72104-6

72104-6

NO. 72104-6 I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Appellant,

v.

FISH AND WILDLIFE OFFICERS GUILD and PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

AMENDED BRIEF OF FISH AND WILDLIFE OFFICERS GUILD

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 2

A. Errors Assigned 2

B. Issues Presented 2

III. COUNTERSTATEMENT OF FACTS 3

IV. SUMMARY OF ARGUMENT 6

V. ARGUMENT 8

A. The Standard of Review is De Novo. 8

B. The Trial Court Properly Rejected the State's Theory that the PSRA allows other Labor Unions to Supplant the Guild's Statutory Role as the "Exclusive Bargaining Representative." 10

C. The State Collective Bargaining Law Provides Employees a Preeminent Right to select Representatives of their Choosing and Participate in Collective Bargaining through those Selected Representatives 12

D. The Commission Erred in Concluding the State Collective Bargaining Law Binds the Guild and its Members to an Agreement the Members Never Approved and the Guild Never Negotiated or Executed 18

1. The Coalition Bargaining Provisions should be interpreted so as to be harmonized with the Constitution, Common Law, and Other Provisions of the Statute 19

2. The Trial Court Properly Held that PERC Misinterpreted the Coalition Bargaining Provisions and Failed to harmonize those provisions with the other Provisions of RCW 41.80 20

3.The Trial Court Properly Held that PERC Failed to Harmonize RCW Chapter 41.80 Consistent with the Applicable Common Law, Including the Contract Law Mandate that Contracts be executed in order to be Effective and the Agency Law Principle that Parties are only Bound Principles when they have extended Authority.....32

4.The Trial Court Properly Held that PERC Failed to Harmonize RCW 41.80 with the requirements of the Constitutional Right of Association.....37

E. Under the Proper Interpretation of the PSRA adopted by the Trial Court, the State of Washington Committed an Unfair Labor Practice When It Unilaterally Reduced Wages and the Amount it contributes to Health Insurance Premiums by Three Percent.....45

VI. CONCLUSION.....49

APPENDIX: RELEVANT SECTIONS OF RCW CHAPTER 41.80.....52

TABLE OF AUTHORITIES

Court Cases

Bernot v. Morrison, 81 Wash. 538, 544, 143 P. 104 (1914) 33
Bill McCurley Chevrolet, Inc., v. Rutz,
61 Wn. App.53, 56, 808 P.2d 1167 (1991) 35
Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia Bar
Association 377 U.S. 1 (1964) 41
City of Redmond v. Central Puget Sound Growth Mgt. Hearings Bd.,
136 Wn.2d 38; 959 P.2d 1091 (1998) 10
Clark County PUD No. 1 v. IBEW
150 Wn.2d 237, 253; 76 P.3d 248 (2003) 32
Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.,
159 Wn.2d 292, 298-99, 149 P.3d 666 (2006) 19
Costco Wholesale Corp. v. World Wide Licensing Corp.,
78 Wn. App. 637, 645, 899 P.2d 347 (1995) 34
Delyria v. State, 165 Wn.2d 559 (2009) 19
Dep't of Soc. & Health Servs. v. State Pers. Bd.,
61 Wn. App. 778, 783-84, 812 P.2d 500 (1991) 33
Emwright v. King County, 96 Wn.2d 538, 543, 637 P.2d 656 (1981) 19
Fisher Flouring Mills Co. v. Swanson,
76 Wash. 649, 668, 137 P. 144 (1913) 34
Ford v. United Bhd. of Carpenters & Joiners of Am.,
50 Wn.2d 832, 838, 315 P.2d 299 (1957) 34
Fray v. Spokane County, 134 Wn.2d 637, 648, 952 P.2d 601 (1998) 19
Fray v. Spokane County, 134 Wn.2d at 651 19
Healy v. Town of Pembroke Park
730 F.3d 258 (1984) 43
Lyng v. International Union 485 U.S. 360
(1988) 42
Muncie v. Westcraft Corp., 58 Wn.2d 36, 38, 360 P.2d 744 (1961) 33
Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005). 33
Pasco Police Officers' Association v. City of Pasco 119 Wn.2d 504, 506,
833 P.2d 381 (1992) 9
Professional Association of College Educators v. El Paso County
Community College District 730 F.3d 258 (1984 43

Queets Band of Indians v. State, 102 Wn.2d 1, 5, 682 P.2d 909 (1984).. 19
Restraint of Matteson, 142 Wn.2d 298, 307, 12 P.3d 585 (2000)..... 36
Roberts v. Van Buren Public Schools, 773 F.3d 949 (1985) 43
Sayward v. Carlson, 1 Wash. 29, 23 P. 830 (1890) 33
Sharpe Sign Co. v. Parrish, 33 Wn.2d 883, 894, 207 P.2d 758 (1949)..... 34
Smith v. Arkansas State Highway Employees 441 U.S. 463 (1979).....39
State v. Bao Dinh Dang, 178 Wn.2d 868, 878; 312 P.3d 30 (2013) 36
*Terry v. Village of Glendale Heights,*1989 U.S. Dist. LEXIS 10737..... 43
The State of Washington v. Bryant,
146 Wn.2d at 90, 102, 104, 42 P3d 1278 (2002) 35
Lamb v. Gen. Assocs., Inc., 60 Wn.2d 523, 627, 374 P.2d 677 (1962)..... 35
University of Washington v Washington State Federation of State Employees, 175 Wn.App. 251, 254, 303 P.3d 1101 (2013). 28
Wright v. Engum, 124 Wn.2d 343, 351-52, 878 P.2d 1198 (1994) 19
Wright v. Engum, 124 Wn.2d at 352 19
Yakima County v. Yakima County Law Enforcement Officer's Guild 174 Wn.App 171, 297 P.3d 745 (2013).....*10,24*
Snohomish County Public Transp. Benefit Area v. PERC,
173 Wn. App. 504, 294 P.3d 803 (2013)..... 10

Statutes

California Code Section 110000 et. seq.....38
Connecticut General Statutes 5-278..... 38
Connecticut General Statutes 5-278 (f)(1)..... 38
Delaware Code, Chapter 19, Section 1311A 38
Delaware Code, Chapter 19, Section 1311A (g)..... 39
RCW 34.05.570(3)..... 8
RCW 4.04.110..... 33
RCW 41.56.140(1)..... 45
RCW 41.56.140(4)..... 45
RCW 41.56.160(4)..... 45
RCW 41.80.005 (2)..... 16
RCW 41.80.005(2)..... 10
RCW 41.80.005(9)..... 10
RCW 41.80.005(9)..... 30
RCW 41.80.010 ..... 16, 17, 23

RCW 41.80.010(2)(a) 20, 22
RCW 41.80.020 45
RCW 41.80.020(1) 45
RCW 41.80.020(2)(a) 21, 22
RCW 41.80.020. 17
RCW 41.80.050 14
RCW 41.80.070 (1). 15
RCW 41.80.080 ..... 15, 27, 29
RCW 41.80.080 (3). 15, 29
RCW 41.80.080(2)(a) 21
RCW 41.80.080(3) 10, 26
RCW 41.80.080(4). 48
RCW 41.80.110 27
RCW 41.80.110 (1)(a) 14
RCW 41.80.110 (1)(b). 14
RCW 41.80.110 (1)(c) 14
RCW 41.80.110 (1)(d). 14
RCW 41.80.110(e) 10
RCW 41.80.110. 27
RCW Chapter 41.80 ..... *passim*

Other Authorities

Restatement (Second) of Agency §161A 34
Restatement (Third) of Agency §2.03 (2000) 34
SHB 1268 (2002 Regular Session) 25

Constitutional Provisions

First Amendment of the US Constitution 37

PERC Decisions

Battle Ground School District, Decision 2449-A (PECB, 1986) 45
City of Anacortes, Decision 9004-A (PECB, 2007) 46
City of Dayton, Decision 1990-A (PECB, 1985) 46
City of Pullman, Decision 8086 (PECB, 2003) 45

City of Seattle, Decision 651 (PECB, 1979) 46
City of Yakima, Decision 7147 (PECB, 2000). 29
Cowlitz County, Decision 7007 (PECB, 2000) 31
East Valley School District, Decision 9256 (PECB, 2006) 46
Federal Way School District, Decision 232-A (EDUC, 1977 45
Federal Way School District, Decision 232-A (EDUC, 1977) 46
Griffin School District, Decision 10489-A (PECB, 2010) 46
Island County Fire District 1, Decision 9867 (PECB, 2007) 46
King County Library Systems, Decision 9039 (PECB, 2005) 46
Kitsap County, Decision 11675-A (PECB, 2013) 18
Lewis County, Decision 10571 (PECB, 2009) 46
Mabton School District Decision 2419 (PECB, 1986) *46,48*
Naches Valley School District, Decision 2516-A (EDUC, 1987). 18
Port of Tacoma, Decision 4626-A, 4627-A (PECB, 1995) 28
Shelton School District, Decision 579-B (PECB, 1983) 18
Shoreline School District, Decision 9336-A (PECB, 2007) 18
State – Attorney General, Decision 10733 (PRSA, 2010) 30
State – Attorney General, Decision 10733-A (PRSA, 2011) 30, 31
State – Fish and Wildlife, Decision 11000-A (PSRA, 2011). 3
State – Natural Resources, Decision 8458-B (PRSA, 2005) 12
State—Fish and Wildlife, Decision 11394-B (PSRA, 2013) 20
Tacoma-Pierce County Employment and Training Consortium, Decision 10280-A (PECB, 2009) 30, 31
Washington State Patrol, Decision 4757-A (PECB, 1995) 45
Western Washington University, Decision 8256 (PSRA 2003) 45
Western Washington University, Decision 9309-A (PRSA, 2008) 12, 45
WSCCCE v. Spokane County, Decision 2167-A (PECB, 1985) 46
Yakima County, Decision 9338 (PECB, 2006) 46
Yakima Valley Community College, Decision 11326 (PECB, 2012) 46

I. INTRODUCTION

This case arises under the collective bargaining statute covering State general government employees — the Personnel Services Reform Act (PSRA). The State's legal theory needlessly pits employees' statutory right to collectively bargain against those same employees' statutory (and constitutional) right to a union representative of the employees' choosing. The State insists that employees must choose between these rights, but this creates a false dichotomy that does not exist in the law.

The Petitioner, the Fish and Wildlife Officers Guild represents the commissioned enforcement officers in the State Department of Fish and Wildlife (DFW). The Guild asserts the State committed an Unfair Labor Practice (ULP) under the PSRA when it unilaterally imposed contract terms upon the Guild and its members — applying a "contract" that the Guild never negotiated or executed.

A ruling by Public Employment Relations Commission (PERC) found no ULP. PERC, peculiarly, concluded the decision of the employees exercise their statutory right to change their collective bargaining representatives created a "consequence" of the members losing their statutory bargaining rights. This PERC ruling was reversed during an Administrative Procedures Act Review undertaken by the Honorable

Kimberly Prochnau, and the matter was remanded to PERC to apply appropriate ULP remedies. The State appeals this reversal order.

