NO. 46735-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD, INC.

Petitioner

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Petitioner

v.

KITSAP COUNTY and
KITSAP COUNTY SHERIFF

Respondents

PETITIONER KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD'S OPENING BRIEF

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I. INTRODUCTION

The Kitsap County Correctional Officers' Guild ("Guild") represents all of the corrections officers employed by the Kitsap County ("County") Sheriff's Office. After indirectly learning that the County intended to layoff two Guild members at the start of the 2012 calendar year, the Guild submitted a timely demand to bargain over the County's unilateral decision to engage in layoffs. The County has refused to bargain over the layoff decision with the Guild, and instead chose to file a claim in Mason County Superior Court seeking a declaratory judgment that the County has no duty to bargain over its decision to "reduce the jail budget, operations, or staffing levels." [CP 767-773] The Guild filed a counterclaim seeking its own finding and order that the layoff decision by the County was a mandatory subject of bargaining and that the County committed an unfair labor practice ("ULP") by refusing to bargain with the Guild over this decision. [CP 753-766]

The Guild seeks reversal of the latest findings, conclusions, and Order from the Superior Court in favor of the County after the matter had originally been remanded back to the Superior Court upon a finding by the Court of Appeals that the appropriate balancing analysis under RCW Chapter 41.56 had not been initially applied by the Superior Court. During the remand proceedings, the Superior Court again committed an

error of law by failing to properly analyze the layoff decision under the applicable balancing analysis. That analysis necessarily dictates a conclusion that the decision to layoff two correctional officers in an effort by the County to reduce its labor costs is, in fact, a mandatory subject of bargaining. Through the County's admitted refusal to bargain this change and its unilateral implementation, the County has committed a ULP in violation of RCW Chapter 41.56

II. ASSIGNMENTS OF ERROR

A. Errors Assigned.

The Appellant, Kitsap County Correctional Officers' Guild, asserts that the Mason County Superior Court made the following errors:

1. Granting judgment in favor of Kitsap County through the issuance of an Order, dated August 29, 2014, based on proposed findings of fact and conclusions of law as proposed by Kitsap County determining that the decision to layoff two Guild members was a non-mandatory subject of bargaining and that the County had no legal obligation to negotiate this decision with the Guild; and

2. Denying judgment in favor of the Guild through its proposed findings of fact and conclusions of law

determining that Kitsap County committed an unfair labor practice by refusing to negotiate in good faith and interfering with the rights of the Guild through the unilateral layoff of Guild members and for all damages associated with this unlawful act, based on the final Order issued on August 29, 2014 by the Honorable Lisa Sutton, on behalf of the Mason County Superior Court.

B. Issues Presented

The Guild presents the following issues relating to these Assigned Errors:

1. The courts and Public Employees Relations Commission ("PERC") are required to apply a balancing test in assessing whether a potential subject of bargaining is mandatory or permissive under RCW Chapter 41.56. In applying this balancing analysis, PERC has routinely found that layoffs and other employment actions like furloughs constitute mandatory subjects of bargaining when motivated by an employer desire to reduce labor costs. Did the Superior Court misapply the relevant balancing analysis and prior case precedent in determining that the layoff

decision by Kitsap County herein constituted a non-mandatory subject of bargaining? (Assignment of Error Nos. 1 and 2).

2. It is an unfair labor practice for an employer to unilaterally implement a change in a mandatory subject of bargaining without first providing notice to a union, a reasonable opportunity to bargain, and then bargaining in good faith with the union. Kitsap County admittedly refused to bargain its decision to layoff two Guild members at the outset of 2012 and unilaterally imposed the layoffs. Did Kitsap County commit an unfair labor practice through its refusal to bargain, and interference, with the Guild? (Assignment of Error No. 2).

