93857-6

Court of Appeals No. 72104-6 I

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Appellant,

v.

FISH AND WILDLIFE OFFICERS GUILD and PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

PETITION FOR REVIEW

James M. Cline, WSBA #16244
Christopher J. Casillas, WSBA #34394
Cline & Casillas
520 Pike Street, Suite 1125
Seattle, WA 98101
(206) 838-8770 (Phone)
(206) 838-8775 (Fax)

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I. IDENTITY OF PETITIONER

Petitioner, Fish and Wildlife Officers Guild, asks this Court to accept review of the attached decision of the Court of Appeals, Division I.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its Decision on December 7, 2015. That decision is set forth in pages A-35-51. The Petitioners promptly filed a Motion for Reconsideration on December 28, 2015. After an order to the Respondents on January 5, 2016 to file an Answer to the Motion, the Motion was denied by the Court on January 28, 2016. That ruling is set forth in the Appendix at A-52.

III. ISSUE PRESENTED FOR REVIEW

Issue 1: Is the Guild 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 state employee collective bargaining law (Personnel Services Reform Act — 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 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 Court of Appeals err when it reversed the Superior Court conclusion that the Public Employment Relations Commission (PERC) had 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?

IV. STATEMENT OF THE CASE

The commissioned officers of the Washington Department of Fish and Wildlife, now represented by the Guild, were previously represented in a bargaining unit designated by PERC as "RU-538."[1] This bargaining unit was represented by the Washington Federation of State Employees (WFSE).[2] The most recent Collective Bargaining Agreement (CBA) covering the unit was the agreement between the State and the WFSE that was in effect from July 1, 2009 through June 30, 2011.[3]

Following the PERC election rules, the Guild collected representation interest "cards" from employees and, in March 2011, filed a representation

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

petition with PERC.[4] Faced with an election, WFSE disclaimed representation.[5] PERC then scheduled an election.[6] On June 24, 2011, PERC tallied the results and issued an interim certification declaring the Guild as the exclusive bargaining representative.[7]

The Guild wrote to the State indicating that the WSFE contract terms no longer applied to the Guild and requested bargaining.[8] Despite the Guild's letter, on July 1, the State implemented the terms of the WSFE contract, reducing the Guild's members' wages by 3% and also reducing its contribution to insurance premiums.[9] The State claimed that the Guild had no right to negotiate for its represented members and that the Guild members were bound by an agreement *previously* negotiated. The contract that the State asserted bound the Guild, though, was *not* the WFSE contract, but a *different contract* signed by a "coalition." Although the WFSE CBA had contained specific provisions about the officer's working conditions, this "coalition" agreement had *no* such provisions.[10]

Both parties here agreed that the WFSE terms no longer applied to the Officers. But the State also claimed that, despite this effective revocation

[4] AR 194-195, at ¶3.
[5] AR 195, at ¶6
[66] AR 195, at ¶ 7.
[7] AR 202-203 Joint Ex. A.
[8] AR 198, at ¶14, ¶18.
[9] AR 198, at ¶15.
[10] AR 127-128, at ¶11.

of the WFSE terms, it had *no* duty to negotiate with the Guild for up to two years because of their members decision to choose a new representative. The Guild filed a ULP complaint with PERC.

The assigned Examiner took up the matter on summary judgment.[11] The Examiner ruled that the Guild bargaining unit was now bound by a CBA signed by a "coalition" of other unions.[12] The Guild petitioned the Commission for review, and the Commission upheld the Examiner.[13]

The Guild filed a Petition for Review to King County Superior Court.[14] The Honorable Kimberly Prochnau reversed PERC and remanded for entry of appropriate ULP remedies.[15] The State appealed. The Court of Appeals reversed on December 7, 2015, and on January 28, 2016 denied the Guild's Motion for Reconsideration.

V. ARGUMENT FOR ACCEPTANCE OF REVIEW

A. Summary of Argument.

Words matter. It matters what words have been included. It also matters what words have been excluded.

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

The trial court properly concluded that PERC had erred when it had committed *entirely excluded* from its analysis a term that the Legislature had *expressly included.* The trial court properly found the statutory phrase — "*exclusive bargaining representative*" — entirely changed the meaning and that PERC's failure to *even identify or otherwise discuss* this term "*exclusive bargaining representative*" was a violation of the Administrative Procedures Act (APA), entitled the decision to no deference and was reversible error.

The trial court properly found the decision made little sense. Nothing in the statute or the common law of contract and agency supports PERC's peculiar conclusion that a party can be bound by a contract it never agreed to or executed. The trial court also properly concluded that PERC's ruling had a retaliatory and potentially unconstitutional consequence of denying these employees any right to negotiate for two years.

Unfortunately, the Court of Appeals, inexplicably, *repeated the same exclusionary error as PERC.* Although it had, in passing, quoted the relevant key statutory term —"*exclusive bargaining representative*," it *did not discuss this term in its application of the law.*

Words matter. It was error for the Court of Appeals to *exclude* the words the legislature had *included.* The appellate court's enigmatic failure to identify and discuss the express legislative mandate granting the right of State

employees to choose their own *exclusive bargaining representative* for collective bargaining warrants this Court's acceptance of review and reversal.

The Petitioner recognizes this Court is not simply a court of errors. But this Court should accept review here because the error below is significant, as is its potential impact. The Petitioner will first identify the nature of the error and then address how RAP 13.4 supports acceptance of review.