II. ASSIGNMENT OF ERROR

A. Errors Assigned.

The Guild assigns no error to the Order of the Superior Court Pursuant to RAP 10.3(h), the Guild assigns error to the Administrative Order[1] as follows:

1. Conclusion of Law Number 3.

2. The Order of Dismissal.

B. Issues Presented.

The following issues relate to both of the two Administrative errors assigned by the Guild:

Issue 1: Is the Guild by bound by a contract that it never agreed to or executed?

Issue 2: Is the Guild bound by the contracting actions of a coalition of other labor unions when it never extended those unions authority to act on its behalf?

Issue 3: Under the collective bargaining law (PSRA), employees have a statutory right to select their own bargaining representative, and it is unlawful to interfere or discriminate against employees for exercising that right. According to the State, when the Wildlife Enforcement Officers exercised this statutory right to replace their current representative with a new one, it could then impose terms it negotiated a "coalition" of other unions upon the Officers. The State also asserts that the Officers are

[1] The Commission Order incorporated by reference the Findings and Conclusions of the Examiner Order (See AR 2479-2493).

compelled to waive their collective bargaining rights for two years as to those terms. Does such a compelled two-year waiver of bargaining rights of the Guild and its members constitute unlawful interference and discrimination under the PSRA?

Issue 4: The First Amendment of the Constitution extends a "freedom of association" right to public employees to select representatives of their choosing. Is this First Amendment right of Association infringed by applying or interpreting the Washington collective bargaining system in a manner so as to compel employees to waive their collective bargaining rights for two years?

Issue 5: Did the Superior Court properly hold that PERC erred when it interpreted the State collective bargaining law to compel the Guild and its members to accept a labor contract signed by other labor unions, a contract which reduced the Guild members' wages and health benefits, even though the members and the Guild they had just elected had no input in the creation of that contract?

III. COUNTERSTATEMENT OF FACTS

The Commissioned Enforcement Officers at DFW, now represented by the Guild, were previously represented in a bargaining unit designated by PERC as "RU-538."[2] Historically, this "RU-538" bargaining unit was represented by the Washington Federation of State Employees (WFSE).[3] The most recent Collective Bargaining Agreement (CBA) covering the RU-538 unit was the agreement between the State and the WFSE that was in effect from July 1, 2009 through June 30, 2011.[4]

Following the PERC election rules, the Guild collected interest "cards" from employees seeking the Guild's representation and, on March 4, 2011,

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[2] Administrative Record ("AR") 194, ¶1.
[3] *Id.*
[4] AR 196, at ¶9.

the Guild filed its petition with PERC seeking to represent the RU-538 Commissioned Enforcement Officer bargaining unit.[5] Faced with an election on that petition, the WFSE disclaimed representation of the bargaining unit on June 6, 2011.[6] PERC then scheduled an election.[7] On June 24, 2011, PERC tallied the results and issued an interim certification declaring the Guild as the exclusive bargaining representative.[8]

The Guild's legal counsel immediately wrote to to the State advising them that the WSFE-negotiated changes in wages and benefits negotiated, due to take effect days later on July 1, 2011, no longer applied to the of the now Guild-represented employees.[9] The letter also presented a demand to bargain any changes to the "status quo," as well as the creation of a new labor agreement covering the bargaining unit.[10] Despite the Guild's demand letter and the statutory bargaining requirements (discussed below), on July 1 the State reduced the Guild's members' wages by 3%.[11] The State also reduced its contribution to insurance premiums to 85%, from previously paying 88% of the premium.

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[5] AR 194-195, at ¶3.
[6] AR 195, at ¶6
[77] AR 195, at ¶ 7.
[8] AR 202-203 Joint Ex. A. A final certification, reiterating the interim certification, was not issued by PERC until September 26, 2011 due to the fact that the State had challenged the eligibility of certain individuals. Those issues were resolved and a final certification was issued. *State – Fish and Wildlife*, Decision 11000-A (PSRA, 2011).
[9] AR 197-198, at ¶14.
[10] AR 198, at ¶18.
[11] AR 198, at ¶15.

The State claimed that the Guild had no right to negotiate the terms of employment for its represented members. Instead, the State claimed that the Guild and its members were bound by an agreement *previously* negotiated and executed. The contract that the State asserted bound the Guild, though, was *not* the WFSE contract, but a *different contract* signed by a "coalition" designated to represent bargaining units consisting of fewer than 500 members. Although the now defunct (as to the Wildlife Officers) WFSE CBA had contained specific provisions pertaining to the officer's working conditions, this "coalition" agreement had no such provisions.[12]

Both parties here agree that the WFSE terms no longer applied to the Officers. But the State also claimed that, despite this effective revocation of the WFSE terms, it had *no* duty to negotiate or otherwise address with the Guild how these previously negotiated issues would be addressed. According to the State, the members lost any opportunity to negotiate any compensation or other terms and conditions of employment for up to two years because of their decision to choose a new representative. The State also claimed that the Guild even lost its ability to maintain an "agency shop" clause by which it could collect mandatory union dues from its members. The Guild filed a ULP with PERC claiming the unilateral

[12] AR 127-128, at ¶11.

reductions, and corresponding refusal to negotiate, constituted a ULP under the State collective bargaining law.

As the issues presented were predominantly legal, the assigned PERC hearing examiner took up the matter on cross-motions for summary judgment.[13] The Examiner ruled for the State, holding that the Guild bargaining unit was now bound by a CBA signed by a "coalition" of other unions.[14] The Guild petitioned the Commission for Review, and the Commission upheld the Examiner.[15] The Guild filed a Petition for Review to King County Superior Court.[16] The Honorable Kimberly Prochnau reversed PERC and remanded for entry of appropriate ULP remedies.[17]

IV. SUMMARY OF ARGUMENT

The PSRA affirmatively allows employees to select (and change) representatives. The State insists that whenever employees exercise this right, they must submit to a two-year waiver of their bargaining rights. The State further claims that the during this waiver period, the newly selected bargaining representative (and their members) must *abide by a labor contract that they never negotiated and never executed.* The trial court properly rejected these claims.

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[13] AR 885-95
[14] *Id*
[15] CP 5-12
[16] CP 1-3
[17] CP 102-03

As the trial court recognized, PERC erred by failing to acknowledge and harmonize all terms of the PSRA together, invoking some while ignoring others. PERC also errantly approached the interpretation issue without a proper recognition of the moderately complicated legal issues *outside* its ordinary expertise, including contract law, agency law, and constitutional law. PERC seemingly did not grasp the extent to which these residual common law and constitutional law mandates were implicit in the statutory scheme. It adopted a cramped analysis of the law, *one that peculiarly ignored some of the operative words in the very same key section it purported to interpret.*

The PSRA creates a "coalition" bargaining process. The State argued, and PERC agreed, that the "coalition" of other unions could bind later "recognized" unions *without their consent*. Yet PERC overlooked critical words—"exclusive bargaining representative"—in the very section it purported to interpret. Those overlooked words reveal that a new bargaining representative *cannot* be bound because it was *not in existence at the time the contract with the third parties was formed.*

As the trial court also noted, PERC also misunderstood the role of common law principles implicit in the statute. These principles mandate *consent and approval* before a party is legally bound by a contract. Under elemental principles of contract law, a party cannot be bound by a contract

it never accepted or executed. The trial court properly applied these common law principles and harmonized all the elements of the law.

Ultimately it is for courts, not administrative agencies, to say what the law is. Furthermore, in this case, the legal issues involved fall outside PERC's administrative expertise. Contract law, agency law, and constitutional law all directly bear, in this instance, on the proper interpretation of this statute. Although PERC's labor relations expertise is unquestioned, its failure to calibrate these overarching legal concepts into its PSRA interpretation leave its decision fatally flawed. The trial court properly applied these legal issues and properly concluded that PERC had erred in its interpretation of the statute.

V. ARGUMENT

A. The Standard of Review is De Novo.

This case involves an appeal of a Court ruling on Petition for Review of an administrative adjudicative decision. As such, it is governed by the review procedures of the Administrative Procedures Act (APA) defined in RCW 34.05.570(3).[18] *In Pasco Police Officers' Association v. City of*

[18] Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

Pasco,[19] the Supreme Court described the appropriate standard of review of PERC administrative rulings:

> Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. *City of Pasco v. PERC*, 119 Wn.2d 504, 506, 833 P.2d 381 (1992). RCW 34.05.570(3)(d) permits relief from an agency order if the agency erroneously interpreted or applied the law. *Pasco*, 119 Wn.2d at 507. Under the error of law standard, the court may substitute its interpretation of the law for that of PERC. *Public School Employees v. PERC*, 77 Wn. App. 741, 745, 893 P.2d 1132, *review denied,* 127 Wn.2d 1019, 904 P.2d 300 (1995). *See also Pasco,* 119 Wn.2d at 507 ("an agency is charged with the administration and enforcement of a statute, the agency's interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous.") (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992)).[20]

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
(d) The agency has erroneously interpreted or applied the law;
(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
(f) The agency has not decided all issues requiring resolution by the agency;
(g) A motion for disqualification under *RCW 34.05.425* or *34.12.050* was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
(i) The order is arbitrary or capricious.

[19] *Id. At 458*

[20] 132 Wn.2d 450, 458, 938 P.2d 450 (1997).

As this case was resolved on summary judgment,[21] it is subject to de novo review.[22] "Legal determinations are reviewed using the 'error of law' standard, which allows the court to substitute its view of the law for that of the [agency]."[23] "The agency's interpretation of pure questions of law is not accorded deference."[24] Because the legal issues at stake in this case involve matters outside of PERC's expertise—including questions invoking contract law, agency law, and constitutional law—this Court owes no deference to PERC's interpretation.[25] Also, recent court decisions have reflected reduced deference to PERC's judgment, especially in cases where PERC applied—or misapplied—legal concepts in its decision-making.[26]

B. The Trial Court Properly Rejected the State's Theory that the PSRA allows other Labor Unions to Supplant the Guild's Statutory Role as the "Exclusive Bargaining Representative."

Key provisions of the PSRA support the Guild claim that it has the exclusive right to enter agreements on behalf of its members:

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[21] AR 885-895 The State argues (Brief at 11) that any "factual findings are verities." This argument ignores the underlying procedural posture of this case: PERC undertook no fact finding and merely applied the parties agreed stipulations.

[22] *Yakima County v. Yakima County Law Enforcement Officers' Guild*, 174 Wn. App. 171, 180-81; 297 P.3d 745 (2013).

[23] *Chi. Title Ins. Co. v. Office of the Comm'r.*, 178 Wn.2d 120, 133; 309 P.3d 372 (2013).

[24] *Id., citing Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 2929, 2 P.3d 1022 (2000).

[25] *See City of Redmond v. Central Puget Sound Growth Mgt. Hearings Bd.*, 136 Wn.2d 38; 959 P.2d 1091 (1998).