3. Whether the Guild is entitled to damages to remedy the unfair labor practice and attorneys' fees for having to bring this action to recover wages lost by its members as the result of the County's unlawful layoffs. (Assignment of Error No. 2)

III. STATEMENT OF CASE

The Guild represents all full-time and regular part-time corrections officers in the Kitsap County Sheriff's Office, Corrections Division, excluding sergeants, confidential employees and all other employees. [CP 634 ¶3] The employees represented by the Guild work in the County jail and are primarily responsible for the housing, control, and care of all inmates secured in the Kitsap County Jail. [CP 598 ¶5]

At the time of the initiation of proceedings at issue herein, the most recent collective bargaining agreement between the Guild and the County was for the period commencing January 1, 2007 through December 31, 2009. [CP 634 ¶6] The parties began negotiations for a successor agreement during the Summer of 2009. After reaching an impasse in negotiations in 2010, the parties filed for mediation with PERC. [CP 634 ¶7] Around May of 2011, the parties again reached an impasse during mediation, and around June 1, 2011, PERC certified the parties for interest arbitration. [CP 634-5 ¶7] An interest arbitration hearing in front of Arbitrator Howell Lankford was held on February 6, 2012 through February 9, 2012, and a final decision was issued on June 1, 2012. The new collective bargaining agreement stemming from the arbitration award is for the period of January 1, 2010 through December 31, 2012. [CP 635 ¶7]

On October 24, 2011, the Guild's President, Terry Cousins, learned that two of the Guild's members had been contacted by, and met with, the Chief of the Criminal Division, Ned Newlin. [CP 635 ¶8] President Cousins was told by the members that Chief Newlin had informed them that they would likely be laid off as of January 1, 2012. [CP 635 ¶8] Prior to this meeting, no member of the Guild's Executive Board had been contacted by the County notifying them of the possibility of layoffs starting in 2012, and as a result no Guild representatives attended this meeting with Chief Newlin. [CP 635 ¶8]

Immediately upon learning of this information, Guild President Cousins drafted a demand to bargain letter. [CP 635 ¶9; CP 642] The letter was hand delivered to Chief Newlin's secretary on October 24, 2011. [CP 635 ¶9] In the letter, Cousins stated the Guild demanded that the County bargain any layoffs and the associated impacts of any layoffs. [CP 635 ¶9] In a follow-up email, the Guild's attorney also communicated with the County's Labor Relations Manager, Fernando Conill, the next day on October 25, 2011, reiterating the Guild's demand to bargain the decision over the layoffs. [CP 635-6 ¶11; CP 646]

The parties eventually agreed to set up a face-to-face meeting to discuss the Guild's demand letter on November 8, 2011. [CP 636 ¶13] In advance of this meeting, the Guild's representative made an extensive

request for information concerning the County's current fiscal situation and budget for 2012. [CP 636 ¶11; CP 646] Some information pertinent to the County's fiscal situation was provided on November 5th [CP 636 ¶12], but the Guild had inadequate time to review all the material in advance of the November 8th bargaining meeting. [CP 636 ¶13] At that meeting, the County stated its position that the two layoffs were necessitated by budget cutbacks, but the Guild indicated it was still reviewing the County's fiscal data and did not necessarily agree. [CP 636 ¶14] The parties went on to discuss some proposals over the impacts of any layoffs. [CP 636 ¶14] No further meetings were scheduled. [CP 636 ¶14]

On December 2, 2011, the Guild's legal counsel sent an email reply to Mr. Conill reiterating the Guild's demand to bargain both the decision over the layoffs and any impacts and that, upon further review and analysis, the Guild did not believe there to be any budget constraint necessitating layoffs in 2012. [CP 637 ¶15; CP 663-65] At this juncture, the Guild had completed its review of the County's fiscal and budget data and determined that there was no financial need for any budget cutbacks in the Jail's 2012 budget and that, instead, it appeared the Board of County Commissioners had made a *policy decision* to reduce the Jail's budget and staffing. [CP 637 ¶15] The Guild also supplied the County with further

legal argument and case law supporting its position that any decision to engage in layoffs was a mandatory subject of bargaining and that the County had to fulfill its bargaining obligations in advance of any final decision. [CP 637 ¶15]