B. The Court of Appeals Erred when it reversed the Trial Court.

1. 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 right to enter agreements on behalf of its members which is *exclusive*:

- 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 had authority to represent these employees. The trial court properly rejected that claim.

PERC is entitled to no deference here. Courts have extended some deference to agency interpretation, but that is not possible here. Inexplicably, PERC *failed to discuss or even identify* the pivotal statutory term— "*exclusive bargaining representative.*" PERC entirely missed the point it had to address so no weight can be given its conclusions.

2. 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.[16] The case involved the RCW Chapter 41.80, usually referred to as the PSRA, which governs the bargaining rights of general government state employees. (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 to the current issue.)

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

PSRA mandates "collective bargaining"[17] and requires that the agreement be reduced to writing.[18] The PSRA extends to employees the right to freely select an "*exclusive bargaining representative.*"[19] It is an "unfair labor practice" to "interfere with, restrain or coerce employees" in the "exercise of their rights" under the law,[20] "interfere with the formation or administration of any employee organization,"[21] "encourage or discourage membership in any employee organization by discrimination" in terms and conditions of employment,[22] or to "refuse to bargain collectively with the representatives of the employees."[23]

That law expressly requires PERC to apply certain factors and then define an appropriate "bargaining unit." An election is held. PERC issues a "certification" to the organization selected by employees as the "*exclusive bargaining representative.*"[24] The certified union assumes the right to advocate for *all* of the bargaining unit employees on an *exclusive* basis: "The certified *exclusive bargaining representative* shall be

[17] RCW 41.80.005 (2).
[18] RCW 41.80.030.
[19] RCW 41.80.050
[20] RCW 41.80.110 (1)(a).
[21] RCW 41.80.110 (1)(b).
[22] RCW 41.80.110 (1)(c).
[23] RCW 41.80.110 (1)(d).
[24] RCW 41.80.070 (1).

responsible for representing the interests of all the employees *in the bargaining unit.*"[25]

The PSRA imposes upon the State a duty to negotiate with that "*exclusive bargaining representative.*"[26] The proper identity of that representative is key to this case.

Although traditional labor law requires only bilateral bargaining between a union and employer, the PSRA creates "coalition" negotiations under circumstances. PERC misapplied the PSRA terms as to the "coalition" requirements. In RCW 41.80.010, the legislature adopted *three* distinct bargaining processes for those occasions in which the "exclusive bargaining representative" is already in place. PERC's error was that it *conflated* these separate processes and then overlooked how the statutory term "*exclusive bargaining representative*" indicated the correct process.

First, for a labor organization certified as the "*exclusive bargaining representative*" of 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

[25] RCW 41.80.080 (3) (emphasis supplied).
[26] RCW 41.80.005 (2).

fewer than 500 employees, "negotiation shall be by a coalition of all ***those*** *exclusive bargaining representatives*." (Emphasis supplied.) RCW 41.80.010 further allows "supplemental bargaining of agency-specific issues" which can be adopted as an addendum of the master agreements. PERC's error, discussed below, is that it concluded that the PSRA allowed overlooked that the Guild was an "exclusive" representative and allowed other unions to bind non-consenting unions in "coalitional" bargaining.

3. The Commission Erred in Concluding that 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.

a. 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.

i. 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 erred in concluding that the Guild represented "employees were covered by the coalition collective bargaining agreement upon certification."[27] A conclusion that the PSRA *automatically* binds the Guild to an agreement created *without its consent* is not supported either by a plain reading of the statute or by the application of basic precepts of contract and agency law.

[27] *State—Fish and Wildlife*, Decision 11394-B (PSRA, 2013).

RCW 41.80.010(2)(a) does establish a coalitional collective bargaining framework for State employees in bargaining units consisting of fewer than 500 employees. But it also recognizes the right to supplemental agency bargaining. Under supplemental bargaining, the State and Guild *could have* initiated a bargaining process to address the State's desire to implement a salary and health benefits premium reduction, with any agreement either incorporated or added to the master Coalition agreement.

PERC cited RCW 41.80.020(2)(a) and reasoned that if a coalition CBA was "in effect," if a newly created union it was *already* bound by the coalition's "master agreement" *even if it never consented or could not consent.* But PERC misapplied this section by *entirely* omitting the pivotal term — "*exclusive bargaining representative.*" The section states:

> 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.[28]

These provisions bind a new bargaining unit to the master collective bargaining agreement already in effect, *but only* when the "exclusive

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

bargaining representative" of the new unit was *already a party to the master agreement*. In contrast, the Guild, which is the "*exclusive bargaining representative*" for the Wildlife Enforcement Officers, was *not* an "exclusive bargaining representative" at the time the coalition contract was negotiated. Therefore, no contract was "in effect" ***for the Guild***.

PERC conflated provisions, disregarding that the provision *only* applies to those bargaining units *already represented* by an exclusive bargaining representative who had *previously been a party to the master Coalition agreement*. In other words, under the PSRA, if a union *was* a member of the coalition and *then* successfully petitioned to add bargaining units, *those* new units would automatically join *that* union's CBA.

PERC also ignored that RCW 41.80.010(2)(a) indicates "the coalition" can *only* bargain on behalf of "exclusive bargaining representatives" that are coalition members. The coalition has *no ability* to bargain for *future* members. The State's claim that the coalition in and of itself is an "exclusive bargaining representative" with authority to bind future bargaining units, 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 Guild was *not* an "*exclusive collective bargaining*

representative" when that contract was formed and could not have been part of that coalition.