[26] *Yakima County v. Yakima County Law Enforcement Officers' Guild*, 174 Wn. App. 171, 297 P.3d 745 (2013); *Snohomish County Public Transp. Benefit Area v. PERC*, 173 Wn. App. 504, 294 P.3d 803 (2013)

- RCW 41.80.110(e) makes it an "unfair labor practice" for an employer "to refuse to "bargain collectively with the representatives of its employees."

- RCW 41.80.005(2) defines "collectively bargaining" as the employer's obligation to "bargain in good faith" with the "exclusive bargaining representative."

- RCW 41.80.005(9) defines "exclusive bargaining representative" as the "employee organization" that has been "certified," following the statutory election procedures, as the "representative of the employees in an appropriate bargaining unit."

- RCW 41.80.080(3) provides that the "certified exclusive bargaining representative shall be responsible for representing the interests of all employees in the bargaining unit."

Despite these provisions defining the rights and responsibilities of the elected exclusive bargaining representative, the State argues that a "coalition" of *other* labor organizations serves as the bargaining representative for these employees. The trial court properly rejected that argument. The statute defines *only* the employee-selected employee organization as the "exclusive bargaining representative" for those employees in the relevant "bargaining unit."

The State seeks to reinstate the final order of the Commission that had found that the State had no obligation to negotiate with the Guild. But the Commission's reasoning was fatally flawed and is entitled to no deference whatsoever. Most fatal to the State's argument for reinstatement of the Commission decision is that, inexplicably, that decision *failed to discuss*

or even identify the key statutory term applicable here — "*exclusive bargaining representative.*" Although the State argues vigorously for deference to PERC and its assumed "expertise," the Guild cannot imagine how deference could be extended when the Commission *failed to even identify or discuss the most pivotal statutory term at issue.*

The Guild follows with a more detailed analysis of the statute, including a discussion how the concept of "exclusive bargaining representative" is the keystone to understanding the statutory duty to bargain. (The Guild attaches as an Appendix to this brief a compilation of the relevant sections of the PSRA and has taken the liberty to **bold** those provisions it identifies as most relevant.)

C. The State Collective Bargaining Law Provides Employees a Preeminent Right to select Representatives of their Choosing and Participate in Collective Bargaining through those Selected Representatives.

PERC exercises jurisdiction over several collective bargaining statutes covering public employees working for a variety of state and local governments and special districts.[27] The case involved the statute that governs the bargaining rights of general government state employees. This 2002 statute, set forth in RCW Chapter 41.80, is usually referred to as the PSRA. Court and PERC precedents interpreting the law governing local

[27] See link at: http://www.perc.wa.gov/statutes.asp .

government employees, PECBA, apply to the PRSA unless legislative intent clearly dictates otherwise.[28]

The interpretation issues presented to PERC here were complicated by the existence of unusual, and probably not well worded, PSRA provisions involving "coalition" bargaining. Despite this awkward drafting, as will be explained below, the Guild asserts ultimately there is no real "ambiguity" and that the "plain meaning" doctrine controls this case. The plain meaning of the statute can and should be harmonized with: 1) other elements of the statute, 2) applicable common law, and 3) constitutional principles guaranteeing employees the right to "freedom of association." PERC erred by overlooking a key statutory phrase, leading it to adopt a strained interpretation of the PSRA "coalition" language. It then *compounded* those errors by ignoring other controlling legal and constitutional principles that would have dictated a different result. In this regard, *this case represents a textbook example of why it's ultimately up to a court of law, not an administrative agency, to determine what the law is.*

Before delving further into how PERC erred, the Guild believes it would be useful to set forth in greater detail the relevant PSRA provisions. Broadly speaking, the PSRA extends employees both "substantive" rights (e.g., the right of nondiscrimination) and "procedural" rights (e.g., the

[28] *See Western Washington University,* Decision 9309-A (PRSA, 2008); *citing State – Natural Resources*, Decision 8458-B (PRSA, 2005).

right to compel the employer to sit down and engage in a process of "collectively" negotiating with a representative of the employees choosing). At the center of *this case* is the employees' *substantive* right to choose a collective bargaining representative. This right was infringed upon by the employer when it refused to effectively recognize the Guild following its election. PERC erred by failing to harmonize this preeminent *substantive* statutory (and constitutional) right to choose a bargaining representative as it attempted to decipher the meaning of the *procedural* bargaining provisions.

PSRA mandates "collective bargaining."[29] While the law does not require either the employer or the bargaining agent to make particular concessions, it does require that the parties engage to work in "good faith" in an effort to reach an agreement.[30] And the statute further *requires* that the agreement be reduced to writing.[31]

The PSRA extends to employees what the Guild considers a *preeminent* right — the right to freely select a bargaining representative *of the employees' choosing*. RCW 41.80.050 provides:

> Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective

[29] RCW 41.80.005 (2).
[30] *Id.*
[31] RCW 41.80.030.

> bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

It is an "unfair labor practice" to "interfere with, restrain or coerce employees" in the "exercise of their rights" under the law,[32] "interfere with the formation or administration of any employee organization,"[33] "encourage or discourage membership in any employee organization by discrimination" in terms and conditions of employment,[34] or to "refuse to bargain collectively with the representatives of the employees."[35]

In furtherance of these "self-organization" rights, RCW 41.80.080 provides that employees may periodically petition to *change* their bargaining representative. This periodic election right arises during what is considered a "window period" that lasts for 30 days and falls between 90 to 120 day period preceding the expiration of a predecessor labor contract. In other words, at the end of each labor contract cycle, employees have a statutory right to discard their old representatives and bring in a new one.

Following a petition, the law requires PERC to examine certain factors concerning the working conditions and work organizations surrounding the body of work at issue and craft a "bargaining unit" that is appropriate. Once that "bargaining unit" is defined by PERC, an election

[32] RCW 41.80.110 (1)(a).
[33] RCW 41.80.110 (1)(b).
[34] RCW 41.80.110 (1)(c).
[35] RCW 41.80.110 (1)(d).

is held. The product of that election mandates that PERC issue a "certification" to the organization selected by the majority of employees as the "exclusive bargaining unit."[36] Once so certified, the employee-selected labor organization assumes the right and the responsibility to advocate for *all* of the bargaining unit employees on an *exclusive* basis: "The certified exclusive bargaining representative shall be responsible for representing the interests of all the employees in the bargaining unit."[37]

The PSRA imposes upon the State a duty to negotiate with that employee-selected "exclusive bargaining representative."[38] But at this point, dependent upon context, the PSRA diverges as to how those negotiations proceed, and that divergence is at the heart of this case.

Typical collective bargaining laws impose a duty on the employee representative and the employer to engage in bilateral negotiations. As a result of the legislative process, the PSRA adopted some highly unusual and still not yet completely defined procedures for bargaining. Although the law mandates normal bilateral negotiations for some bargaining units, for others the legislature created an unusual "coalition" bargaining process, at least for some circumstances.

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[36] RCW 41.80.070 (1).
[37] RCW 41.80.080 (3).
[38] RCW 41.80.005 (2).

In RCW 41.80.010, the legislature adopted three primary bargaining processes *for those occasions in which the "exclusive bargaining representative" is already in place*. First, for a labor organization certified as the "exclusive" representative for only *a single* bargaining unit, traditional bilateral negotiations were required but *only if the bargaining unit consisted of more than 500 employees*. Second, for a labor organization representing *more than one* bargaining unit (*and* representing more than 500 employees), *all* of the bargaining units are negotiated into a single "master" agreement. Third, for those labor organizations representing *fewer than 500 employees*, "negotiation shall by a coalition of all those exclusive bargaining representatives." RCW 41.80.010 further allows "supplemental bargaining of agency-specific issues" which can be adopted as an addendum of the master agreements. (The statute also requires that the issue of health insurance be negotiated in a coalition of all bargaining units.)[39]

The statute does not detail the precise process by which individual bargaining units "ratify" contracts, even though the heading of RCW 41.80.010 indicates it covers the "negotiation *and ratification* of collective bargaining agreements." Furthermore, neither RCW 41.80.010 nor any

[39] RCW 41.80.020.

other section of the PSRA defines the exact process that is undertaken to acquire the ratification and execution of a "coalition" agreement.

The provisions of RCW 41.80.010 appear best understood as mandating that the "coalition" engage in "coordinated bargaining" in which each "exclusive bargaining representative" retaining the sole right, as stated in RCW 41.80, to advocate for the interests of their represented employees. PERC has yet to address this issue under the PSRA but in other contexts, PERC has held that undermining the right of bargaining unit members to ratify agreements is a ULP.[40]

D. The Commission Erred in Concluding the State Collective Bargaining Law Binds the Guild and its Members to an Agreement the Members Never Approved and the Guild Never Negotiated or Executed.

It is not disputed that PERC has a certain level of expertise relating to the collective bargaining law. What is in dispute is how PERC applied the more general *legal* and *constitutional* concepts *outside its administrative expertise*. The trial court properly concluded that PERC erred because it failed to grasp the extent to which this statutory interpretation issue was controlled by overriding common law and constitutional law principles.

As indicated, courts owe *no* deference whatsoever to PERC when it involves itself in questions of law outside its administrative expertise. The State's theory, that deference should be extended on legal issues, is wholly

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[40] *See Kitsap County*, Decision 11675-A (PECB, 2013); *Shoreline School District*, Decision 9336-A (PECB, 2007); *Shelton School District*, Decision 579-B (PECB, 1983); *Naches Valley School District*, Decision 2516-A (EDUC, 1987).

misplaced. The proper application of the common law, the constitution, and ordinary rules of construction of the collective bargaining law itself all reveal that PERC erred when it interpreted this statute.

1. The Coalition Bargaining Provisions should be interpreted so as to be harmonized with the Constitution, Common Law, and Other Provisions of the Statute.

Several principles of statutory interpretation appear relevant here:

- Absent any ambiguity, a statute should be accorded to its plain and ordinary meaning.[41]

- A statute is ambiguous when more than one reasonable interpretation of the language is possible.[42]

- *If* a statute is ambiguous "it is appropriate to resort to aids of statutory construction, including legislative history."[43]

- When interpreting, "[r]elated statutes should be construed in relation to each other to give effect to each provision and should be read as complementary and not as conflicting."[44]

- "All provisions [of a statute] should be harmonized whenever possible, and an interpretation which gives effect to both provisions is the preferred interpretation."[45]

- "Courts should interpret statutes to avoid absurd or strained results so as not to render any language superfluous."[46]

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[41] *Delyria v. Wash. State Sch. for the Blind, 165 Wn.2d 559, 563, 199 P.3d 980 (2009).*
[42] *Id* (*citing Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298-99, 149 P.3d 666 (2006)).
[43] *Delyria v. State*, 165 Wn.2d 559 (2009).
[44] *Fray v. Spokane County*, 134 Wn.2d 637, 648, 952 P.2d 601 (1998); *citing Wright v. Engum*, 124 Wn.2d 343, 351-52, 878 P.2d 1198 (1994).
[45] *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981).
[46] *Id.* at 649; *citing Wright v. Engum*, 124 Wn.2d at 352.

