer to refuse to engage in collective bargaining with the employee's exclusive bargaining representative. RCW 41.56.140(4). It is an unfair labor practice for a public employer to interfere with, restrain, or

coerce public employees in the exercise of their rights guaranteed by the PECBA. RCW 41.56.140(1).

The obligation to bargain in good faith is mutual. It is an unfair labor practice for a bargaining representative to refuse to engage in collective bargaining with a public employer or to interfere, restrain, or coerce public employees in the exercise of their rights guaranteed by the PECBA. RCW 41.56.150.

The Washington Legislature empowered PERC to prevent any unfair labor practice and to issue appropriate remedial orders. RCW 41.56.160.

1. Mandatory, Permissive, and Illegal Subjects of Bargaining.

The PECBA defines the scope of collective bargaining required of public employers and bargaining representatives. RCW 41.56.030(4) provides:

> "Collective bargaining" means the 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.*

(emphasis added).

As defined in RCW 41.56.030(4), the duty to bargain extends to "personnel matters, including wages, hours and working conditions ..." The scope of mandatory bargaining is limited to matters of direct concern to employees. *International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Com'n*, 113 Wash.2d 197, 200, 778 P.2d 32, 34 (1989)(*"City of Richland"*). These "mandatory subjects" are matters about which the parties *must* bargain. *Klauder v. San Juan County Deputy Sheriffs' Guild,* 107 Wash.2d 338, 341, 728 P.2d 1044 (1986). *See also N.L.R.B. v. Wooster Div. of Borg-Warner,* 356 U.S. 342, 349, 78 S.Ct. 718, 722, 2 L.Ed.2d 823 (1958) (examining National Labor Relations Act).

On the other hand, the parties need not bargain on other matters which are referred to as "permissive or nonmandatory" subjects of bargaining. *Klauder,* 107 Wn.2d at 341-42, 728 P.2d 1044. Permissive subjects are management and union prerogatives, along with procedures for bargaining mandatory subjects. *See City of Pasco*, 132 Wn.2d at 460. Parties are free to discuss and agree to contract provisions not directly related to wages, hours and working conditions, but such terms must be the product of mutual consent. *Klauder,* 107 Wn.2d at 344.

Illegal subjects are matters that parties may not agree upon, because of statutory or constitutional prohibitions. Neither party has an

obligation to bargain such matters. *City of Seattle*, Decision 4687-B (PECB, 1997), *aff'd*, 93 Wn. App. 235 (1998), *review denied*, 137 Wn.2d 1035 (1999).

2. Impasse and Interest Arbitration.

Unlike the National Labor Relations Act, the PECBA expressly states that the right to strike is not granted. RCW 41.56.120; .430. In the event of an impasse in negotiations involving uniformed personnel, the PECBA provides for interest arbitration as an alternative means of settling disputes. RCW 41.56.430. The members of ATU are employees of a public passenger transportation system. Thus, labor disputes are subject to interest arbitration through PERC. RCW 41.56.492.

An impasse is reached where, after a reasonable period of good faith negotiation, the parties reach their final positions but remain at odds over one or more bargaining subjects. *City of Pasco,* 132 Wash.2d 450, 461 (citation omitted). If the parties reach impasse during contract negotiations, either the union or the employer may submit the dispute to PERC, which appoints a mediator. RCW 41.56.440. If, after a reasonable period of negotiations and mediation, the parties remain at impasse, then an interest arbitration panel is created to resolve the dispute. RCW 41.56.450. The decision of the arbitration panel is final and binding on the parties. RCW 41.56.480.

3. Bargaining Permissive Subjects to Impasse is an Unfair Labor Practice.

In *Klauder*, the Washington Supreme Court held that parties are not entitled to force the submission of permissive subjects to interest arbitration. 107 Wn.2d at 341. To do so is an unfair labor practice. In *Klauder*, the union sought to continue a provision requiring the parties to submit bargaining disputes to interest arbitration over the objection of the employer. Citing *NLRB v. Sheet Metal Workers, Local 38*, 575 F.2d 394 (2d Cir. 1978), the Court wrote:

> A party violates the duty to bargain collectively if it insists, as a precondition to reaching an agreement, on inclusion of a provision concerning a non-mandatory subject for bargaining, that is, a subject other than the mandatory issues of wages, hours, and other terms and conditions of employment.

Klauder, 107 Wn.2d at 341. The U.S. Supreme Court has explained this is because bargaining a permissive subject to impasse is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *NLRB v. Wooster Div. of Borg-Warner,* 356 U.S. 342, 349, 78 S.Ct. 718, 722, 2 L.Ed.2d 823 (1958).

In other words, public employers and bargaining representatives have a duty to bargain regarding grievance procedures and employee wages, hours and working conditions (i.e. mandatory subjects). RCW

41.56.030(4). They have a right to be free of compelled bargaining on any other subject not provided by statute (i.e. permissive or illegal subjects).

Either party may bargain about a permissive topic without losing the right, at any time before the agreement is reached, to a take a firm position that the matter not be included in a contract.[2] Higgins, John, *The Developing Labor Law*, Vol. 1 at 1448 (6th ed. 2012). With the expiration of a collective bargaining agreement, permissive subjects contained therein will continue only with mutual consent. *Klauder,* 107 Wn.2d at 344.

PERC protects the rights of both parties to be free from compelled bargaining regarding permissive subjects. Per WAC § 391-55-265, the Commission provides an administrative procedure allowing a party to seek suspension of interest arbitration on a disputed item until resolution of an unfair labor charge. This procedure benefits both employers and bargaining representatives as it grants both parties a sphere of control not subject to negotiation.

Employers have a duty to bargain concerning "conditions of employment." However, there are limits to this duty. The U.S. Supreme

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[2] A party's position at the bargaining table is not jeopardized by putting forward a proposal containing both mandatory and permissive items. Although a party may not insist to impasse upon a permissive proposal, it may alter its mandatory proposals in light of the rejection of a permissive subject. Higgins at 1449, citing *Nordstrom Inc.,* 229 NLRB 601 (1977); *Dependable Storage, Inc.,* 328 NLRB 44 (1999).