Likewise here, PERC failed to recognize that it belies common sense to conclude that one entity can bind another. But PERC's ultimate error in analysis stems from the same peculiar error that the—it discussed how exclusive bargaining representatives bargain in the prescribed coalition system *yet without ever identifying or discussing the actual definition of "exclusive bargaining representative." Nowhere* in its decision is this pivotal term discussed.

Unfortunately, even after the trial court reversed PERC by calling out this omission, the Court of Appeals *repeated the PERC error*. Although the Court decision did *quote* the pertinent language, *it omitted that language in its ultimate analysis*. The court summarized its conclusion: "If a master CBA is in effect when an employee organization of fewer than 500 employees is certified, that agreement shall apply and "[n]othing in this section [RCW 41.80.080(2)(a)] requires the parties to engage in new negotiations during the term of that agreement."[29] It later added:

> But the PSRA does not allow the State and the newly certified exclusive bargaining representative to negotiate subjects already covered in the master agreement. Instead, if a master CBA is "in effect," it will apply to the bargaining unit for which certification was issued and "[n]othing in this section requires the parties to

[29] Slip opinion at 1.

engage in new negotiations during the term of that agreement." RCW 41.80.080(2)(a).[30]

Neither of these statements contains a complete summary of RCW 41.80.080(2)(a). The law does *not* simply state that no negotiations are required whenever there is a CBA "in effect." The statute specifically creates a negotiations bar only "if a master collective bargaining agreement is *in effect* ***for the exclusive bargaining representative***." By focusing on the existence of a coalition agreement while ignoring the statutory mandate that it specifically be in effect *for the recognized "exclusive bargaining representative,"* both PERC and the Court of Appeals erred.

ii. 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 all other sections of the PSRA. These provisions include the *paramount right* of employees to seek representation *of their own choosing* expressly codified in RCW 41.80.005. These rights are further codified in RCW 41.80.080 which

[30] Slip opinion at 17.

defines election procedures and makes it unlawful to infringe on representation rights.[31]

PERC's interpretation repudiates those statutory rights. It binds employees to a third party contract—even though the "exclusive bargaining representative" they just elected did not participate. This interpretation *directly* conflicts with the *express* provisions: "The certified *exclusive bargaining representative* shall be responsible for representing the interests of all the employees in the bargaining unit."[32] The Guild and the Guild alone was the designated advocate.

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."

b. 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.

[31] See RCW 41.80.110.
[32] RCW 41.80.080 (3).

The common law continues except where it has been *expressly modified* by a statute's terms.[33] The common law prevails in such instances except where it has been expressly abrogated; statutory terms in "derogation" of the common law are to be "strictly construed."[34] The trial court properly concluded that PERC erred in failing to apply contract and agency law.

Generally, "the terms of a contract will bind only the parties to the contract."[35] "A person cannot be bound by the terms of a contract of which he knew nothing."[36] A party may be bound under some circumstances by its agent. Agency necessarily is created by the actions of *two* parties: "The agent manifests a willingness to act subject to the principal's control, and the principal expresses consent for the agent to so act."[37] An "agent who is not authorized or apparently authorized to enter into a contract generally *cannot* bind the principal."[38]

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[33] 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." *See also 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).

[34] *Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 38, 360 P.2d 744 (1961).

[35] *Id.* at 100; *citing Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 668, 137 P. 144 (1913).

[36] *Id.; citing Sharpe Sign Co. v. Parrish*, 33 Wn.2d 883, 894, 207 P.2d 758 (1949).

[37] *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).

[38] *Id.* at 646; *citing* Restatement (Second) of Agency §161A. (Emphasis supplied.)

PERC itself has elsewhere acknowledged that the state collective bargaining laws retain a common law foundation, including these agency and contract law principles.[39] PERC erred by failing to acknowledge those principles retained here, which included that the Guild could not be bound by a contract that it did not sign or authorize.

c. 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 competing interpretations, this Court should favor one that finds it constitutional, rather than one that would render it unconstitutional.[40] The State's interpretation of the PSRA would conflict with the First Amendment freedom of association rights.

The First Amendment right of association has not been interpreted, per se, to create a right of collectively bargaining. But once a state creates a collective bargaining system, it cannot infringe or retaliate against the exercise of rights under those systems. Courts have *uniformly* held that the exercise of union advocacy is protected under the First Amendment from efforts at discrimination or retaliation.[41]

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[39] *See, e.g., Cowlitz County,* Decision 7007 (PECB, 2000).
[40] *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).
[41] A Fifth Circuit decision in *Professional Association of College Educators v. El Paso County Community College District*, 730 F.3d 258 (1984), 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.

PERC's interpretation is inherently discriminatory, compelling employees to accept as a "consequence" of changing representatives, a two-year freeze on their right to be represented. This peculiar view of the statute compels employees to *choose between* exercising their statutory right to bargain, *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 these rights.

C. This Case Warrants Review.

1. The Court of Appeals Decision conflicts with well-established principles of statutory interpretation as well as common law.

The Court of Appeals decision conflicts with basic principles of statutory construction as well as common law. "All provisions [of a statute] should be harmonized whenever possible, and an interpretation which gives effect to both provisions is the preferred interpretation."[42] Obviously, an interpretation that entirely omits application of a pivotal

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Other court decisions agree that it is unconstitutional to retaliate for the exercise of union affiliation actions. 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.