- "Where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions."[47]

2. The Trial Court Properly Held that PERC Misinterpreted the Coalition Bargaining Provisions and Failed to harmonize those provisions with the other Provisions of RCW 41.80.

a. The PSRA does not bind newly elected "exclusive bargaining representatives" to terms adopted by unions elected as "exclusive bargaining representative" for other employee bargaining units.

The trial court properly held that PERC in concluding that Guild represented "employees were covered by the coalition collective bargaining agreement upon certification."[48] A conclusion that the PSRA *automatically* binds the Guild to the master Coalition agreement *without its consent* is not supported either by a plain reading of the statute or by the application of basic precepts of contract law.

The PSRA establishes a collective bargaining framework for State employees. RCW 41.80.010(2)(a), in relevant part, provides:

> For those exclusive bargaining representatives who represent fewer than a total of five hundred employees each, negotiation shall be by a coalition of all those exclusive bargaining representatives. The coalition shall bargain for a master collective bargaining agreement covering all of the employees represented by the coalition.

Ordinarily, this provision requires exclusive representatives who represent units with 500 or fewer employees to bargain collectively for

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[47] *Fray v. Spokane County*, 134 Wn.2d at 651; *citing Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984).
[48] *State—Fish and Wildlife*, Decision 11394-B (PSRA, 2013).

one master agreement. But the statute *also* expressly contemplates an individualized bargaining process outside of the coalition:

> The governor's designee and the exclusive bargaining representative or representatives are authorized to enter into supplemental bargaining of agency-specific issues for inclusion in or as an addendum to the master collective bargaining agreement, subject to the parties' agreement regarding the issues and procedures for supplemental bargaining.

Under this section, the State and Guild *could have* initiated a bargaining process to address the State's desire to implement a salary and health benefit premium reduction, with any agreement either being incorporated back into the master Coalition agreement or being attached as an addendum. The events created by the timing of the Guild's representation petition particularly fits within the definition of "agency-specific issues" and would justify accessing this process.

PERC adopted the State's claim that the Guild (and its members) were bound by an agreement for which the Guild was not a party. It cited RCW 41.80.020(2)(a) for the proposition that because a master agreement was in effect for the coalition, which the Guild was to join in the future, it was *already* bound by the coalition's "master agreement" before the Guild was even formed. But a closer examination reveals that PERC misapplied the language of RCW 41.80.020(2)(a):

> If an employee organization has been certified as the exclusive bargaining representative of the employees of a bargaining unit,

> the employee organization may act for and negotiate master collective bargaining agreements that will include within the coverage of the agreement all employees in the bargaining unit as provided in RCW 41.80.010(2)(a). However, if a master collective bargaining agreement is *in effect for the exclusive bargaining representative*, it shall apply to the bargaining unit for which the certification has been issued. Nothing in this section requires the parties to engage in new negotiations during the term of that agreement.[49]

These provisions bind a new bargaining unit to the master collective bargaining agreement already in effect, *but only* when the "exclusive bargaining representative" of the new unit was *already a party to the master agreement*. In contrast, the Guild, which is the exclusive representative for the Wildlife Enforcement Officers, was *not* an "exclusive representative" that participated in negotiations for the master Coalition contract or signed off on that contract. (In fact, the Guild did not even exist as an entity at the time of the Coalition negotiations). Therefore, no contract was "in effect" for the Guild. It had neither executed nor authorized such a contract.

PERC overlooked that this provision *only* applies to those bargaining units represented by an exclusive bargaining representative who had *previously been a party to the master Coalition agreement*. In other words, if a union *was* a member of the coalition and *then* successfully petitioned

[49] RCW 41.80.080(2)(a) (emphasis supplied).

to add additional bargaining units, those new units would automatically join *that* union's CBA.

PERC also overlooked the plain terms of RCW 41.80.010(2)(a) that indicate "the coalition" can *only* bargain on behalf of "exclusive bargaining representatives" that are coalition members. The Guild was not an "exclusive collective bargaining representative" when that contract was formed. The coalition has *no ability* to bargain for *future* members.

The statute cannot mandate "retroactive" incorporation provisions of RCW 41.80.020(2)(a) to the Guild without abrogating contract and agency law. Those legal concepts can only be harmonized, as the trial court properly concluded, by recognizing this provision applies *solely* to unions that *actually* negotiated, bargained, and executed a contract. The State argues that this provision binds the Guild to the master Coalition agreement, without the Guild's assent and execution. But this provision *specifically references* contracts that were "in effect" for a union, and no such contract, without effective formation and execution, was "in effect" for *the Guild*.

In fact, the claim made by the State that the coalition or its separate unions serve as an "exclusive bargaining representative" for other bargaining units who selected a different union, is precluded by the express terms of the statute: RCW 41.80.010 defines the coalition as *a*

collection of "exclusive bargaining representatives," *not* as *the* exclusive bargaining representative. The State's claim also fails to harmonize the statutory "exclusive bargaining representative" language with the judicially imposed "Duty of Fair Representation" (DFR).

It is important to consider the history and policy of "DFR" which is a *judicially* imposed rule of law (and one which PERC has previously misapplied). Most recently the Court of Appeals in *Yakima County v. Yakima County Law Enforcement Officer's Guild*[50] overturned PERC when it failed to recognize that DFR principles mandated a different result on a "scope of bargaining" determination. Citing to the parallel PECBA provision in RCW 41.56.080 that extends exclusivity to the certified bargaining agent, the Court of Appeals explained the DFR doctrine:

> Our Supreme Court has interpreted *RCW 41.56.080* to impose a duty of fair representation on unions because of their status as the exclusive bargaining agent for their members. *Allen v. Seattle Police Officers' Guild, 100 Wn.2d 361, 371-72, 670 P.2d 246 (1983).* "A union breaches its duty of fair representation when its conduct is discriminatory, arbitrary, or in bad faith." *Muir v. Council 2 Wash. State Council of County & City Emps., 154 Wn. App. 528, 531, 225 P.3d 1024 (2009).* The doctrine applies not only to "'negotiating, administering or enforcing a collective bargaining agreement,'" but also to "day-to-day adjustments in the contract and other working rules, resolutions of new problems and

[50] 174 Wn.App 171, 297 P.3d 745 (2013).

protection of employee rights already secured by contract." *Allen, 100 Wn.2d at 372-73.*[51]

The DFR concept is a judicial concept that *overlays* the collective bargaining statute. While PERC *should be* familiar with this concept, DFR actions are generally brought in courts of law, and it is clear that as recent as the 2013 *Yakima County* decision PERC failed to appreciate the full contours of this doctrine. PERC erred in *Yakima County* by peculiarly concluding unions could evaluate and decide grievances without holding a meeting, a proposition that the Court of Appeals recognized belied common sense. This mistake appears to have stemmed from PERC's misconception about the level of care owed by unions to its members under the court imposed DFR doctrine.

Likewise here, PERC failed to recognize that it belies common sense to conclude that one union could somehow bind another. PERC's analysis stems from the same peculiar error that the State's brief makes here—it discusses how exclusive bargaining representatives bargain in the prescribed coalition system *yet without ever identifying or discussing the actual definition of "exclusive bargaining representative."*

The State also disregards the legislative history, a history built upon the concept of the certified exclusive representative. The PSRA expanded

[51] Id. at 187.

previous State government employee bargaining rights.[52] That previous law had granted bargaining rights on a limited scope of bargaining (allowing only working condition bargaining and not compensation bargaining). *But it specifically allocated those bargaining rights to the certified representatives on a bargaining unit by bargaining unit basis.*[53] When PSRA broadened the scope of bargaining, it directed that bargaining units negotiate on a coordinated basis. But the PSRA did *not* expressly divest the exclusive bargaining representatives of their preexisting right and responsibility to advocate for their members. Instead, it expressly recognized that authority, specifying that it was the responsibility of the elected representatives to advocate for their members, *not* other unions with no interest or concern for those members.

These employees did *not* petition to be represented by the *other* unions within the "coalition." They *only* petitioned to be represented by *the Guild.* And as the trial court noted, at the time the Coalition CBA was created, the petition had not even been filed, so any "coalition representation was an impossibility. RCW 41.80.080(3) expressly indicates that, upon the employee's selection of the "certified exclusive bargaining representative," the elected union "shall be responsible for representing the interests of all the employees in the bargaining unit." The

[52] SHB 1268 (2002 Regular Session) (amending RCW Chapter 41.06)
[53] Id

Guild alone — and *not* any other union — retains the rights and responsibilities to advocate for its members.

Nowhere do the express terms of the PSRA specify that, when an *entirely new exclusive bargaining agent* becomes the new representative of a group of employees in a bargaining unit of less than 500, that this new bargaining agent and the members it represents, are *automatically* and without *assent* bound by the terms of the master Coalition agreement. Such compelled inclusion cannot be a reasonable outcome because the Guild did not participate in that agreement. Therefore, the State's interpretation conflicts with the plain terms of the collective bargaining definition in the PSRA. As we will see next, it also conflicts with *other terms* of the PSRA.

b. PERC failed to harmonize the other statutory provisions including those relating to the employee's right to choose their own representation without infringement or retaliation.

The trial court properly recognized that the terms of the statutes just referenced should be *harmonized* with other sections of the PSRA. These provisions include the *paramount right* of employees to seek representation of their own choosing:

> Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through

> representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion.[54]

The "right to self-organization .... through representatives of their own choosing" is further codified in RCW 41.80.080 which defines the election procedures. The statute also makes it unlawful to infringe on these election or other representation rights.[55] The PSRA also mandates that these rights cannot be "interfered with" and it specifically bars an employer from any actions to "dominate or interfere with the formation or administration of any employee organization" or otherwise "discourage membership in any employee organization."[56] PERC has repeatedly held in other cases that steering employees from one organization to another more favored organization is patently unlawful.[57]

In a recent case involving the University of Washington,[58] this Court upheld a PERC determination that the University committed a ULP when it insisted that, as a condition of receiving a pay raise, the employees accept a transfer from one labor organization to another. As the Court explained:

> Washington law guarantees state employees the right "to bargain collectively through representatives of their own choosing." *RCW*

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[54] RCW 41.80.050.
[55] See RCW 41.80.110.
[56] RCW 41.80.110.
[57] *Port of Tacoma*, Decision 4626-A, 4627-A (PECB, 1995).
[58] *University of Washington v Washington State Federation of State Employees*, 175 Wn.App. 251, 254, 303 P.3d 1101 (2013).

> *41.80.050*. A state employer may not, therefore, impose upon employees its own choice as to which labor union should represent them. Here, the University of Washington insisted on moving a group of hospital employees to a bargaining unit represented by a different union as a condition of reallocating them to a position with a higher pay grade. The Public Employment Relations Commission correctly decided that this was an unfair labor practice.[59]

Under State's interpretation of the PSRA, notwithstanding these terms protecting employees rights to seek representation of *their own choosing*, a separate provision of the same statutory framework would effectively be applied to repudiate such a right. It would do so by binding a group of employees to a contract of a third party—even though the "exclusive representative" that they just chose did not participate in that contract. Such a negation of the elected representative's advocacy rights would directly conflict with RCW 41.80.080. It specifies that following an election "[t]he certified exclusive bargaining representative shall be responsible for representing the interests of all the employees in the bargaining unit."[60]

The State's appeal theory, therefore, sets up a direct conflict between these separate provisions of the PSRA. The newly-elected and newly-certified exclusive bargaining representative cannot fulfill its statutory responsibility, under the State's interpretation.