In response, by way of email on December 13th, Mr. Conill stated, for the first time, that the County's position was that it had no obligation to bargain over its decision to conduct layoffs and that a final decision to layoff two Guild members starting in 2012 had already been made. [CP 637 ¶16] A few days later, on December 17th, the Guild's legal counsel responded to Mr. Conill's email arguing why the County's legal rationale behind its belief that it did not have to engage in decisional bargaining over the layoffs was in error and again restating the Guild's desire to meet and bargain in good faith over any decision on layoffs. [CP 638 ¶17; CP 667] No further discussions or negotiations occurred on this matter, as the County filed the subsequent action herein on December 22, 2011. [CP 638 ¶18]

The two Guild members were laid off on January 1, 2012. [CP 638 ¶19] The impact of these additional layoffs on the working conditions of the remaining members of the Guild, as well as the two affected officers, were both wide-ranging and severe. In the years leading up to these two most recent layoffs, the ranks of the corrections officers had

been decimated, which had increased the workload and safety concerns of the remaining Guild members. [CP 91-2 ¶5, 6]. A staffing analysis done by the jail in the early 2000s indicated that more than 100 officers were needed to run the facility, but with this latest round of layoffs the number of corrections officers had been reduced to just 73. [CP 91 ¶4]. Coupled with the fact that the inmate population only increased during this time, the ratio of officers to inmates was significantly diminished, which resulted in significant safety concerns for the remaining officers. [CP 96, ¶16-17].

Additionally, the two affected officers have suffered significant financial hardship as a result of the layoffs. Both officers endured lengthy periods of unemployment following their layoffs, which resulted in significant financial and emotional burdens to them and their families. [CP 99, ¶22-23] While both have now found employment, the impacts of their extended unemployment have been ongoing in the form of compromised credit, increased travel time to a new job, and an overall loss in earning power. [CP 99, ¶22-23].

The original Superior Court Order of October 2012 in favor of Kitsap County was appealed, and on March 13, 2014, with a subsequent Mandate from the Court issued on April 22, 2014, the Court of Appeals remanded the case back to Superior Court upon finding that the Superior

Court did not properly conduct the requisite balancing analysis required in cases under RCW Chapter 41.56. Following an Order granting intervention in the case by PERC, the Superior Court received written arguments from the parties. By way of an Order issued on August 29, 2014, the Superior Court entered findings of fact and conclusions of law in favor of Kitsap County. This appeal stems from that final Order.

IV. SUMMARY OF ARGUMENT

The Superior Court committed an error of law in issuing an Order with findings of fact and conclusions of law that the County was not obligated to bargain over its decision to layoff two Guild members, which the Court found to be a non-mandatory subject of bargaining. The trial court also erred in denying the Guild's counterclaim, also seeking a declaratory judgment, that the County committed a ULP in contravention of RCW chapter 41.56 through its refusal to bargain, and interference with the rights of the Guild, by unilaterally imposing layoffs on Guild members without bargaining in good faith.

The decision to engage in layoffs is a mandatory subject of bargaining that must be negotiated and either agreed upon or imposed through a binding interest arbitration award before the County can implement such an action. The County's failure to discharge this good faith bargaining obligation herein should be declared to be in bad faith and

an unfair labor practice, and they should be enjoined from further action until they have discharged all of their duties under the Public Employees Collective Bargaining Act ("PECBA"), RCW Chapter 41.56

Under the scope of bargaining balancing analysis, the Court must weigh how directly an issue impacts employee "wages, hours, and working conditions" against those topics that are traditionally considered to be managerial prerogatives. In the past, application of this balancing analysis to the subject of layoffs has divided along the line of the employer's motivation behind the layoffs or other type of work reduction, like furloughs. When the motivation is found to be one where the *employer seeks to reduce labor costs*, the subject of layoffs has been found to be a mandatory subject of bargaining. In contrast, when any layoffs are only an indirect result of *programmatic or service changes* by the employer, bargaining is only permissive.

The record in this matter is clear that the County's motivation for engaging in layoffs was to reduce labor costs. There is no evidence that the County changed the scope of the enterprise by, for instance, closing a section of the jail or eliminating certain programs. The impact on employee wages and working conditions in this case is significant, and through the application of the balancing test it is clear that the layoffs here were mandatory subjects of bargaining.