[42] *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981).

statutory term violates this established principle. As indicated, the decision also conflicts with basic principles of contract and agency law, including the elemental notion that a party cannot be bound to a contract to which it never assented.

2. The case involves an issue of substantial public interest — the collective bargaining rights of Washington State government employees.

At issue here is not just the collective bargaining rights of these Fish and Wildlife officers, but of nearly all state employees. This decision chills the rights of employees that might want to change representatives and ossifies current representation. State employees want the right to change representatives without having to suffer "consequences" or lose at least two years of bargaining rights.

The bargaining process following an election to change bargaining representatives needs to be addressed with finality. The Court should weigh the likelihood of its opportunity to address this later. The Guild submits the chances of these being presented to the Court again, as opposed to other legal issues that regularly recur, approaches nil. If not modified, this PERC decision will likely stand indefinitely as the rule defining the bargaining process following an election. Given the context in which the question might arise, it is quite unlikely that a party would

pursue a legal challenge on this issue which could only be granted in the face of this precedent by pursuing several layers of appeal. This issue of state government bargaining rights is important and the time to address those rights is now.

3. This case directly involves the constitutional right of public employees to freely choose their own Associations.

This case does not present a claim that the statute is unconstitutional. Rather, the Guild asserts that the *interpretation* offered by PERC would render it constitutional and for that reason, their interpretation should be rejected. The trial court properly reasoned that an interpretation that a statute is unconstitutional should be avoided in favor of a constitutional interpretation.[43] These rights are significant and should be addressed.

VI. CONCLUSION

For the foregoing reasons, review should be granted.

RESPECTFULLY SUBMITTED this 26th day of February, 2016, at Seattle, WA.

CLINE & CASILLAS

By: _____

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

[43] *See 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).

CERTIFICATE OF SERVICE

I certify that on February 26, 2016, 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:

Morgan Damerow
Office of the Attorney General
P.O. Box 40145
Olympia, WA 98504-0145
morgand@atg.wa.gov
Attorney's for Washington Department of Fish and Wildlife

Mark Lyon
Office of the Attorney General
7141 Cleanwater Dr. SW
P.O. Box 40108
Olympia, WA 98504-0108
MarkL1@atg.wa.gov
Attorney for Public Employment Relations Commission

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

DATED this 26th day of February 2016, at Seattle, Washington.

CLINE & CASILLAS

Cathy Riccobuono
Legal Assistant

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.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FISH AND WILDLIFE OFFICERS' GUILD,	)	No. 72104-6-I
Respondent,	)	
v.	)	PUBLISHED OPINION
WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,	)	
Appellant.	)	FILED: December 7, 2015

SCHINDLER, J. — The right of state employees to collective bargaining is governed by statute. The Personnel System Reform Act of 2002 (PSRA), chapter 41.80 RCW, requires exclusive bargaining representatives of bargaining units with fewer than 500 employees to negotiate a master collective bargaining agreement (CBA) as a coalition. The PSRA requires the representatives for all bargaining units to bargain as a coalition for health care benefits. The PSRA sets forth the rules for certification of an employee organization as the exclusive bargaining representative for the employees of a bargaining unit. If a master CBA is in effect when an employee organization of fewer than 500 employees is certified, that agreement shall apply and "[n]othing in this section requires the parties to engage in new negotiations during the term of that agreement."[1]

[1] RCW 41.80.080(2)(a).

The Fish and Wildlife Officers' Guild (FWOG) filed an unfair labor practice complaint asserting the state of Washington (State) refused to bargain wages and health care benefits. The Public Employment Relations Commission (PERC) concluded that when it certified FWOG as the exclusive bargaining representative of approximately 94 employees, the coalition master CBA for the 2011-2013 biennium was in effect and applied. PERC ruled the State did not alter the status quo or commit an unfair labor practice by refusing to engage in collective bargaining with FWOG and negotiate a new agreement on wages and health care benefits. The superior court reversed the PERC decision. The Washington Department of Fish and Wildlife appeals the superior court order. FWOG contends PERC erroneously interpreted and applied the PSRA. We reverse the superior court and affirm the PERC decision.

FACTS

The facts are undisputed. The Washington Federation of State Employees, AFSCME,[2] Council 28, AFL-CIO[3] (WFSE), represented a number of bargaining units including the Washington Department of Fish and Wildlife enforcement officers, bargaining unit RU-538. The master collective bargaining agreement (CBA) between WFSE and the state of Washington (State) for the 2009-2011 biennium expired on June 30, 2011.

During 2010 and early 2011, WFSE and the State negotiated a successor master CBA for the next biennium, July 1, 2011 through June 30, 2013. On December 14, 2010, WFSE and the State tentatively agreed to a three percent salary reduction for all bargaining unit employees effective July 1, 2011.

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[2] American Federation of State, County, and Municipal Employees.

[3] American Federation of Labor-Congress of Industrial Organizations.

On January 5, 2011, the State and the coalition of bargaining units with fewer than 500 employees agreed to a master CBA that included a three percent salary reduction for the 2011-2013 biennium effective July 2, 2011.

The State also negotiated an agreement with a coalition of all exclusive bargaining representatives (Health Care Coalition) to reduce the health care contributions paid by the State. On December 2, 2010, the State and the Health Care Coalition agreed to a reduction in the amount the State contributed for health care premiums from 88 percent to 85 percent effective January 1, 2012.