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[59] *Id* at 254.
[60] RCW 41.80.080 (3).

This interpretation also conflicts with case law imposing upon the exclusive bargaining agent a "duty of fair representation."[61] It allows *other unions* to impose terms upon its members but while unrestrained by apparent duty of fair representation. This interpretation, which disregards the fundamental concept of the "duty of fair representation," should be rejected in favor an interpretation which harmonizes the statutory terms and coherently seams rights and responsibilities together, where they belong.

In holding that the Guild members had lost their immediate bargaining rights, PERC bluntly asserted that "[t]he changes about which the union complains are all a direct consequence of the employees' decision to leave the WFSE." But leaving WFSE is a statutory (and constitutional) *right*. The exercise of that right is *not* something that should lead to the imposition of adverse "consequences".

After a petition seeking to change representation is filed and before an agreement can be reached with the new exclusive representation, an employer *must* maintain the status quo on all mandatory subjects of bargaining. Under PERC's own case law, exclusive bargaining representative under PSRA means "any employee organization that has been certified under this chapter as the representatives of the employees in

[61] *See City of Yakima*, Decision 7147 (PECB, 2000).

an appropriate unit."[62] "A union that files a representation petition thereby acquires some status in the employment relationship;" specifically, it is entitled to file and prosecute unfair labor practice charges when, among other things, the status quo is unilaterally altered.[63] "When this Commission certifies the union as the exclusive bargaining representative, the obligation to maintain the status quo regarding all mandatory subjects of bargaining continues until the parties bargain a change to the status quo, or until the parties reach a bona fide impasse."[64] PERC "determines the status quo as of the date the union filed the representation petition."[65]

"During the period between certification of the exclusive bargaining representative and the final ratification and implementation of the parties' first collective bargaining agreement...the employer may not make a change that impacts mandatory subjects of bargaining in that subject area without first satisfying its bargaining obligation."[66] PERC has adopted this approach in an effort to protect the *fundamental right* of employees to seek representation of their choosing.

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[62] RCW 41.80.005(9).
[63] *State – Attorney General*, Decision 10733 (PRSA, 2010); *aff'd State – Attorney General*, Decision 10733-A (PRSA, 2011).
[64] *Id.*, *citing Tacoma-Pierce County Employment and Training Consortium,* Decision 10280-A (PECB, 2009).
[65] *State – Attorney General*, Decision 10733-A (PRSA, 2011); *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A (PECB, 2009).
[66] *Id.*

"Collective bargaining relationships between employers and unions are ongoing, so long as the union retains its status as exclusive bargaining representative."[67] Once that relationship is severed with employees selecting a new exclusive representative, *past agreements* between the employer and incumbent union are *nullified*. As explained by PERC in a previous case:

> The bargaining relationship between a union and employer commences with the certification or recognition of that union. While the wages, hours and working conditions then in effect mark the *status quo ante* from which alleged unilateral changes must be evaluated, any contractual commitments and tentative agreements made prior to that date between the employer and individual employees, or between the employer and a previous exclusive bargaining representative, are completely severed upon the change of exclusive bargaining representatives.[68]

3. The Trial Court Properly Held that PERC Failed to Harmonize RCW Chapter 41.80 Consistent with the Applicable Common Law, Including the Contract Law Mandate that Contracts be executed in order to be Effective and the Agency Law Principle that Parties are only Bound Principles when they have extended Authority.

The Collective Bargaining Law *supplemented* but did not *repeal* the common law. Without a doubt, the enactment of collective bargaining statutes, starting with the National Labor Relations Act, *restricted* and *modified* the reach of the common law and its principles of property owner rights and "freedom of contract." But these statutes did not entirely supplant the common law. In fact, to this day, many labor law disputes involve questions concerning whether the statutory "duty to bargain"

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[67] *Cowlitz County*, Decision 7007 (PECB, 2000).
[68] *Id.*

trumps—or does not trump—"inherent management rights" to direct the enterprise and control property, rights that are directly derived from common law.

Labor law, while certainly modifying common law notions of *unfettered* ownership rights, still retains and extends other key common law doctrine, including those derived from contract and agency law. In *Clark County PUD No. 1 v. IBEW*,[69] for example, the State Supreme Court explained that the right to arbitrate under a CBA was an extension of *common law* contract principles:

> When reviewing an arbitration proceeding, an appellate court does not reach the merits of the case. The common law arbitration standard, applicable when judicial review is sought outside of any statutory scheme or any provision in the parties' agreement, requires this extremely limited review. *See DSHS,* 61 Wn. App. at 783-84 (common law arbitration doctrine persists, despite the enactments of arbitration statutes, to "fill interstices that legislative enactments do not cover"). The doctrine of common law arbitration states that the arbitrator is the final judge of both the facts and the law, and "'no review will lie for a mistake in either.'"

There is express statutory[70] and case law[71] support for the idea that the common law continues except where it has been *expressly modified* by a

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[69] 150 Wn.2d 237, 253; 76 P.3d 248 (2003).

[70] RCW 4.04.110 ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

[71] *Bernot v. Morrison*, 81 Wash. 538, 544, 143 P. 104 (1914) (citing *Sayward v. Carlson*, 1 Wash. 29, 23 P. 830 (1890)); *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783-84, 812 P.2d 500 (1991).

statute's terms. Statutes and common law may co-exist to jointly define the "law," with the common law used "to address gaps in existing statutory enactments."[72] The common law prevails in such instances except where it has been expressly abrogated; statutory terms in "derogation" of the common law are often said to be "strictly construed."[73] The trial court properly concluded that PERC erred in failing to acknowledge and apply certain key contract and agency law principles that were not abrogated by the collective bargaining statute remain a part of the collective bargaining scheme.

A review of contract and agency law principles reveal the nature of this PERC error. Generally, "the terms of a contract will bind only the parties to the contract."[74] "A person cannot be bound by the terms of a contract of which he knew nothing."[75] But a person not a party to the contract may be bound by its terms *if* one of the parties to the contract acted as an "agent" for the non-party. Agency necessarily is created by the actions of *two* parties: "The agent manifests a willingness to act subject to

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[72] *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005).
[73] *Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 38, 360 P.2d 744 (1961).
[74] *Id.* at 100; *citing Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 668, 137 P. 144 (1913).
[75] *Id.; citing Sharpe Sign Co. v. Parrish*, 33 Wn.2d 883, 894, 207 P.2d 758 (1949).

the principal's control, and the principal expresses consent for the agent to so act."[76]

The burden of proving that agency exists rests upon the one who asserts it. [77] An "agent who is not authorized or apparently authorized to enter into a contract generally *cannot* bind the principal."[78] Apparent authority exists between a principal and its agent when "words or conduct *by the principal* are reasonably interpreted by a third party as conferring authority upon the agent."[79] Apparent authority may *only* be "inferred from the acts of the principal, *not from the acts of the agent,* and there must be evidence the principal had knowledge of the agent's acts."[80]

PERC itself has, in other contexts, acknowledged that the state collective bargaining laws retain a common law foundation, including these agency and contract law principles. In *Cowlitz County,* PERC addressed the question of whether a newly elected labor organization was bound by the contract terms of the predecessor union which had effectively "waived" some of the members' bargaining rights in its CBA.

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[76] *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn. App. 637, 645, 899 P.2d 347 (1995); *citing Ford v. United Bhd. of Carpenters & Joiners of Am.*, 50 Wn.2d 832, 838, 315 P.2 299 (1957).
[77] *See id.*
[78] *Id.* at 646; *citing* Restatement (Second) of Agency §161A. (Emphasis supplied.)
[79] *The State of Washington v. Bryant*, 146 Wn.2d at 102; *citing* Restatement (Third) of Agency §2.03 (2000). (Emphasis supplied.)
[80] *Bill McCurley Chevrolet, Inc., v. Rutz*, 61 Wn. App.53, 56, 808 P.2d 1167 (1991); *The State of Washington v. Bryant*, 146 Wn.2d at 90, 104, 42 P3d 1278 (2002) *citing Lamb v. Gen. Assocs., Inc.*, 60 Wn.2d 523, 627, 374 P.2d 677 (1962). (Emphasis supplied.)

PERC properly concluded in that case that "fundamental principles" of contract law indicated those CBA "waivers" could *not* be applied to the new representative that had never assented to that contract:

> A collective bargaining agreement is a voluntary act of two parties. A union only enjoys the benefits of the duty to bargain and has capacity to sign a collective bargaining agreement covering a particular group of employees while it holds status as exclusive bargaining representative of that bargaining unit under RCW 41.56.080. Fundamental principles of contract law dictate a conclusion that a contract between an employer and particular union terminates in all respects when that union loses its status as exclusive bargaining representative. There is no legal or logical reason to hold employees who have just separated themselves from a union to the contract terms negotiated by that union with their employer.[81]

Common law principles, while modified in certain limited respects by the collective bargaining statute, are *not* eviscerated by the adoption of a collective bargaining law. The State's appeal theory to the contrary is simply wrong. As in *Cowlitz County*, there is "no legal or logical reason" to conclude that a party is bound by the actions of a third party *to whom it never extended such authority*. The very notion of a union serving as the "exclusive bargaining representative" *hinges entirely* on its ability to be bound—or not be bound—solely *on its own volition*. PERC erred by failing to acknowledge the extent to which agency and contract law

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[81] *Cowlitz County*, Decision 7007 (PECB, 2000); see also *City of Kalama*, Decision 6739, 6740 and 6741 (PECB, 1999)

principles retained their independent force. Those principles mandated that the Guild could not be bound by a contract that it did not sign or authorize.

4. The Trial Court Properly Held that PERC Failed to Harmonize RCW 41.80 with the requirements of the Constitutional Right of Association.

To the extent the PSRA is subject to different interpretations, this Court should favor one that finds it constitutional, rather than one that would render it unconstitutional.[82] The interpretation of the PSRA advanced by the State would conflict with the First Amendment requirements of freedom of association and therefore, would result in the PSRA being subject to being declared unconstitutional. Rather than adopting such an avoidable interpretation, this Court, as the trial court did, should adopt an interpretation that harmonizes the PSRA with constitutional mandates.

The First Amendment of the US Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The constitutional right of association is inferred from the right to peaceably assemble and petition the government. The First Amendment is extended to the states through the 14th amendment.

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[82] *State v. Bao Dinh Dang*, 178 Wn.2d 868, 878; 312 P.3d 30 (2013); *quoting In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000).

The right of association has not been interpreted, per se, to create a right of collectively bargaining. Such rights, admittedly, are statutory. But once a state creates a collective bargaining system it cannot infringe or retaliate against the exercise of rights under such statutes.