Court recognized in *Fibreboard Paper Products Corp. v. N. L. R. B.*, 379 U.S. 203, 221-23, 85 S.Ct. 398 (1964) there are certain management decisions that are merely permissive subjects of bargaining. These are business decisions "which lie at the core of entrepreneurial control." [3] *Id.* at 223 (Stewart concurring). Courts also recognize certain managerial prerogatives not subject to mandatory bargaining when public interests are reserved to governmental decision-making. *Spokane Education Ass'n. v. Barnes* 83 Wn.2d 366, 517 P2d 1362 (1974) (no duty to negotiate with teachers organization on the school district's budget). An employer may not be compelled to accept a contract term if its entrepreneurial control or management prerogative predominates. *City of Richland,* 113 Wn.2d 197, 203.

Mandatory subjects of bargaining concern relations between the employer and the employees, not between the union and the employer, or between the union and the employees. Higgins, at 1468; *Whatcom County,* 2004 WL 725698 at *4. Therefore, an employer may request bargaining about internal union matters ("union prerogatives") but may

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[3] Such business decisions may include matters regarding financing, the basic scope of the enterprise, and management decisions fundamental to the "basic direction of the corporate enterprise" or which impinge only indirectly upon employment security. *Id.* An employer who wishes to make changes to these "management prerogatives" has only an obligation to bargain the effects of the decision on mandatory bargaining subjects. *City of Richland*, 113 Wn.2d at 197, 201.

not insist upon a clause to impasse. For example, an employer may not insist upon a clause requiring non-union employees to vote in union meetings. *NLRB v. Corsicana Cotton Mills,* 178 F.2d 344, 347 (5th Cir. 1949). An employer may not insist upon particular bargaining procedures with the union. "[N]onmandatory issues include[e] those that deal with the procedures by which wages, hours and the other terms and conditions of employment are established." *Klauder,* 107 Wn.2d 338, 341-42.

The Commission has recognized a sphere of "management and union prerogative" not generally subject to compelled bargaining. *Yakima County v. Yakima County Law Enforcement Officer's Guild,* Decision 10204-A, 2011 WL 125216 at *3 (Wash.Pub.Emp.Rel.Com. Jan. 11, 2011)

Examples of PERC preventing parties from advancing permissive subjects to interest arbitration are numerous. *See Clark County v. Clark County Deputy Sheriff's Guild,* Decision 11346, 2012 WL 1385447 (Wash.Pub.Emp.Rel.Com. April 18, 2012) (preventing union's certification of permissive subject involving pay for reserve deputies where deputies were not bargaining unit employees); *Yakima County v. Yakima County Law Enforcement Officers' Guild,* Decision 10204-A, 2011 WL 125216 (Wash.Pub.Emp.Rel.Com. January 11, 2011) (preventing union's certification of permissive subject regarding paid

employee leave and training in labor issues); *SEIU Healthcare 775NW v. Washington State,* Decision 10193, 2008 WL 5369734 (Wash.Pub.Emp.Rel.Com. Sept. 24, 2008) (preventing employer's certification of permissive subject of bargaining regarding consumer driven training); *Whatcom County,* 2004 WL 725698 (preventing employer's certification of permissive subject of bargaining involving broad waiver of bargaining rights regarding changes of rules in its procedure manual).

4. The Continuing Duty to Bargain.

While collective bargaining agreements typically fix some terms for the life of the contract, the duty to bargain continues to exist during the life of a collective bargaining agreement as to any mandatory subjects of bargaining which are not specifically addressed by the contract. *Whatcom County,* 2004 WL 725698. Therefore, an employer violates the duty to bargain if it unilaterally implements a change on a mandatory subject of bargaining, without first giving notice to the exclusive bargaining representative of its employees and fulfilling its collective bargaining obligations. *Id.* The union may request bargaining but need not do so. *Id.*

Parties may choose to negotiate certain contract terms to ensure flexibility during the life of the contract. For instance, employers commonly seek a "Management Rights" clause, which defines a sphere of

entrepreneurial authority. A management rights clause with terms directly related to terms and conditions of employment may be a mandatory subject of bargaining. *City of Pasco*, 132 Wn.2d 450. With some limitations, management rights clauses may be bargained to impasse. *Id.*

Parties may also agree to written contract language creating an exception to the duty to bargain. If a union waives its bargaining rights by contract language, an action in conformity with that contract will not be an unlawful "unilateral change". *Community Transit*, Decision 6375, 1998 WL 1978452 (Wash.Pub.Emp.Rel.Com. July 23, 1998). PERC has found broadly-worded management rights clauses insufficient to constitute a waiver of a union's right to bargain changes in mandatory subjects. *Whatcom County,* 2004 WL 72568 at 4. In *City of Yakima*, Decision 3564-A (PECB, 1991), the Commission wrote:

> In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer.

PERC then found no waiver on certain issues in *Yakima*, because the contract provisions were either ambiguous or added no substance to the matter at issue. *Id.*

The waiver of a union's statutory right to bargain must be "clear and unmistakable." *Whatcom County,* 2004 WL 725698, at *4. To meet

the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corporation*, 330 NLRB 1363, 1365 (2000); *Lakewood School District*, Decision 755-A (PECB, 1980) (waiver of bargaining was made knowingly and intentionally); *International Ass'n of Fire Fighters, Local 453 v. City of Wenatchee*, Decision 6517 (PECB, 1998).

When a union agrees to waive its right to bargain, the employer may act unilaterally. "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." *Bellevue Police Support Guild v. City of Bellevue,* Decision 10830, 2012 WL 3283656 at *12 (Wash.Pub.Emp.Rel.Com. Aug. 12, 2010) (citations omitted).