WFSE scheduled meetings with bargaining unit employees on the tentative master CBA. WFSE posted the tentative master CBA on its website with a description of the three percent wage reduction and the change in health care contributions agreed to by the Health Care Coalition. On January 24, 2011, WFSE mailed ballots to members. On February 17, 2011, WFSE announced the bargaining unit members voted to ratify the 2011-2013 master CBA that included a three percent reduction in wages and a reduction in health care benefits.[4]

On March 4, 2011, the Fish and Wildlife Officers' Guild (FWOG) filed a petition with the Public Employment Relations Commission (PERC) to represent approximately 94 "full time and regular part time employees in the Enforcement Program" of the Washington Department of Fish and Wildlife. PERC scheduled a unit determination hearing for June 7, 2011.

On May 25, the legislature approved the 2011-2013 WFSE master CBA and the 2011-2013 coalition master CBA reducing the wages paid by three percent. ENGROSSED SECOND SUBSTITUTE H.B. 1087, 62nd Leg., 1st Spec. Sess. (Wash. 2011).

[4] The master coalition also ratified the 2011-2013 CBA.

The legislature also approved the Health Care Coalition agreement reducing the amount the State contributed to employee health care premiums from 88 percent to 85 percent effective January 1, 2012. ENGROSSED SECOND SUBSTITUTE H.B. 1087, 62nd Leg., 1st Spec. Sess. (Wash. 2011).

That same day, on May 25, the legislature adopted Engrossed Substitute Senate Bill (ESSB) 5860 declaring an emergency and reducing the base salaries for the 2011-2013 biennium for all executive, legislative, and judicial branch State employees by three percent. ESSB 5860, 62nd Leg., 1st Spec. Sess. (Wash. 2011).

On June 24, PERC issued an "Interim Certification" of FWOG as the exclusive bargaining representative for a bargaining unit of approximately 94 Fish and Wildlife officers.

On June 28, FWOG sent a letter to the director of the Financial Management Labor Relations Office (LRO Director) "to verify that the employer understands the need to maintain the status quo throughout this period and up until the State reaches a Collective Bargaining Agreement with the Guild." FWOG asserts the WFSE master CBA that the Fish and Wildlife officers previously agreed to and ratified did not apply after WFSE disclaimed representation on June 6, 2011. FWOG demanded collective bargaining on "a new labor agreement" on wages and benefits.

In response, the LRO Director states that because the coalition master CBA was in effect for the 2011-2013 biennium when the bargaining unit was certified, that agreement applied to bargaining unit employees.

> There is a current collective bargaining agreement in place for the Coalition of Unions, which I've attached for your reference. Article 1.2 of that master agreement provides:

> If the Public Employment Relations Commission certifies a new bargaining unit in general government during the term of this Agreement and the exclusive bargaining representative represents fewer than a total of five hundred (500) employees, the terms of this Agreement will apply. The Employer agrees to enter into negotiations regarding mandatory subjects with the newly added group to discuss any bargaining unit specific concerns which are not addressed in this Agreement.

> You raise the issue of the 3% compensation reduction. The master collective bargaining agreement in place for the 2011-2013 Coalition of Unions agreement provides for a 3% reduction in pay and offsetting temporary salary reduction leave. The compensation reduction contained in the master agreement has been approved and funded by the legislature. The same is true for the 2011-2013 Washington Federation of State Employees (WFSE) master agreement.

The LRO Director states that under the PSRA, the employer did not have "the ability to bargain over legislatively imposed pay reductions, nor does it have the ability to bargain a new agreement between the State and the Guild" for the 2011-2013 biennium. However, the LRO Director agreed that under the PSRA, the State would negotiate "subjects that are unique to [Fish and Wildlife officers] that are not addressed in the Coalition agreement."[5]

> RCW 41.80.020(2)(a) establishes that unions with fewer than 500 employees shall negotiate with the State for one master collective bargaining agreement, which covers all such unions. The statute further provides that the Governor's designee and the exclusive 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.

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[5] The LRO Director also noted the legislature adopted ESSB 5860 declaring an emergency and directing a "3% cut" in wages. The letter states, in pertinent part:

> RCW 41.80.040 prohibits bargaining over actions deemed "necessary to carry out the mission of the state and its agencies during [an] emergenc[y]." And, of course, pursuant to RCW 41.80.020 (6), the terms of a collective bargaining agreement may not conflict with a statute.

(Alterations in original.)

On July 1, 2011, the State implemented the three percent wage reduction according to the terms of the master CBAs, the coalition master CBA, and ESSB 5860 for all State employees. The reduction in the amount the State contributed to health care premiums was scheduled to take effect on January 1, 2012.

On November 9, 2011, FWOG filed an unfair labor practice complaint with PERC. The complaint alleged the State interfered with employee rights by refusing to engage in collective bargaining with FWOG and unilaterally reducing wages and health care benefits.[6]

FWOG and the State entered into a joint stipulation of facts. FWOG and the State filed cross-motions for summary judgment on whether the State committed an unfair labor practice by refusing to engage in collective bargaining with FWOG on wages and health care benefits. The PERC hearing examiner granted the State's motion for summary judgment. The decision states that "under RCW 41.80.010(2)(a), upon certification, the union became a party to the coalition collective bargaining agreement and was not entitled to bargain a separate agreement on wages and health benefits." The hearing examiner ruled as a matter of law, the State "did not unilaterally change wages or health benefits or breach its good faith bargaining obligations over wages and health benefits." FWOG appealed the hearing examiner decision.