In terms of the *precise* question before this Court concerning suspension or impairment of bargaining rights, there appears to be no case on point, making this nationally an apparent case of first impression. The coalition arrangement adopted by the State Legislature is highly unusual (and undoubtedly reflects the product of a political process advanced by some of the State's major unions) and lacks sufficient express attention to some of the constitutional constraints governing associational rights. In the Guild's research of state collective bargaining laws, it could find only three other states that had even remotely similar arrangements.Those statutes did not necessarily encumber rights as PERC's interpretation here does, and no court has yet apparently passed on constitutional issues concerning those arrangements.

In 2012, California adopted a coalition arrangement for a narrow class of individuals referenced as "in-home supportive providers."[83] Nothing in the structure of the California law appears to infringe upon the ability or

[83] California Code Section 110000 et. seq.

such individuals to change representation or suffer consequences for doing so nor does there appear to be case law yet addressing such encumbrances.

The State of Connecticut has an arrangement for health insurance to be bargained in a state coalition for its state government employees.[84] It is unclear how a change in representation petition is affected by that arrangement, although the law does provide for bargaining unit specific negotiations "whenever the parties jointly agree that such matters are unique to the particular bargaining unit."[85]

The State of Delaware provides for coalition bargaining for its state government employees[86] *but appears to have created a specific provision to appropriately address the constitutional issue raised here by the Guild*:

> Notwithstanding any provision in this Code to the contrary, collective bargaining pursuant to this section shall commence at least 150 days prior to the expiration date of any current collective bargaining agreement or in the case of a newly certified representative within a reasonable time after certification.[87]

The law appears to prohibit the commencement of coalition bargaining until such representation issues are resolved.[88]

Given this national collective bargaining situation, in which compelled "coalitional" bargaining is a rarity, it then should come as little surprise

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[84] Connecticut General Statutes 5-278.
[85] Connecticut General Statutes 5-278 (f)(1).
[86] Delaware Code, Chapter 19, Section 1311A.
[87] Delaware Code, Chapter 19, Section 1311A (f).
[88] Delaware Code, Chapter 19, Section 1311A (g).

that there is an absence of controlling case law. But general principles of freedom of association case law in the context of labor unions does provide support to the trial court's conclusions.

In 1979, in *Smith v. Arkansas State Highway Employees*[89] the Supreme Court addressed what had until then appeared to be an open serious question — whether the First Amendment could be interpreted to create a constitutional right to public sector collective bargaining. The Eighth Circuit, following other cases at the time, answered that it did. But the Supreme Court overturned the Eighth Circuit, finding no such right. *But in so doing, it did nonetheless acknowledge that the right of association did confer certain rights upon union advocates.*

At issue in *Smith* was an Arkansas policy that refused to consider a workplace grievance that was presented through the union rather than the individual. The Supreme Court acknowledged that a union advocate could not be retaliated against but declined to find that the constitutional right to petition compelled public employers to collectively bargain outside a statutory mandate:

> The *First Amendment* protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. *NAACP v. Button, 371 U.S. 415 (1963)*; *Eastern Railroad*

[89] 441 U.S. 463 (1979).

> *Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)*. The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, *NAACP v. Button, supra*, or by imposing sanctions for the expression of particular views it opposes, *e. g., Brandenburg v. Ohio, 395 U.S. 444 (1969)*; *Garrison v. Louisiana, 379 U.S. 64 (1964)*.
>
> But the *First Amendment* is not a substitute for the national labor relations laws. As the Court of Appeals for the Seventh Circuit recognized in *Hanover Township Federation of Teachers v. Hanover Community School Corp., 457 F.2d 456 (1972)*, the fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution. The *First Amendment* right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective." *Id., at 461*. The public employee surely can associate and speak freely and petition openly, and he is protected by the *First Amendment* from retaliation for doing so. See *Pickering v. Board of Education, 391 U.S. 563, 574-575 (1968)*; *Shelton v. Tucker, 364 U.S. 479 (1960)*. But the *First Amendment* does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

As indicated, preceding *Smith*, applying the right to petition to create a collective bargaining right appeared to be at least debatable, stemming from favorable dicta in the Supreme Court's earlier (1964) decision in *Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia Bar Association.*[90] In *Brotherhood of Railroad Trainmen*, the Court found that an effort from the Virginia Bar Association to impede the union from

[90] 377 U.S. 1 (1964).

referring its members to union-preferred legal counsel violated the right of association:

> It cannot be seriously doubted that the *First Amendment's* guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance -- and, most importantly, what lawyer a member could confidently rely on -- is an inseparable part of this constitutionally guaranteed right to assist and advise each other.[91]

Despite these broad principles which led the 8th Circuit at least to conclude that an associational right to engage in collective bargaining exists, the Supreme Court did not reach that far. But it has since reaffirmed the *general right* of union advocacy and organization. Nine years following *Smith*, the Supreme Court addressed another union associational rights issue concerning in *Lyng v. International Union*[92] In *Lyng* the Court rejected a union claim that "striker" penalty in the Federal Food stamp law, which caused a forfeiture of the right of strikers and their

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[91] *Id.* at 6.
[92] 485 U.S. 360 (1988).

families to food stamps, was unconstitutional. While rejecting that specific claim, though, the Court did reaffirm the union right of association. [93]

In short, the Supreme Court has recognized a constitutional right for unions and its members to advocate, but not a constitutional obligation on the government to *listen or respond to that advocacy.* But the right to advocate *does encompass the right to be free from interference or retaliation in that advocacy*. Following *Smith* courts have *uniformly* held that the exercise of union advocacy is protected under the First Amendment from efforts at discrimination or retaliation. A number of cases have *consistently* held that union officers that face retaliation have an actionable First Amendment claim.

A Fifth Circuit decision in *Professional Association of College Educators v. El Paso County Community College District*[94] appears to be the most frequently cited case recognizing this principle. The union officers claimed retaliation for their union activities and the court recognized the claims as actionable:

> The First Amendment protects the right of all persons to associate together in groups to further their lawful interests. This right of association encompasses the right of public employees to join unions and the right of their unions to engage in advocacy and to petition government in their behalf. Thus, the *first amendment* is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its

[93] *Id.* at 366-67.
[94] 730 F.3d 258 (1984).

> affairs or to retaliate against those who do. Such "protected *First Amendment* rights flow to unions as well as to their members and organizers." *Allee v. Medrano, 416 U.S. 802, 819 n. 13, 94 S. Ct. 2191, 2202 n. 13, 40 L. Ed. 2d 566, 582 n. 13 (1974).*
>
> The issue is not, as the defendants appear to argue, whether a public employer is required to deal with a union or other employee association but whether, assuming the correctness of the allegations of the complaint, the state may set out to injure or destroy an association of public employees for the purpose of preventing the exercise of their first amendment rights.[95]

Other court decisions are in accord with the principle that it is unconstitutional to retaliate for the exercise of union affiliation actions.[96]

Therefore, there is little doubt that collective bargaining statutes cannot contain discriminatory elements. While a state is not constitutionally obligated to recognize the right of, *once such a system has been established, it cannot infringe upon associational rights.*

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[95] *Id.* at 262.

[96] In *Roberts v. Van Buren Public Schools*, 773 F.3d 949 (1985) the 8th Circuit similarly upheld a retaliation claim indicating that "a public employer may not constitutionally prohibit its employees from joining together in a union." *Id.* at 957. In *Healy v. Town of Pembroke Park*, 643 F.Supp. 1208 (S.D.Fla. 1986)a federal district court observed that while there is no constitutional obligation to set up a grievance process, *once established*, "an employer may not discriminate or retaliate against union members in administering that process." *Id.* at 1212 In *Terry v. Village of Glendale Heights*, 1989 U.S. Dist. LEXIS 10737 another federal court rejected an argument that once a collective bargaining statute was in place the First Amendment retaliation claims were supplanted by the terms of the statutory scheme:
Defendants contend that because the right of collective bargaining was conferred upon public employees pursuant to a state law, activities arising out of that right are not protected by the First Amendment. We find this reasoning wholly unsound. The source of a public employee's right to unionize cannot change the associational rights that attach. A public employee may associate, speak freely and petition openly, and is protected by the First Amendment from retaliation for doing so. Smith, 441 U.S. at 464-65, 99 S.Ct. at 1828. It is true that the First Amendment does not impose an affirmative duty on the government to listen, to respond, or in this context, to recognize the association and bargain with it. Id. However, to leap from that proposition to the contention advanced by the defendants would seriously undermine recognized First Amendment rights. The state may not set out to injure or destroy an association for the purpose of preventing the exercise of First Amendment rights. *Id.* at 24-25

The Guild submits that the PSRA interpretation urged by the State is inherently discriminatory, explicitly compelling employees to accept as a "consequence" of changing advocates a two-year freeze on their right to be represented by the newly selected advocate. PERC's peculiar view of the statute compels employees to *choose between* exercising their statutory right to engage bargaining *or* their constitutional right to self-organize and associate with a different advocate. As the trial court properly concluded, the statute cannot constitutionally infringe upon such a right, and such an interpretation of PSRA should not be adopted.

E. Under the Proper Interpretation of the PSRA adopted by the Trial Court, the State of Washington Committed an Unfair Labor Practice When It Unilaterally Reduced Wages and the Amount it contributes to Health Insurance Premiums by Three Percent.

Once the PSRA is properly interpreted to mandate bargaining in this situation, as the trial court properly found, a further finding that an Unfair Labor Practice was committed is unavoidable. PERC's long consistently applied case law makes that beyond reasonable dispute.

RCW 41.80.020 defines the scope of bargaining under the PRSA. RCW 41.80.020(1) specifically notes that wages, hours, and other terms and conditions of employment are subjects of bargaining."[97] "Matters affecting wages, hours, and working conditions are mandatory subjects of

[97] *Western Washington University*, Decision 9309-A (PRSA, 2008).

bargaining, while matters considered remote from 'terms and conditions of employment' or which are regarded as a prerogative of employers or unions have been categorized as 'non-mandatory' or 'permissive'."[98] "The failure or refusal of an employer to bargain in good faith [on a mandatory subject of bargaining] (including a unilateral change made without fulfilling the statutory... obligation) is an unfair labor practice."[99]

"It is well settled that employee wages and hours are mandatory subjects of bargaining."[100] Therefore, an employer is "obligated to bargain any decision to reduce employees' wages and work hours because they are mandatory subjects of bargaining.[101] Similarly, PERC has long recognized that health and welfare benefits are mandatory subjects of bargaining [102] because this constitutes an extension of wages paid by the employer.[103]

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[98] *Id.*; *Federal Way School District*, Decision 232-A (EDUC, 1977).

[99] *City of Pullman*, Decision 8086 (PECB, 2003); *citing* RCW 41.56.160(4). (Additionally, "any refusal to bargain in violation of RCW 41.56.140(4) inherently interferes with the rights of bargaining unit employees, so that a 'derivative' violation is found under RCW 41.56.140(1)."; *Western Washington University*, Decision 8256 (PSRA 2003); *citing Washington State Patrol*, Decision 4757-A (PECB, 1995), *Battle Ground School District*, Decision 2449-A (PECB, 1986)). (Thus, an employer commits a derivative interference under 41.56.140(1) whenever a refusal to bargain is found under 41.56.140(4).)