C. In Prior Litigation, PERC Agreed With the Employer: Article 18.2 is a Waiver Provision That Established an Alternative Bargaining Procedure.

ATU and Community Transit litigated the meaning of Article 18.2 in 1998. *Amalgamated Transit Union, Local 1576 v. Community Transit*, Decision 6375, 1998 WL 1978452 (Wash.Pub.Emp.Rel.Com. July 23, 1998) . PERC found Article 18.2 was a waiver provision.

In the 1998 case, the employer made mid-term changes to the disciplinary procedures in its Standard Operating Procedures manual. ATU contended that the employer unlawfully made a unilateral change to mandatory subjects of bargaining without bargaining those changes with the union. The employer argued that (then) Article 19.2 "clearly and unmistakably waived" the union's right to bargain, and the examiner agreed. He held:

> By the language of Article 19 of the parties' 1994-1997 collective bargaining agreement, Amalgamated Transit Union, Local 1576, has waived its right to bargain concerning mandatory subjects of bargaining incorporated into the employer's standard operating procedures or performance code.

Id. at *6. Article 18.2 eliminates the union's statutory right to bargain changes to a great number of mandatory subjects during the life of the contract. Instead of bargaining, ATU agreed to an alternate procedure. The provision requires the employer to provide notice to the union of any changes to its rules and regulations, grants the union five days to provide written comments and suggestions, and affirms that the employer will consider these comments and suggestions before issuing policies in final form. AR 1844-45.

Subjects about which ATU may not bargain include: discipline, hours, attendance, accident policies, and more. *Community Transit,* WL 235040 at *2 (2010).

As the hearing examiner found in the present case, "*Community Transit* involves the exact same contract language" at issue in the present case (then located at Article 19.2). *Community Transit,* WL 235040 at *3-4 (2010). The "Notice of Rules" provision has already been used successfully by Community Transit as the basis for the affirmative defense of waiver by contract. In other words, Article 18.2 is a waiver provision.

D. PERC Correctly Interpreted and Applied the Law When it Held that Article 18.2 is a Permissive Subject of Bargaining.

The issue in this case is whether a waiver of collective bargaining rights is a mandatory or permissive subject of bargaining. It is a case of first impression at the Court of Appeals. This case turns on ambiguities within the definition of "collective bargaining" as set forth in RCW 41.56.030. The Commission's expertise in labor law matters entitles it to great deference and its reasoning must be given great weight. *City of Pasco*, 119 Wn.2d 504, 507-508; *Maple Valley Firefighters*.

PERC's conclusion that Article 18.2 is a permissive subject of bargaining is correct as a matter of law and fact. PERC applied the correct test under *City of Richland.* It properly harmonized its prior decisions in *City of Whatcom* and *City of Pasco,* which was affirmed by the Washington Supreme Court. PERC followed federal labor law. PERC's

conclusion that Article 18.2 is a permissive subject of bargaining should be affirmed.

1. Distinguishing Mandatory and Permissive Subjects of Bargaining is a Question of Law and Fact.

PERC requires parties engaged in contract negotiations to withdraw any permissive subjects of bargaining prior to interest arbitration if not the subject of mutual consent. WAC § 391-55-265. PERC will suspend interest arbitration and conduct a hearing to resolve the impasse dispute. *Id.* The first step in such an impasse hearing is for the examiner and the Commission to determine whether the duty to bargain exists.

Whether a particular subject is mandatory or non-mandatory is a question of law and fact determined by the Commission on a case-by-case basis. *City of Richland*; WAC § 391-45-550. The parties are afforded a hearing before an examiner who will assess the substance of the contract term. *City of Richland*, 113 Wn.2d 197, 202.

When deciding whether an issue is mandatory or permissive, two principal considerations must be taken into account: (1) the extent to which the contract term is of direct concern to employee wages, hours and working conditions, and (2) the extent to which the contract term is deemed to be an essential management or union prerogative. *Seattle Police Officers' Guild v. City of Seattle,* Decision 9957-A; 9958-A, 2009

WL 3241825 at *3 (Wash.Pub.Emp.Rel.Com. Oct. 6, 2009) (citing *City of Richland*).

In *City of Richland,* the Supreme Court reversed PERC's decision finding that the union had impermissibly bargained an equipment and staffing level provision to impasse. 113 Wn.2d 197, 198-99. PERC considered staffing level decisions to be a management prerogative. It failed to consider whether evidence also established a direct relationship to employee concerns. If so, a balancing test may have been appropriate. 113 Wn.2d 197, 204. Rather than a summary analysis, PERC should have considered the possibility of competing interests before resolving the scope of bargaining issue. *Id.*

In some cases a contract term will directly relate to conditions of employment and be a managerial or union prerogative. This was the case in *City of Richland.* "Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which predominates." *Id.* at 203-204 (emphasis added). In other words, if "the disputed issue could fall into either category" a balancing test is required. *County of King v. Washington State Public Employment Relations Com'n*, 94 Wash.App. 431, 972 P.2d 130, 133 (Wash.App. Div. 1,1999).

2. PERC Engaged in the Case-Specific Analysis Required by *City of Richland.*

PERC did not begin with a clean slate when it resolved the scope of the bargaining issue raised in this case. It had the benefit of its 1998 decision where the agency examined the precise language in dispute. *Community Transit,* Decision 6375 (AR 164-169). The 1998 case and the facts established at the scope-of-bargaining hearing both established that Article 18.2 is an alternate bargaining procedure, which includes a broad waiver of union bargaining rights.

In the earlier case, PERC found that the parties bargained for a procedure for establishing the employer's rules and regulations, including SOPs and the performance code. 1998 WL 1978452 at *6. By the terms of the provision, "ATU waived the right to negotiate the particulars of the changes in exchange for notice of changes, opportunity to provide comments and suggestions; and the union obtained an obligation by Community Transit to consider the ATU's comments and suggestions." *Id.*

The rules, regulations, SOPs, and performance codes contained provisions regulating employee discipline, attendance, accidents, and other matters impacting employee working conditions. *Id.* at *4. Ordinarily, a union has the statutory right to bargain disciplinary rules and procedures

impacting employee wages, hours, and working conditions. *Id.* at *3. However, in this case, the union clearly and unequivocally waived its right to bargain these mandatory subjects of bargaining. *Id.* at *6.