PERC affirmed the decision of the hearing examiner. Decision 11394-B - PSRA, No. 24387-U-11-6249 (Wash. Pub. Emp't Relations Comm'n Sept. 5, 2013). PERC rejected the argument that the hearing examiner decision violated the status quo principles under the Public Employees' Collective Bargaining Act (PECBA), chapter

[6] FWOG also alleged the State changed paid release time and insisted to impasse on ground rules. The superior court affirmed the PERC decision to dismiss these allegations. Neither the State nor FWOG appeal dismissal of these allegations.

41.56 RCW. PERC concluded "the unique features of Chapter 41.80 RCW" dictate "a different result."

> In essence, the union requests that the status quo principles applicable under Chapter 41.56 RCW apply to Chapter 41.80 RCW. The status quo under Chapter 41.56 RCW would have been the collective bargaining agreement negotiated between the employer and the WFSE and that status quo would have continued until the employer and the union negotiated a new agreement. However, the unique features of Chapter 41.80 RCW require a different result.

PERC decided that after certifying FWOG as the exclusive bargaining representative of approximately 94 Fish and Wildlife officers, the coalition master CBA established the status quo, and FWOG was not entitled to negotiate a new master CBA on wages or health care benefits. The PERC decision states, in pertinent part:

> The bargaining unit employees were covered by the WFSE master agreement at the time the union filed its petition. During the pendency of the representation petition, the status quo wages, hours, and other terms and conditions of employment were set by the WFSE master agreement. The employer was obligated to maintain the status quo until the union was certified as the exclusive bargaining representative. Once the union was certified as the exclusive bargaining representative, the WFSE master agreement no longer applied because the union represented fewer than 500 employees.
>
> The union was not entitled to negotiate a separate master collective bargaining agreement. If the employees had chosen to join a union that represented more than 500 employees, upon ratification, the employees would have been covered by that master collective bargaining agreement. RCW 41.80.010(2)(a) and 41.80.080(2)(a). In this case, the employees chose to be represented by a union that represented fewer than 500 employees. When the union was certified, the coalition collective bargaining agreement was in effect and became the status quo. Thus, the employees were covered by the coalition agreement and will be required to bargain successor agreements as part of the coalition.

PERC affirmed the dismissal of the allegation that the State violated RCW 41.80.110 by refusing to bargain with FWOG on wages and health care benefits. The

PERC decision states, in pertinent part:

> The union did not represent more than 500 employees and was required to bargain as part of the coalition. The union was not entitled to negotiate a separate master collective bargaining agreement or agreement on health benefits. Upon certification, the status quo for employee wages, hours, and terms and conditions of employment became the coalition collective bargaining agreement. The employer did not unilaterally change the status quo on wages, health benefits, or paid release time. The employer did not insist to impasse upon ground rules.

FWOG filed an appeal of the PERC decision in superior court. The court reversed the PERC decision that the State did not commit an unfair labor practice. The court concluded PERC erred in concluding the coalition master CBA applied. The court ruled that under general contract principles, the State had a duty to engage in collective bargaining with FWOG on wages and health care benefits. The State appeals.

ANALYSIS

The State argues the superior court erred in reversing the PERC decision. FWOG contends PERC erroneously interpreted the PSRA in concluding the State did not commit an unfair labor practice.

In reviewing an agency decision, we sit in the same position as the superior court and apply the standards of the Administrative Procedure Act, chapter 34.05 RCW. Pasco Police Officers' Ass'n v. City of Pasco, 132 Wn.2d 450, 458, 938 P.2d 827 (1997). Accordingly, our review is limited to the record of the administrative tribunal and the PERC decision, not the decision of the hearing examiner. City of Vancouver v. Pub. Emp't Relations Comm'n, 107 Wn. App. 694, 703, 33 P.3d 74 (2001).

A reviewing court may grant relief only if the party challenging the agency decision shows that the order is invalid for one of the reasons set forth at RCW 34.05.570(3). Yakima Police Patrolmen's Ass'n v. City of Yakima, 153 Wn. App. 541,

553, 222 P.3d 1217 (2009). RCW 34.05.570(3)(d) requires relief from the agency order when the decision is based on an erroneous interpretation or application of the law.

We review an agency order granting summary judgment de novo. Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Unchallenged and stipulated facts are verities on appeal. Fuller v. Dep't of Emp't Sec., 52 Wn. App. 603, 605, 762 P.2d 367 (1988).

The State argues the right of State employees to engage in collective bargaining is governed by statute, and the specific and unique provisions of the PSRA control. The State asserts that under the statutory provision for negotiation and ratification of a master CBA, RCW 41.80.010(2)(a); and the statute that sets forth the rules following certification of an employee organization as a new bargaining representative, RCW 41.80.080(2)(a); the State did not commit an unfair labor practice by refusing to engage in collective bargaining with FWOG on wages and health care benefits for the 2011-2013 biennium. FWOG contends that under the plain language of the PSRA, the State committed an unfair labor practice by refusing to bargain and by interfering with the employees' right to negotiate a new CBA.