[100] *Yakima Valley Community College*, Decision 11326 (PECB, 2012); *citing Griffin School District*, Decision 10489-A (PECB, 2010); *citing Federal Way School District*, Decision 232-A (EDUC, 1977).

[101] *Id.*

[102] *Lewis County, Decision* 10571 (PECB, 2009); *citing City of Anacortes,* Decision 9004-A (PECB, 2007), *East Valley School District*, Decision 9256 (PECB, 2006); *citing King County Library Systems*, Decision 9039 (PECB, 2005).

[103] *Island County Fire District 1*, Decision 9867 (PECB, 2007); *citing Yakima County*, Decision 9338 (PECB, 2006).

Specifically, health insurance premium contributions have been found to be a mandatory subject of bargaining.[104]

The State's alternative "dynamic status quo" and "emergency" defenses were properly never adopted by PERC, nor could they have been in light of PERC's precedent. In *Mabton School District*[105] (and its progeny) PERC has made it clear that the status quo is fixed at the date the petition was filed *and* that potential for a CBA (even one formally agreed by the incumbent challenged union) cannot defeat the petitioner's right to maintain the actual status quo existent *in the previous CBA*.

Similarly, PERC did not accept the State's "emergency" claim. Employers cannot evade bargaining by self-created emergencies, such as here, by passing budgets that strip out established employee compensation. The adopted Engrossed Senate Bill embodying the budget the State cites does not supplant the codified collective bargaining statute.

The modifications in wages and benefits implemented by the State were changes to the status quo for the Guild and its members. The status quo is the established wage, hour, and terms and conditions of employment as they existed for members of the Guild at the time it filed the petition, which occurred on March 4, 2011. Between then and July 1,

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[104] *WSCCCE v. Spokane County*, Decision 2167-A (PECB, 1985); *citing City of Seattle*, Decision 651 (PECB, 1979); *City of Dayton*, Decision 1990-A (PECB, 1985).
[105] Decision 2419 (PECB, 1986).

2011, (when the State implemented a new salary schedule that effectively reduced wages 3%), the only communication was a June 28, 2011 letter from the Guild's legal counsel to the State demanding a maintenance of the status quo, a letter the State disregarded.[106] There was, therefore, by definition, no bargaining and no agreement in advance of the July 1, 2011 implementation date.

Undeniably, the Guild did not file its petition until bargaining for the

2011-2013 agreements between both the State the various unions had mostly been completed. But the Guild filed its petition when it did during March simply *because this is the only "window period" permitted under the law to present such petitions.*[107] The statute created a right to change representation, created a process for making such a change, and also imposed a duty to bargain with the exclusive bargaining representative on "wages, hours and working conditions." To harmonize these rights, the State must be held to maintain the status quo with newly elected "exclusive bargaining representatives."

This principle is reflected in *Mabton School District.*[108] There the employer had reached an agreement with the incumbent union to extend the labor contract an additional two years. A challenging union then filed a

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[106] AR 848-849 Ex. H.
[107] *See* RCW 41.80.080(4).
[108] *Mabton School District* Decision 2419 (PECB, 1986)

petition during the initial "window period" created by the first contract. PERC rejected the argument by the incumbent union that the petition was "untimely" due to the intervening contract extension agreement. It concluded that the execution of the original contract created a fixed window period preserving the employees' right to file a change of representation petition and to fulfill the "statutory obligation to provide employees with the opportunity to select, reject, or change bargaining representatives at reasonable and predictable intervals."

The right to demand that the status quo be maintained based on the existing wage, hour, and working conditions in place at the time of its petition is a necessary feature of the right of employees to seek representation of their own choosing, and not some effort by the Guild's members to "game" the system and avoid the wage decrease other units incurred. An interpretation of the PSRA can be adopted that permits the parties to negotiate, and that is the one that should be adopted.

VI. CONCLUSION

For the foregoing reasons, the trial court's Order reversing and remanding the PERC decision should be affirmed. PERC erred by suggesting that the Wildlife Officers must suffer "consequences" for replacing WFSE. The Constitution protects the rights of public employees to engage in associational rights free of any adverse "consequences." An

interpretation of the statute that renders it unconstitutional can be avoided. The legislature, by specifically and narrowly defining the term "exclusive bargaining representative," retained for new representatives their right to advocate for their members. The arguments of the State and PERC that ignore the express definition of "exclusive bargaining representative" should be rejected.

RESPECTFULLY SUBMITTED this 9th day of January, 2015, at Seattle, WA.

CLINE & CASILLAS

By: _____

James M. Cline #16244
Christopher J. Casillas, WSBA #34394
Attorney for Fish and Wildlife Officers Guild

CERTIFICATE OF SERVICE

I certify that on January 9th, 2015, I caused to be served via electronic mail and U.S. Mail a true and accurate copy of the foregoing *RESPONDENT'S REPLY BRIEF* and this *CERTIFICATE OF SERVICE* in the above-captioned matter with:

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

DATED this 9th day of January 2015, at Seattle, Washington.

CLINE & CASILLAS

Donna Steinmetz
Paralegal

APPENDIX

RELEVANT SECTIONS OF RCW CHAPTER 41.80

41.80.005
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(2) "***Collective bargaining" means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020.*** The obligation to bargain does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter.

(9) "***Exclusive bargaining representative" means any employee organization that has been certified under this chapter as the representative of the employees in an appropriate bargaining unit.***

41.80.010
Negotiation and ratification of collective bargaining agreements.

(1) For the purpose of negotiating collective bargaining agreements under this chapter, the employer shall be represented by the governor or governor's designee, except as provided for institutions of higher education in subsection (4) of this section.

(2)(a) ***If an exclusive bargaining representative represents more than one bargaining unit, the exclusive bargaining representative shall negotiate with each employer representative as designated in subsection (1) of this section one master collective bargaining agreement on behalf of all the employees in bargaining units that the exclusive bargaining representative represents. For those exclusive bargaining representatives who represent fewer than a total of five hundred employees each, negotiation shall be by a coalition of all those exclusive bargaining representatives. The coalition shall bargain for a master collective bargaining agreement covering all of the employees represented by the coalition. The governor's designee and the exclusive bargaining representative or representatives are authorized to enter into supplemental bargaining of agency-specific issues for inclusion in or as an addendum to the master collective***

bargaining agreement, subject to the parties' agreement regarding the issues and procedures for supplemental bargaining. This section does not prohibit cooperation and coordination of bargaining between two or more exclusive bargaining representatives.

(b) This subsection (2) does not apply to exclusive bargaining representatives who represent employees of institutions of higher education, except when the institution of higher education has elected to exercise its option under subsection (4) of this section to have its negotiations conducted by the governor or governor's designee under the procedures provided for general government agencies in subsections (1) through (3) of this section.

(c) If five hundred or more employees of an independent state elected official listed in RCW 43.01.010 are organized in a bargaining unit or bargaining units under RCW 41.80.070, the official shall be consulted by the governor or the governor's designee before any agreement is reached under (a) of this subsection concerning supplemental bargaining of agency specific issues affecting the employees in such bargaining unit.

(3) The governor shall submit a request for funds necessary to implement the compensation and fringe benefit provisions in the master collective bargaining agreement or for legislation necessary to implement the agreement. Requests for funds necessary to implement the provisions of bargaining agreements shall not be submitted to the legislature by the governor unless such requests:

(a) Have been submitted to the director of the office of financial management by October 1 prior to the legislative session at which the requests are to be considered; and

(b) Have been certified by the director of the office of financial management as being feasible financially for the state.

The legislature shall approve or reject the submission of the request for funds as a whole. The legislature shall not consider a request for funds to implement a collective bargaining agreement unless the request is transmitted to the legislature as part of the governor's budget document submitted under RCW 43.88.030 and 43.88.060. If the legislature rejects or fails to act on the submission, either party may reopen all or part of the agreement or the exclusive bargaining representative may seek to implement the procedures provided for in RCW 41.80.090.

(4)(a)(i) For the purpose of negotiating agreements for institutions of higher education, the employer shall be the respective governing board of each of the universities, colleges, or community colleges or a designee chosen by the board to negotiate on its behalf.

(ii) A governing board of a university or college may elect to have its negotiations conducted by the governor or governor's designee under the procedures provided for

general government agencies in subsections (1) through (3) of this section, except that:

(A) The governor or the governor's designee and an exclusive bargaining representative shall negotiate one master collective bargaining agreement for all of the bargaining units of employees of a university or college that the representative represents; or

(B) If the parties mutually agree, the governor or the governor's designee and an exclusive bargaining representative shall negotiate one master collective bargaining agreement for all of the bargaining units of employees of more than one university or college that the representative represents.

(iii) A governing board of a community college may elect to have its negotiations conducted by the governor or governor's designee under the procedures provided for general government agencies in subsections (1) through (3) of this section.

(b) Prior to entering into negotiations under this chapter, the institutions of higher education or their designees shall consult with the director of the office of financial management regarding financial and budgetary issues that are likely to arise in the impending negotiations.

(c)(i) In the case of bargaining agreements reached between institutions of higher education other than the University of Washington and exclusive bargaining representatives agreed to under the provisions of this chapter, if appropriations are necessary to implement the compensation and fringe benefit provisions of the bargaining agreements, the governor shall submit a request for such funds to the legislature according to the provisions of subsection (3) of this section, except as provided in (c)(iii) of this subsection.

(ii) In the case of bargaining agreements reached between the University of Washington and exclusive bargaining representatives agreed to under the provisions of this chapter, if appropriations are necessary to implement the compensation and fringe benefit provisions of a bargaining agreement, the governor shall submit a request for such funds to the legislature according to the provisions of subsection (3) of this section, except as provided in this subsection (4)(c)(ii) and as provided in (c)(iii) of this subsection.

(A) If appropriations of less than ten thousand dollars are necessary to implement the provisions of a bargaining agreement, a request for such funds shall not be submitted to the legislature by the governor unless the request has been submitted to the director of the office of financial management by October 1 prior to the legislative session at which the request is to be considered.

(B) If appropriations of ten thousand dollars or more are necessary to implement the provisions of a bargaining agreement, a request for such funds shall not be submitted to

the legislature by the governor unless the request:

(I) Has been submitted to the director of the office of financial management by October 1 prior to the legislative session at which the request is to be considered; and

(II) Has been certified by the director of the office of financial management as being feasible financially for the state.

(C) If the director of the office of financial management does not certify a request under (c)(ii)(B) of this subsection as being feasible financially for the state, the parties shall enter into collective bargaining solely for the purpose of reaching a mutually agreed upon modification of the agreement necessary to address the absence of those requested funds. The legislature may act upon the compensation and fringe benefit provisions of the modified collective bargaining agreement if those provisions are agreed upon and submitted to the office of financial management and legislative budget committees before final legislative action on the biennial or supplemental operating budget by the sitting legislature.