When the parties appeared before PERC again in June 2009, the agency faced a new question: could Community Transit bargain Article 18.2 to impasse and interest arbitration? Stated in another way, is a contract term establishing a bargaining procedure and containing a broad waiver of the Union's statutory right to bargain, itself, a mandatory or permissive subject of bargaining? To resolve this dispute, the PERC examiner and then the Commission engaged in the case-specific analysis set forth in *City of Richland* and its predecessors.

a. Article 18.2 does not directly concern the wages, hours, and working conditions of employees under the *City of Richland* test.

Both the hearing examiner and PERC considered the extent to which Article 18.2 directly impacts the wages, hours and working conditions of employees. Both concluded the bargaining provision does not have a direct impact on employee work conditions.

In Article 18, the parties bargained for a procedure to establish *future* rules and operation procedures. The provision requires the employer to provide notice to the union of any changes to its rules and regulations, grants the union five days to provide written comments and

suggestions, and affirms that the employer will consider such these comments and suggestions before issuing policies in final form. AR 1844-45. Article 18.2 replaces the statutory bargaining scheme with a new bargaining procedure involving notice and period for comment. AR 1844-45. PERC has reached this conclusion three times. *See* 1998 WL 1978452 at *6; 2010 WL 235040 at *2; 2011 WL 6026156 at *3.

Article 18.2 does not directly involve employee day-to-day responsibilities or the relationship between employer and employee. AR 1766. 2010 WL 235040 at *3. As the hearing examiner explained, "Article 18.2 would 'affect the relationship between the employer and union, by enabling the employer to change work rules without having to deal with the union.'" *Id.* quoting *Whatcom County.*

The hearing examiner believed these facts made the case similar to *Whatcom County. Id.* at *3. In *Whatcom County,* a 2004 case, PERC held that a contract provision containing an alternate bargaining procedure and a broad waiver of union rights could not be bargained to impasse. *Whatcom County,* Decision 7244-B, 2004 WL 72568 (Wash.Pub.Emp.Rel.Com. Feb. 11, 2004). He also found the clause analogous to the procedures the parties chose to determine wages and other terms and conditions of employment in *Klauder.* He noted that the Supreme Court in *Klauder* held that a methodology for determining terms

of employment is not itself a mandatory subject of bargaining. 2010 WL 235040 at *4 (citing *Klauder*, 107 Wn.2d at 342).

On appeal from the examiner's decision, PERC also assessed whether the particular proposal directly impacted wages, hours or working conditions of bargaining unit employees. *Amalgamated Transit Union Local 1576 v. Community Transit,* Decision 10647-A, 2011 WL 6026156 (Wash.Pub.Emp.Rel.Com Nov. 11, 2011) (AR 1842-1848).

Like the hearing examiner, PERC found Article 18.2 analogous to the provision in *Whatcom County,* because it governed relations between the employer and union and did not directly involve employee day-to-day responsibilities or the employer's relationship with employees. *Id.* at *3.

b. Article 18.2 impacts an essential union prerogative: the right to engage in collective bargaining guaranteed by statute.

The hearing examiner and PERC also considered whether Article 18.2 impacts a management or union prerogative. Both expressed dismay at the employer's attempt to force the union to succumb to broad waivers of rights guaranteed by the PECBA.

The predominant characteristic of Article 18.2 is the exclusion of the union from its statutory bargaining role. The hearing examiner held that Article 18.2 is a waiver clause requiring the union to surrender its

statutory rights to bargain mid-term changes to employer policy manuals impacting mandatory subjects of bargain. 2010 WL 235040 at *7.

PERC explained the high threshold necessary to establish a waiver of bargaining rights. A waiver must be clear and unmistakable. 2011 WL 6026156 at *2 (citations omitted). The typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards necessary to find a waiver. *Id.* at *2 (citing *Griffin School District*, Decision 10489-A, 2010 WL 2553112 (Pub.Empl.Rel.Com. June 18, 2010)). In *Griffin School District,* for instance, PERC held that the employer's reliance upon a management rights clause permitting "lay off due to lack of work" was not persuasive evidence of a waiver. Nevertheless, in this case, PERC agreed that Article 18.2 is a waiver provision.

PERC reviewed the breadth of the sweeping waiver of rights required by Article 18.2. 2011 WL 235040. at *2. It noted that after successfully arguing in the 1998 proceeding that the language was a "waiver, the employer has now changed course, and argues in this proceeding that the language is a management rights clause and, therefore, a mandatory subject of bargaining." *Id.* at *3. PERC rejected this transparent tactic. "The language has not changed and still constitutes a waiver." *Id.*

In *Whatcom County,* PERC explained that "employers may lawfully make proposals for broad waivers of union bargaining rights" but they may not insist to impasse upon such waivers. 2004 WL 725698 at *6. Developing that theme in this case, PERC explained its finding that Article 18.2 invades the union's prerogative:

> The language in Article 18.2 excuses the employer from what would otherwise be its legal duty to bargain with the union on mandatory subjects. Article 18.2 is a waiver and a permissive subject of bargaining. ... As we stated in *Whatcom County*, "it is simply inconsistent with the purpose of the statute to permit an employer to insist to impasse on the exclusion of the employees' statutory representative from the bargaining process."

2011 WL 6026156 at *4 (AR 1846).

Just as in *Whatcom County,* Article 18 "substantially altered the collective bargaining system" provided for in the PECBA "by eliminating the role" of the representative chosen by the employees in negotiation of mid-term changes to mandatory subjects of bargaining. *See Whatcom County,* at *5. The net effect was to weaken the independence of the union chosen by the employees. AR 1766.