Interpretation or application of the law by an agency is reviewed de novo. Pasco Police, 132 Wn.2d at 458. Our objective is to ascertain and give effect to legislative intent. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Statutory interpretation begins with the plain meaning of the statute. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The "plain meaning" of a statute is discerned from the ordinary meaning of the language at issue as well as the context of the statute in which that provision is found, related

provisions, and the statutory scheme as a whole. Lake, 169 Wn.2d at 526. " 'Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme.' " In re Bankr. Petition of Wieber, 182 Wn.2d 919, 926, 347 P.3d 41 (2015)[7] (quoting State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 342, 12 P.3d 134 (2000)). "While we look to the broader statutory context for guidance, we 'must not add words where the legislature has chosen not to include them,' and we must 'construe statutes such that all of the language is given effect.' " Lake, 169 Wn.2d at 526 (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). "Where the language of a statute is clear, legislative intent is derived from the language of the statute alone." City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). If the statute is unambiguous, the inquiry ends. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

When construing a collective bargaining statute, we give "substantial weight and great deference" to PERC's interpretation in view of its expertise in the area of collective bargaining. City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604, 119 Wn.2d 373, 381-82, 831 P.2d 738 (1992). However, we may substitute our interpretation for that of the agency. Chi. Title Ins. Co. v. Office of the Ins. Comm'r, 178 Wn.2d 120, 133, 309 P.3d 372 (2013).

The national Labor Relations Act specifically exempts state and local government employers from coverage. 29 U.S.C. § 152(2) ("The term 'employer' . . . shall not include . . . any State or political subdivision thereof."). Congress left the decision concerning collective bargaining rights for public employees to the states. See also City

[7] Internal quotation marks omitted.

of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n, 117 Wn.2d 655, 666-67, 818 P.2d 1076 (1991).

In 1967, the legislature adopted the Public Employees' Collective Bargaining Act (PECBA), chapter 41.56 RCW. LAWS OF 1967, Ex. Sess., ch. 108, § 1. The PECBA gives cities, counties, and political subdivisions of the State the right to engage in collective bargaining with employees on wages, hours, and working conditions. However, the PECBA gives the right to engage in collective bargaining to only certain limited categories of State employees. See, e.g., RCW 41.56.473 (Washington State Patrol officers); RCW 41.56.027 and RCW 47.64.120 (Washington State Department of Transportation Ferries Division employees).

In 2002, the legislature adopted the PSRA, chapter 41.80 RCW. LAWS OF 2002, ch. 354, § 301. The legislature substantively restructured the administration and collective bargaining rights for State employees.

The PSRA of 2002 gives all State employees the right to engage in collective bargaining with "the governor or governor's designee." RCW 41.80.010(1), .020(1). "Except as may be specifically limited by this chapter," the PRSA gives State employees the right to organize and "bargain collectively through representatives of their own choosing." RCW 41.80.050.

The PSRA adopts a unique structure that mandates the negotiation of a master CBA. RCW 41.80.010(2)(a). Exclusive bargaining representatives for bargaining units with fewer than 500 members must bargain as a coalition for wages, hours, and other terms and conditions of employment. RCW 41.80.010(2)(a). RCW 41.80.010(2)(a)

states:

> 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.[8]

RCW 41.80.020 defines the scope of bargaining. RCW 41.80.020(1) states:

> 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.

The PSRA mandates coalition collective bargaining for health care benefits with the bargaining representative of all bargaining units for "the dollar amount expended on behalf of each employee for health care benefits shall be conducted between the employer and one coalition for all the exclusive bargaining representatives subject to this chapter." RCW 41.80.020(3). The amount agreed to with the coalition "shall be included in all master collective bargaining agreements negotiated by the parties." RCW 41.80.020(3). RCW 41.80.020(3) provides, in pertinent part:

> 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,

[8] Emphasis added.

> 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. . . . Any such provision agreed to by the employer and the coalition shall be included in all master collective bargaining agreements negotiated by the parties.[9]

Under RCW 41.80.010(3)(a), the master CBA must be submitted to the Office of Financial Management by October 1 prior to the legislative session before the beginning of the biennium. The Office of Financial Management must certify that the master CBA is "feasible financially for the State." RCW 41.80.010(3)(b). "The legislature shall approve or reject the submission of the request for funds as a whole." RCW 41.80.010(3)(b). RCW 41.80.010(3) provides:

> 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:
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> (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.

Consistent with the requirement under RCW 41.80.010(2)(a) to negotiate a master CBA, the legislature adopted rules governing certification of an employee

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[9] Emphasis added.

organization as the new exclusive bargaining representative of a bargaining unit. Under RCW 41.80.080(4)(b), a bargaining unit may petition to change bargaining representatives during a 30-day window that is "no more than one hundred twenty calendar days nor less than ninety days" before the expiration of the CBA. RCW 41.80.080(4)(b) states:

> No question concerning representation may be raised if: . . . [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.

RCW 41.80.080(2)(a) states that when a new employee organization is certified as the exclusive bargaining representative of fewer than 500 employees and a master CBA is "in effect for the exclusive bargaining representative, it shall apply to the bargaining unit for which the certification has been issued." RCW 41.80.080(2)(a) states, in pertinent part:

> 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.[10]

The parties dispute whether under the plain language of the PSRA, the coalition master CBA was in effect and applied to FWOG. The State asserts PERC correctly decided that because the coalition master CBA was in effect when PERC certified FWOG, it applies, and the State did not have the authority to negotiate a new agreement with FWOG on wages and health care benefits. The State asserts RCW

[10] Emphasis added.