(iii) In the case of a bargaining unit of employees of institutions of higher education in which the exclusive bargaining representative is certified during or after the conclusion of a legislative session, the legislature may act upon the compensation and fringe benefit provisions of the unit's initial collective bargaining agreement if those provisions are agreed upon and submitted to the office of financial management and legislative budget committees before final legislative action on the biennial or supplemental operating budget by the sitting legislature.

(5) There is hereby created a joint committee on employment relations, which consists of two members with leadership positions in the house of representatives, representing each of the two largest caucuses; the chair and ranking minority member of the house appropriations committee, or its successor, representing each of the two largest caucuses; two members with leadership positions in the senate, representing each of the two largest caucuses; and the chair and ranking minority member of the senate ways and means committee, or its successor, representing each of the two largest caucuses. The governor shall periodically consult with the committee regarding appropriations necessary to implement the compensation and fringe benefit provisions in the master collective bargaining agreements, and upon completion of negotiations, advise the committee on the elements of the agreements and on any legislation necessary to implement the agreements.

(6) If, after the compensation and fringe benefit provisions of an agreement are approved by the legislature, a significant revenue shortfall occurs resulting in reduced appropriations, as declared by proclamation of the governor or by resolution of the legislature, both parties shall immediately enter into collective bargaining for a mutually agreed upon modification of the agreement.

(7) After the expiration date of a collective bargaining agreement negotiated under this chapter, all of the terms and conditions specified in the collective bargaining agreement remain in effect until the effective date of a subsequently negotiated agreement, not to exceed one year from the expiration date stated in the agreement. Thereafter, the employer may unilaterally implement according to law.

(8) ***For the 2013-2015 fiscal biennium, a collective bargaining agreement related to employee health care benefits negotiated between the employer and coalition pursuant to RCW 41.80.020(3) regarding the dollar amount expended on behalf of each employee shall be a separate agreement for which the governor may request funds necessary to implement the agreement. The legislature may act upon a 2013-2015 collective bargaining agreement related to employee health care benefits if an agreement is reached and submitted to the office of financial management and legislative budget committees before final legislative action on the biennial or supplemental operating appropriations act by the sitting legislature.***

41.80.020
Scope of bargaining.

(1) Except as otherwise provided in this chapter, the matters subject to bargaining include wages, hours, and other terms and conditions of employment, and the negotiation of any question arising under a collective bargaining agreement.

(2) The employer is not required to bargain over matters pertaining to:

(a) Health care benefits or other employee insurance benefits, except as required in subsection (3) of this section;

(b) Any retirement system or retirement benefit; or

(c) Rules of the human resources director, the director of enterprise services, or the Washington personnel resources board adopted under RCW 41.06.157.

(3) Matters subject to bargaining include the number of names to be certified for vacancies, promotional preferences, and the dollar amount expended on behalf of each employee for health care benefits. However, except as provided otherwise in this subsection for institutions of higher education, negotiations regarding the number of names to be certified for vacancies, promotional preferences, and the dollar amount expended on behalf of each employee for health care benefits shall be conducted between the employer and one coalition of all the exclusive bargaining representatives subject to this chapter. The exclusive bargaining representatives for employees that are subject to chapter 47.64 RCW shall bargain the dollar amount expended on behalf of each employee for health care benefits with the employer as part of the coalition under

this subsection. Any such provision agreed to by the employer and the coalition shall be included in all master collective bargaining agreements negotiated by the parties. For institutions of higher education, promotional preferences and the number of names to be certified for vacancies shall be bargained under the provisions of RCW 41.80.010(4). For agreements covering the 2013-2015 fiscal biennium, any agreement between the employer and the coalition regarding the dollar amount expended on behalf of each employee for health care benefits is a separate agreement and shall not be included in the master collective bargaining agreements negotiated by the parties.

41.80.030
Contents of collective bargaining agreements — Execution.

(1) ***The parties to a collective bargaining agreement shall reduce the agreement to writing and both shall execute it.***

(2) A collective bargaining agreement shall contain provisions that:

(a) Provide for a grievance procedure that culminates with final and binding arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement and that is valid and enforceable under its terms when entered into in accordance with this chapter; and

(b) Require processing of disciplinary actions or terminations of employment of employees covered by the collective bargaining agreement entirely under the procedures of the collective bargaining agreement. Any employee, when fully reinstated, shall be guaranteed all employee rights and benefits, including back pay, sick leave, vacation accrual, and retirement and federal old age, survivors, and disability insurance act credits, but without back pay for any period of suspension.

(3)(a) If a collective bargaining agreement between an employer and an exclusive bargaining representative is concluded after the termination date of the previous collective bargaining agreement between the employer and an employee organization representing the same bargaining units, the effective date of the collective bargaining agreement may be the day after the termination of the previous collective bargaining agreement, and all benefits included in the new collective bargaining agreement, including wage or salary increases, may accrue beginning with that effective date.

(b) If a collective bargaining agreement between an employer and an exclusive bargaining representative is concluded after the termination date of the previous collective bargaining agreement between the employer and the exclusive bargaining representative representing different bargaining units, the effective

date of the collective bargaining agreement may be the day after the termination date of whichever previous collective bargaining agreement covering one or more of the units terminated first, and all benefits included in the new collective bargaining agreement, including wage or salary increases, may accrue beginning with that effective date.

41.80.050
Rights of employees.

Except as may be specifically limited by this chapter, ***employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion.*** Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

41.80.070
Bargaining units — Certification.

(1) A bargaining unit of employees covered by this chapter existing on June 13, 2002, shall be considered an appropriate unit, unless the unit does not meet the requirements of (a) and (b) of this subsection. ***The commission, after hearing upon reasonable notice to all interested parties, shall decide, in each application for certification as an exclusive bargaining representative, the unit appropriate for certification.*** In determining the new units or modifications of existing units, the commission shall consider: The duties, skills, and working conditions of the employees; the history of collective bargaining; the extent of organization among the employees; the desires of the employees; and the avoidance of excessive fragmentation. However, a unit is not appropriate if it includes:

(a) Both supervisors and nonsupervisory employees. A unit that includes only supervisors may be considered appropriate if a majority of the supervisory employees indicates by vote that they desire to be included in such a unit; or

(b) More than one institution of higher education. For the purposes of this section, any branch or regional campus of an institution of higher education is part of that institution of higher education.

(2) The exclusive bargaining representatives certified to represent the bargaining units existing on June 13, 2002, shall continue as the exclusive bargaining

representative without the necessity of an election.

(3) If a single employee organization is the exclusive bargaining representative for two or more units, upon petition by the employee organization, the units may be consolidated into a single larger unit if the commission considers the larger unit to be appropriate. If consolidation is appropriate, the commission shall certify the employee organization as the exclusive bargaining representative of the new unit.

[2002 c 354 § 308.]

41.80.080
Representation — Elections — Rules.

(1) The commission shall determine all questions pertaining to representation and shall administer all elections and be responsible for the processing and adjudication of all disputes that arise as a consequence of elections. The commission shall adopt rules that provide for at least the following:

(a) Secret balloting;

(b) Consulting with employee organizations;

(c) Access to lists of employees, job classification, work locations, and home mailing addresses;

(d) Absentee voting;

(e) Procedures for the greatest possible participation in voting;

(f) Campaigning on the employer's property during working hours; and

(g) Election observers.

(2)(a) ***If an employee organization has been certified as the exclusive bargaining representative of the employees of a bargaining unit, the employee organization may act for and negotiate master collective bargaining agreements that will include within the coverage of the agreement all employees in the bargaining unit as provided in RCW 41.80.010(2)(a). However, if a master collective bargaining agreement is in effect for the exclusive bargaining representative, it shall apply to the bargaining unit for which the certification has been issued. Nothing in this section requires the parties to engage in new negotiations during the term of that agreement.***

(b) This subsection (2) does not apply to exclusive bargaining representatives who

represent employees of institutions of higher education.

(3) The certified exclusive bargaining representative shall be responsible for representing the interests of all the employees in the bargaining unit. This section shall not be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

(4) No question concerning representation may be raised if:

(a) Fewer than twelve months have elapsed since the last certification or election; or

(b) A valid collective bargaining agreement exists covering the unit, except for that period of no more than one hundred twenty calendar days nor less than ninety calendar days before the expiration of the contract.

[2002 c 354 § 309.]

41.80.100
Union security — Fees and dues — Right of nonassociation.

(1***) A collective bargaining agreement may contain a union security provision requiring as a condition of employment the payment, no later than the thirtieth day following the beginning of employment or July 1, 2004, whichever is later, of an agency shop fee to the employee organization that is the exclusive bargaining representative for the bargaining unit in which the employee is employed. The amount of the fee shall be equal to the amount required to become a member in good standing of the employee organization. Each employee organization shall establish a procedure by which any employee so requesting may pay a representation fee no greater than the part of the membership fee that represents a pro rata share of expenditures for purposes germane to the collective bargaining process, to contract administration, or to pursuing matters affecting wages, hours, and other conditions of employment.***

(2) An employee who is covered by a union security provision and who asserts a right of nonassociation based on bona fide religious tenets, or teachings of a church or religious body of which the employee is a member, shall, as a condition of employment, make payments to the employee organization, for purposes within the program of the employee organization as designated by the employee that would be in harmony with his or her individual conscience. The amount of the payments shall be equal to the periodic dues and fees uniformly required as a condition of acquiring or retaining membership in the employee organization minus any included monthly premiums for insurance programs sponsored by the employee organization. The employee shall not be a

member of the employee organization but is entitled to all the representation rights of a member of the employee organization.

(3) Upon filing with the employer the written authorization of a bargaining unit employee under this chapter, the employee organization that is the exclusive bargaining representative of the bargaining unit shall have the exclusive right to have deducted from the salary of the employee an amount equal to the fees and dues uniformly required as a condition of acquiring or retaining membership in the employee organization. The fees and dues shall be deducted each pay period from the pay of all employees who have given authorization for the deduction and shall be transmitted by the employer as provided for by agreement between the employer and the employee organization.

41.80.110
Unfair labor practices enumerated.

(1) ***It is an unfair labor practice for an employer:***

(a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter;

(b) ***To dominate or interfere with the formation or administration of any employee organization*** or contribute financial or other support to it: PROVIDED, That subject to rules adopted by the commission, an employer shall not be prohibited from permitting employees to confer with it or its representatives or agents during working hours without loss of time or pay;

(c) ***To encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment, or any term or condition of employment;***

(d) To discharge or discriminate otherwise against an employee because that employee has filed charges or given testimony under this chapter;

(e) To refuse to bargain collectively with the representatives of its employees.

CERTIFICATE OF SERVICE

I certify that on January 14, 2015, I caused to be served via electronic mail and U.S. Mail a true and accurate copy of the foregoing *AMENDED FACEPAGE TO RESPONDENT'S REPLY BRIEF* and this *CERTIFICATE OF SERVICE* in the above-captioned matter with:

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

DATED this 14 day of January 2015, at Seattle, Washington.

CLINE & CASILLAS

Donna Steinmetz
Paralegal