PERC properly concluded that Article 18.2 is a bargaining procedure and waiver with no direct impact on employee concerns. Article 18.2 concerns only the union prerogative to bargain collectively. It is a permissive subject of bargaining.

c. Although not required to do so, PERC evaluated Community Transit's interest in management "flexibility."

Community Transit faults the Commission for failing to apply a "balancing test" weighing its interest in "management flexibility" against the union's interest in exercising rights guaranteed it by statute. *Petitioner's Brief* at 21-25. Thus, Article 18.2 does not involve a management prerogative. This critique misstates the *City of Richland* test. When a proposed contract term is of "direct concern to employees" and impacts a union or management prerogative, PERC must balance these competing interests. *City of Richland,* 113 Wn.2d 197, 200.

In this case, PERC found that Article 18.2 was not a matter of direct concern to employees. AR 1766; AR 1846. As the employer concedes it has no authority to act unilaterally regarding employee working conditions. *Petitioner's Brief* at 25. It is the union's prerogative, as the employees' statutory representative, to participate in the bargaining process. *See* 2011 WL 6026156 at *4 (AR 1846). Put simply, in this case, there were no valid interests to balance.

Nevertheless, PERC did consider the employer's interest in continuing the waiver provision. The examiner heard testimony concerning the impact of Article 18. According to management witnesses, Article 18.2 gave the employer the "ultimate authority" to devise and

implement employee rules and procedures. AR 98. This "ultimate authority" even included the right to impose unreasonable rules. *See* AR 86-87 (within CT's discretion to elevate minor infractions to serious terminable offense). The testimony made apparent that the employer's intent in continuing Article 18.2 was to retain "flexibility" concerning its rules of operation without having to "deal with" the union when its action impacted mandatory subjects of bargaining. AR 1770. PERC simply found that the employer's interest in management flexibility was not a valid consideration in the face of the broad waiver of the union's statutory bargaining rights.

3. Article 18.2 is a Permissive Subject Under *Whatcom County*.

PERC applied to this case much of the reasoning it developed in *Whatcom County Deputy Sheriff's Guild v. Whatcom County,* Decision 7244-B, 2004 WL 725698 (Wash.Pub.Empl.Rel.Com. Feb. 11, 2004).

a. The Examiner's decision in *Whatcom County*.

In 2004, the Commission heard an unfair labor practice involving an employer's "rules of operation" and "management rights" proposals during contract bargaining. The proposal replaced the union's right to bargain mid-term changes with an opportunity to object and seek arbitration concerning the reasonableness of the change. *Whatcom County,*

Decision 7244-A, 2003 WL 1712537 (Wash.Pub.Emp.Rel.Com Feb. 13, 2003). The employer bargained the proposal to impasse.

The hearing examiner found the employer's proposal was an illegal subject of bargaining, which was "overly broad" because of "the virtually limitless unilateral changes in working conditions it would permit during the term of the parties' collective bargaining agreement" and because it was in conflict with the interest arbitration process. 2004 WL 725698, at *10. He reasoned that such a broad waiver contravenes the purpose of the PECBA, which is to encourage collective bargaining between public employers and their employees.

b. PERC's Decision in Whatcom County.

The Commission disagreed with the examiner's reasoning. It held that the waiver provision was not illegal but it was a permissive subject of bargaining not to be bargained to impasse or interest arbitration. *Whatcom County,* 2004 WL 725698 at *13. The employer urged PERC to find that the clause was a management rights clause and not a waiver.

Following the test set forth in *City of Richland,* the Commission first analyzed the specific language of the proposals and the testimony regarding bargaining. *Id.* at *2-4. The disputed provision allowed the employer to implement rule changes unilaterally and limited the union's input to objection and resolution by an arbitrator. *Id.* at *10. Its effect

was to extinguish the employer's duty to bargain and replace it with a procedure to resolve disputes with the union. The employer's representative informed the union that, under the employer's proposals, the union would not have any right "to negotiate anything that wasn't actually in the contract." *Id.* at *2.

Based on these facts, the Commission determined the proposal was a means to an end rather than a benefit or condition of employment. *Id.* at *4. The proposal did not establish any terms or conditions of employment directly impacting employees. *See City of Richland,* 113 Wn.2d 197, 200. Instead it established a mechanism governing the relationship between the union and the employer.

PERC closely considered the employer's argument that the proposals were merely management rights clauses, which waived union bargaining rights, and could be bargained to impasse. As the Commission explained:

> The employer contends this is not a "waiver" case, but the plain meaning of its proposed language and the explanation given by its negotiator make it abundantly clear that the employer was asking the union to waive its statutory bargaining rights. The proposed waivers do not directly involve the employees' day-to-day responsibilities, or even the relationship between the employer and employees. Rather, they would only affect the relationship between the employer and union, by enabling the employer to change work rules without having to deal with the union.

Whatcom County, at *4.

The employer also argued that the 1997 Supreme Court case *City of Pasco* established the employer's right to bargain any management rights clause to impasse. 132 Wn.2d 450, 460, 938 P.2d 827 (1997). PERC again noted its skepticism that a boilerplate management rights clause will contain a waiver of union bargaining rights. *Whatcom County,* at *4. The right of public employees to bargain concerning work conditions is an obligation "not to be easily disregarded" it wrote. *Id.* (citation and internal quotation omitted).

Returning to the disputed language, the Commission found the employer was seeking more than a mere management rights clause. The proposals contained an unmistakable waiver of the union's statutory right to bargain. *Whatcom County,* at *4. By bargaining its proposal to impasse, the employer impermissibly sought to avoid its obligation to bargain with the union. *Id.* at *5. The Commission did not fault the employer's request for a *voluntary* waiver of bargaining rights. But it objected to the employer's attempt to use agency resources to compel a waiver of rights through interest arbitration. *Id.*

c. *Whatcom County* applies to this case.