41.80.010(2)(a) authorizes supplemental collective bargaining only for agency-specific issues, not wages or health care benefits.

First, FWOG asserts the PSRA gives the State the authority to engage in supplemental collective bargaining for wages and health care benefits. We disagree. RCW 41.80.020 establishes the scope of bargaining. RCW 41.80.020(1) specifically states that "[e]xcept as otherwise provided in this chapter," wages and conditions of employment are subject to collective bargaining.[11] RCW 41.80.010(2)(a) requires bargaining units with fewer than 500 members engage in collective bargaining as a coalition and authorizes the State to enter into supplemental bargaining only for agency-specific issues as an addendum to the master CBA. Wages and health care benefits are not "agency-specific" issues.

Next, FWOG contends the PERC decision that the coalition master CBA applied ignores the right of employees to choose an exclusive bargaining representative and the right of an exclusive bargaining representative to negotiate a CBA. FWOG argues the definition of exclusive bargaining representative, RCW 41.80.005(9); the rights of employees, RCW 41.80.050; and the rights of the certified exclusive bargaining representative, RCW 41.80.080(3); require the State to engage in bargaining with FWOG for a new CBA on wages and health care benefits. We disagree.

RCW 41.80.005(9) defines an "exclusive bargaining representative" as "any employee organization that has been certified under this chapter as the representative of the employees in an appropriate bargaining unit." The PSRA grants employees the right to "bargain collectively through representatives of their own choosing . . . [e]xcept

[11] Emphasis added.

as may be specifically limited by this chapter." RCW 41.80.050.[12] The statute addressing the responsibilities of a newly certified exclusive bargaining representative of an employee organization of fewer than 500 members under RCW 41.80.080(3) also does not require the State to negotiate a new CBA. RCW 41.80.080(3) states:

> 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.

If a master CBA is in effect for a newly certified exclusive bargaining representative representing fewer than 500 employees, the PSRA does not permit the State to negotiate a separate CBA. RCW 41.80.080(2)(a) specifically states, "Nothing in this section requires the parties to engage in new negotiations during the term of that agreement."

The statutory scheme and plain language of the PSRA make clear the legislative intent to require negotiating a master CBA by a coalition for bargaining units of fewer than 500 members, and if that agreement is in effect when a new exclusive bargaining representative is certified, it shall apply and the State may not negotiate a new agreement.

FWOG concedes it did not file the petition for certification until after the WFSE master CBA and the coalition master CBA were entered into for the 2011-2013 biennium. There is no dispute FWOG represents fewer than 500 employees and a coalition master CBA for all bargaining units with fewer than 500 employees was "in

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[12] RCW 41.80.050 states, in pertinent part:

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.

effect" on June 24, 2011 when PERC certified FWOG as the exclusive bargaining representative. The statute anticipates certification will occur after a successor coalition master CBA has been negotiated and funded. RCW 41.80.080(4) allows questions concerning representation only during a "window" period of no more than 120 days nor less than 90 days before the expiration of a CBA. But the PSRA does not allow the State and the newly certified exclusive bargaining representative to negotiate subjects already covered in the master agreement. Instead, if a master CBA is "in effect," it will apply to the bargaining unit for which certification was issued and "[n]othing in this section requires the parties to engage in new negotiations during the term of that agreement." RCW 41.80.080(2)(a).

We conclude the State did not commit an unfair labor practice by refusing to negotiate a new CBA with FWOG on wages and health care benefits for the 2011-2013 biennium.

FWOG also asserts the PERC decision violates common law contract principles and the constitutional First Amendment right of association. We disagree. The Washington State Supreme Court has consistently held that the terms and conditions of public employment are controlled by statute. Wash. Fed'n of State Emps., AFL-CIO, Council 28, AFSCME v. State, 101 Wn.2d 536, 539-42, 682 P.2d 869 (1984).

FWOG concedes the First Amendment does not create a right to bargain but argues that "once a state creates a collective bargaining system it cannot infringe or retaliate against the exercise of rights under such statutes." FWOG does not meet its heavy burden to establish the PSRA is unconstitutional. Eugster v. State, 171 Wn.2d 839, 843, 259 P.3d 146 (2011) (We presume a statute is constitutional, and the

challenging party "bears the burden of establishing a statute's unconstitutionality beyond a reasonable doubt."). Nonetheless, we conclude the PSRA does not unconstitutionally infringe on the right to collective bargaining.[13]

We hold that under the plain language of the PSRA, PERC correctly concluded that the State did not commit an unfair labor practice by refusing to separately bargain with FWOG on wages and health care benefits. We reverse the superior court and affirm the PERC decision.

WE CONCUR:

Trickey, J

Becker, J

[13] We also note the legislature declared an emergency and mandated the three percent salary reductions under ESSB 5860. RCW 41.80.020(5) provides that "[t]he employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040." RCW 41.80.040 provides, in pertinent part:

> The employer shall not bargain over rights of management which, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:
>
> . . . .
>
> (4) The right to take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FISH AND WILDLIFE OFFICERS' GUILD, Respondent, v. WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, Appellant.	)	No. 72104-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Fish and Wildlife Officers' Guild filed a motion for reconsideration. Appellant Washington Department of Fish and Wildlife filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 28th day of JANUARY, 2016.

For the Court:

Judge