After *Whatcom County*, it was clear under agency authority that a proposal seeking to substantially alter the collective bargaining system through waiver of the statutory rights of either party was likely to be a permissive subject of bargaining, which neither party could permissibly bargain to impasse.

As both the hearing examiner and Commission found, *Whatcom County*, squarely supports the union's position in this case. Like the union in the earlier case, ATU was asked to accept the virtually limitless unilateral changes in working conditions permitted under Article 18.2. The employer's rules and regulations, including Standard Operating Procedures, encompass nearly every employee working condition a union would expect to negotiate. These include: hours of work, work rules, attendance, accident policies, and discipline. *Community Transit,* 2010 WL 235040 at *2 (2010).

Article 18.2 established a notice and comment provision just like that in *Whatcom County.* However, the *Whatcom County* employees retained the option of resolving the reasonableness of a rule through private interest arbitration. *Whatcom County,* at *4. ATU has no interest arbitration option. It must accept all unilateral employer changes. It can challenge changes when an employee is suspended or discharged or it must wait for the next round of negotiations for a new contract.

Community Transit argues that ATU consented to a more narrow waiver of rights than that in *Whatcom County*. *Petitioner Brief,* at 40-41. Both waivers are too broad. Whatcom County sought to send all mid-term contract changes to interest arbitration. Community Transits sought to prevent all mid-term contract changes involving employee rules,

regulations, and procedures. As PERC correctly found, Article 18.2 is a broad waiver of statutory rights and is "simply inconsistent" with the purpose of public employee collective bargaining. 2011 WL 6026156 at *4 (AR 1846).

4. Article 18.2 is a Provision that "Goes too far" under *City of Pasco*.

Community Transit relies heavily upon the Washington Supreme Court case *Pasco Police Association v. City of Pasco,* 132 Wn.2d 450, 938 P.2d 827 (1997) in opposing PERC's decision. This Court should reject the employer's argument, as did the hearing examiner, PERC, and the superior court, because *City of Pasco* concerned a management rights clause not a waiver provision.

In *City of Pasco,* the Supreme Court affirmed a PERC decision which held that the municipality did not commit an unfair labor practice when it bargained to impasse a management rights and hours proposal. 132 Wn.2d 450, 460. PERC held, and the Court agreed, that the management rights proposal at issue was a mandatory subject of bargaining. *Id.*

The Supreme Court's analysis followed *City of Richland.* It did not hold categorically that any management rights clause may be bargained to impasse. It reviewed the facts and the law to determine

whether the specific disputed language was a mandatory or permissive subject of bargaining. *Id* at 460-61. As the Court explained, it is "the particular proposal, not merely the problem to which it is addressed, that must concern 'wages, hours, and other terms and conditions of employment.' " *Id* at 467-68 quoting *NLRB v. Davison,* 318 F.2d 550, 557 (4th Cir. 1963).

Reviewing the management rights clause under consideration, the *City of Pasco* court found "practically every item listed" addressed either wages, hours or working conditions. *Id.* at 468. The clause directly concerned employment conditions. The Court affirmed PERC's finding that the management rights clause could be bargained to impasse. *Id.* at 468.

a. In *City of Pasco,* the Washington Supreme Court recognized the limits of bargaining to impasse.

The Supreme Court did not issue a *blank check* allowing any employer to press any management rights clause to impasse. *See Whatcom County,* 2004 WL 725698, *6. The Court considered the union's argument that the management rights clause proposed by the employer could waive its statutory right to bargain mid-term changes. The Court explained that a waiver must be clear and unmistakable and will typically arise as a defense to a charge that the employer acted unilaterally

without satisfying its obligation to bargain with the union. *Id.* at 462-463. PERC did not analyze this issue below. *City of Pasco,* 132 Wn.2d at 462. The Court declined to do so because the facts did not present a waiver case.[4] *Id.* at 464.

The Supreme Court also cautioned that a management rights clauses "can go only so far.... [S]uch clauses cannot invade a union's statutory right and duty to be the exclusive representative of the relevant employees." 132 Wn.2d 450 at 466. For example, a management rights clause permitting the employer to directly address employees over retirement issues would be overreaching. *Id.* citing *Toledo Typographical Union Decision 63 v. N.L.R.B.,* 907 F.2d 1220, 1222 (D.C.Cir.1990). The Court acknowledged that the employer's obligation to bargain in good faith "insures that management rights proposals do not overreach and are enforceable under the statute." 132 Wn.2d 450 at 467.

b. PERC's Decision is in harmony with *City of Pasco.*

Community Transit urged the hearing examiner and PERC to find that Article 18.2 is a management rights clause not a waiver provision.

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[4] To the extent dicta in the Court's decision can be read as establishing a blanket authorization to bargain to impasse waivers of bargaining rights, that contention has been rejected by PERC. *See, e.g., Whatcom County,* 2004 WL 725698, *6. ("We thus reject any suggestion that *Pasco* gives employers an absolute right to insist to impasse (and obtain interest arbitration) on waivers of bargaining rights.")

The hearing examiner found this argument foreclosed by the 1998 *Community Transit* decision. 2010 WL 235040 at *6. Unlike *City of Pasco*, the issue of waiver is clearly present in this impasse case. In 1998, the employer effectively used Article 18.2 as a waiver defense to the union's claim that it acted unilaterally without satisfying its obligation to bargain with the union. 1998 WL 1978452.

PERC agreed. It found Community Transit's reliance on *City of Pasco* unpersuasive. As the Commission explained:

> The employer's reliance is misplaced. First, in the *City of Pasco*, the Supreme Court was explicit that it did not need to determine whether a waiver of collective bargaining rights is a mandatory subject of bargaining. Second, the court concluded that the management rights proposal at issue was not a waiver of the union's right to collectively bargain, and was a mandatory subject of bargaining about which the employer could insist to impasse and seek interest arbitration. As the Examiner in this case correctly held, Article 18.2 is a waiver of the union's collective bargaining rights and *City of Pasco* is not applicable.

2011 WL 6026156 at * 3 (AR 1846). *City of Pasco* concerned a management rights clause. This case concerns a wavier clause. The two cases are in harmony.

5. Article 18.2 is a Permissive Subject Under Persuasive Federal and State Labor Law.

This case and *Whatcom County* follow a long line of precedent. State and federal law are clear. Employers do not have an absolute right

to pursue waivers of bargaining rights to impasse. AR 1845-46; *Whatcom County,* 2004 WL 725698 at *5-6

In *American National*, the U.S. Supreme Court held that, under the NLRA, it is not a *per se* unfair labor practice for a private sector employer to bargain to impasse a management rights clause reserving certain management prerogatives. In that case, the management rights clause recognized the employer's right to make executive decisions concerning a specific list of items, i.e., promotions, discipline, and work scheduling. 343 U.S. at 398. The provision did not "clearly and unequivocally" waive the union's right to negotiate concerning wages, hours, and working conditions or prevent it from bargaining the effects of management decisions. Therefore, the management rights clause before the court in *American National* was not "so broad" as to substantially weaken the union. *Whatcom County,* at *6.

PERC has repeatedly drawn a clear analytical line between general management rights clauses like *American National* and the waiver provisions presented in *Whatcom County* and in this case. *Id.* at *4, n.4 & n.5. *See also* AR 1844 (same).

The Commission's decision in this case and in *Whatcom County* also followed *NLRB v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 78 S.Ct. 718, 722, 2 L.Ed.2d 823 (1958). *Borg-Warner* concerned an

employer's insistence upon a "ballot clause" requiring a pre-strike secret vote of its employees prior to any union decision to strike. The Court found the ballot provision was a "procedure" that "settle[d] no term or condition of employment" and fell outside of the limited subjects about which either party could be legally obligated to bargain. 356 U.S. at 350. The Court rejected the procedure because it "substantially" modified the collective bargaining system by weakening the union's statutory right to strike. *Id.*

The *Whatcom County* decision also relied upon *Radisson Plaza Minneapolis,* an NLRB decision rejecting an employer's insistence upon a provision incorporating into a collective bargaining agreement an employee handbook granting absolute discretion to alter policies affecting basic terms and conditions of employment without bargaining. 307 NLRB 94 (1992), *enforced,* 987 F.2d 1376 (8th Cir. 1993). Like the employer in this case, by insisting upon the absolute right to reopen the contract terms, the employer substantially modified the statutory structure by seeking a waiver of the union's right to bargain mid-contract changes. Such a waiver was not a "legitimate bargaining proposal" because it left the employees with the equivalent of no union at all. 307 NLRB at 94, 115.

In *East Texas Steel Casting Co,* also cited in *Whatcom County,* the NLRB considered a management rights clause including the "right to

establish plant rules ... and change such rules" concerning any matter not established by contract and precluding any related grievance. 155 NLRB 1080 (1965). The NLRB expressed skepticism that any union could accept such a provision and "effectively represent employees." *Id.* at 1094. It found the provision was a waiver and that the employer had bargained in bad faith. *Id.*

Central to the holding in this case and in *Whatcom County* is the principle that the right to bargain is not, itself, a term of employment subject to compelled negotiation. *See Printing Pressmen Local 252,* 219 NLRB 268 (1975), *enforced*, 543 F.2d 1161 (5th Cir. 1976) (union could not insist upon a procedure requiring interest arbitration on "all disputes" because this would require the employer to bargain on matters it had a right not to negotiate.); *Klauder,* 107 Wn.2d 338, 341 (1986) (same). The other cases cited by *Whatcom County* also support its holding and that of the Commission in this case.[5]

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[5] In *Toledo Typographical Union v. NLRB,* 907 F.2d 1220, 1224 (D.C. Cir. 1990), the D.C. Circuit reversed the NLRB. The circuit court held that an employer may not insist upon a provision waiving the union's right to negotiate retirement benefits for its members. *Carbonex Coal Co.,* 248 NLRB 779 (1980), *enforced,* 679 F.2d 2000 (10th Cir. 1982) concerned an employer's insistence upon a management rights clause giving it the "sole right to make and enforce rules and regulations," explicitly waiving the union's "voice or authority" regarding the management of the business, and denying the right to grieve any matters reserved to management. *Id.* at 790-91. The NLRB found a refusal to bargain. The circuit court affirmed.

Petitioner contends that waivers are a mandatory subject of bargaining under federal law. *Petitioner's Brief* at 36-37. This argument misreads and misconstrues the cases cited. In *NLRB v. Tomco Communications, Inc.,* 567 2.d 871 (9th Cir. 1978), the court approved a broad and detailed management rights clause "in light of the known tendency" of courts and the NLRB to apply a "strict reading" to management rights clauses to avoid a waiver of bargaining rights. *Id.*

In *NLRB v. Salvation Army of Mass. Dorchester Day Care Ctr.,* 763 F.2d 1, 3-4 (1st Cir. 1985), the court considered an "ecclesiastical clause" paired with a "fairly ordinary management rights clause." There was no waiver defense issue present. *Id.* at 8. The remaining cases cited by the employer are not on point.[6] There is simply no line of federal or state cases holding that employers enjoy an unrestrained right to bargain to impasse a clause granting management rights.

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[6] *See, e.g., Commercial Candy Vending Div.*, 294 NLRB 908, 909 (1989) (no unfair labor practice where employer insisted on broad boilerplate management rights clause preserving union's right to contest exercise of management rights through grievance procedures); *Houston County Elec. Co-Op., Inc.,* 285 NLRB 1213, 1216-17 (1987) (employer engaged in surface bargaining but insistence on broad management rights clause excused in light of union's failure to offer counterproposal); *Rescar, Inc.*, 274 NLRB 1, 2 (1985) (employer did not condition disputed provisions so as to attempt to "retain full control over employee terms and conditions.").

E. PERC Acted Within its Statutory Authority by Limiting the Duty to Bargain to Matters Which May be Bargained.

PERC is empowered by the Legislature to interpret and enforce the PECBA. RCW 41.56.160. The Legislature directed the Commission to prevent any unfair labor practice and to issue appropriate remedial orders. *Id.* A public employer may not compel a bargaining representative to accept broad waivers of its statutory rights or alternate bargaining procedure. Community Transit may not use the public resource of interest arbitration to force the union from the bargaining table.

A public employer may not force a union "to agree to a proposal" or "make a concession" not required by the PECBA. RCW 41.56.030(4). PERC acted within its authority when it withdrew certification of Article 18.2 to interest arbitration. *See City of Richland, supra;* WAC § 391-55-265.

F. PERC Analyzed the Facts and Circumstances of the Case Before It. Its Decision Was Not Arbitrary or Capricious.

In light of the close review of the law and weighty consideration of the factual record, it is apparent that the Commission's decision was neither arbitrary nor capricious. *See* RCW 34.05.570(3)(i).

V. CONCLUSION

Community Transit has not demonstrated the invalidity of the Commission's decision. The Commission acted within its authority. There is no Washington State authority addressing the issue of waiver presented in this case. AR 1769-70; 1845-46. The Commission did not "ignore" Washington State authority. It held that the cases cited by the employer are inapplicable to the facts of this case.

Consistent with its unique institutional competence, the Commission correctly interpreted and applied the PECBA. *See* RCW 34.05.570(3)(d); *Maple Valley Firefighters,* 135 Wn.App. 749, 759 n.29 (2006). Its decision is deserving of great deference. *Id.* The Commission reviewed all applicable authority, closely considered the arguments made by the employer, and reached a sound and consistent result.

It is an unfair labor practice to bargain a permissive subject of bargaining to impasse. In 1998, the Commission found Article 18.2 was a waiver of ATU's right to bargain mandatory subjects of bargaining. Article 18.2 is a bargaining procedure whose predominant characteristic is the waiver of statutory bargaining rights. The provision is not of direct concern to terms or conditions of employment. PERC found Article 18.2 was a contractual waiver and a permissive subject of bargaining. It may not be bargained to impasse. PERC must act as a gatekeeper to protect the

interest of both parties in collective bargaining. The Commission's decision sustaining the unfair labor practice charge should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of November 2012

FRANK FREED SUBIT & THOMAS, LLP

By: _____

Beth Barrett Bloom, WSBA #31702
Attorneys for ATU Local 1576

CERTIFICATE OF SERVICE

I, Mia Wadleigh, certify and state as follows:

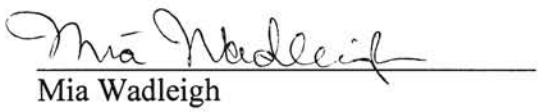
1. I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served upon counsel of record at the address and in the manner described below on November 19, 2012, the following document: BRIEF OF RESPONDENT ATU 1576.

Shannon E. Phillips Sofia D. Mabee Summit Law Group PLLC 315 Fifth Avenue South, Suite 1000 Seattle, WA 098104-2682	[ ] U.S. Mail [X] ABC Legal Messenger [ ] Facsimile [ ] E-Mail
Michael P. Sellars, Executive Director Marilyn Glenn Sayan, Chairperson Washington Public Employee Relations Commission 112 Henry Street NE, Suite 300 Olympia, WA 98506	[ ] U.S. Mail [X] ABC Legal Messenger [ ] Facsimile [ ] E-Mail
Office of Attorney General State of Washington 1125 Washington Street SE Olympia, WA 98504-0100	[ ] U.S. Mail [X] ABC Legal Messenger [ ] Facsimile [ ] E-Mail

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

DATED at Seattle, Washington on this 19th day of November 2012.



Mia Wadleigh

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

Frank Freed Subit & Thomas, LLP
Beth Barrett Bloom, WSBA # 31702
705 Second Avenue, Suite 1200
Seattle, Washington 98104
(206) 682-6711

TO: CLERK OF THE COURT; and

TO: All Counsel of Record.

PLEASE take NOTICE that Brief of Respondents Amalgamated Transit Union, Local 1576, filed on November 20, 2012, did not include a table of authorities. Please add the table of authorities to the Brief of Respondents Amalgamated Transit Union, Local 1576.

DATED this 20th day of November, 2012.

Respectfully submitted,

FRANK FREED SUBIT & THOMAS, LLP

By: _____

Beth Barrett Bloom, WSBA #31702
Attorneys for ATU Local 1576

TABLE OF AUTHORITIES

Cases--Washington

Cases--Other

Statutes

Washington Public Employment Relations Commission Decisions

National Labor Relations Board Decisions

Professional Evaluation and Certification Board Decisions

Treatises

CERTIFICATE OF SERVICE

I, Mia Wadleigh, certify and state as follows:

1. I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served upon counsel of record at the address and in the manner described below on November 20, 2012, the following document: ERRATA.

Shannon E. Phillips Sofia D. Mabee Summit Law Group PLLC 315 Fifth Avenue South, Suite 1000 Seattle, WA 098104-2682	[ ] U.S. Mail [X] ABC Legal Messenger [ ] Facsimile [ ] E-Mail
Michael P. Sellars, Executive Director Marilyn Glenn Sayan, Chairperson Washington Public Employee Relations Commission 112 Henry Street NE, Suite 300 Olympia, WA 98506	[ ] U.S. Mail [X] ABC Legal Messenger [ ] Facsimile [ ] E-Mail
Office of Attorney General State of Washington 1125 Washington Street SE Olympia, WA 98504-0100	[ ] U.S. Mail [X] ABC Legal Messenger [ ] Facsimile [ ] E-Mail

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

DATED at Seattle, Washington on this 20th day of November 2012.

Mia Wadleigh