Upon an appropriate finding that the decision to engage in layoffs in this matter was, in fact, a mandatory subject of bargaining, it necessarily flows from this conclusion that the County committed an unfair labor practice. The County provided no advanced notice to the Guild concerning its decision to conduct layoffs, nor did it provide a reasonable opportunity to bargain. In fact, it is an uncontested fact that the County believed it had no obligation to bargain the layoff decision with the Guild and unilaterally implemented it without any agreement and over the Guild's objections. Such actions violate RCW 41.56.140 for both the refusal to bargain and interference with the rights of the Guild.

To remedy the violation, the Guild seeks a standard remedy in unilateral change cases requiring the County to restore the *status quo ante* and making the employees whole for any damages suffered as a result of the unlawful layoffs. As part of this order, the County should also be required to bargain in good faith with the Guild concerning any layoff decision and post notices of its violation. PECBA empowers PERC, and in turn this Court, to issue damage awards and attorney fees to effectuate the purpose of the statute. Additionally, the Wage Recovery Act mandates an award of attorney's fees to the Guild for defending, and having to bring a claim, in Superior Court for the recovery of lost wages, and for this action on appeal.

V. ARGUMENT

A. Standard of Review.

The rule on Summary Judgment, Civil Rule 56(c) provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

An appellate court shall "review an order of summary judgment in a declaratory judgment action de novo and perform the same inquiry as the trial court."[1] "Facts and reasonable inferences are considered in the light most favorable to the nonmoving party and questions of law are reviewed de novo."[2]

B. The Superior Court Order Was in Error Because it Misapplied the Law Under RCW Chapter 41.56 Concerning the Classification of Mandatory Subjects of Bargaining.

1. A Balancing Test Must be Applied When Determining Whether a Subject of Bargaining is Mandatory or Permissive.

Kitsap County and the Guild are governed by RCW Chapter 41.56, the Public Employees Collective Bargaining Act. PECBA makes it an

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[1] *McNabb v. Dept. of Corrections*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008) (*citing Simpson Tacoma Kraft Co. v. Dept. of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 1992)).

[2] *Id.* (*citing Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005)).

"unfair labor practice" for an employer "to refuse to engage in collective bargaining."[3] "Collective bargaining" is defined in RCW 41.56.030(4):

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

Thus, the duty to bargain extends to "wages, hours and working conditions." PERC has had numerous occasions to expound upon the meaning of the duty to "collectively bargain," which standard has repeatedly been encapsulated as follows:

> A public employer covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the statutory collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB,

[3] RCW 41.56.140

1991). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1)[4]

Bargaining subjects are classified as "mandatory," "permissive" and "illegal."[5] PERC has indicated: that "[m]atters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered remote from 'terms and conditions of employment' or which are regarded as a prerogative of employers or of Unions have been categorized as 'nonmandatory' or 'permissive.'"[6]

PECBA case law recognizes certain "management rights," which are exempt from the duty to bargain. As instructed by the State Supreme Court, when matters touch on "wages, hours and working conditions" but also touch on "management rights," the Courts and PERC are to apply a "balancing approach" to determine if a subject is or is not a "mandatory subject of bargaining."[7] "Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristic predominates."[8]

Commenting on this standard, PERC has said: "The critical consideration in determining whether an employer has a duty to bargain a

[4] *City of Yakima*, Decision 11352 (PECB, 2012).
[5] *Yakima County,* Decisions 6594-C and 6595-C (PECB, 1999).
[6] *Id.*; *see also Federal Way School District*, Decision 232-A (EDUC, 1977).
[7] *International Association of Fire Fighters, Local 1052 v. Public Empl. Relations Commn.*, 113 Wn.2d 197, 203,778 P.2d 32 (1989).
[8] *Id.*

matter is the nature of the impact on the bargaining unit."[9] PERC has been consistent and clear: What it looks to in determining whether a change is within the scope of bargaining is the essential nature of the change, *not the creative label that a party might attach to the change.*[10]

The duty to bargain is broad, and a subject is not automatically exempt from bargaining simply because it *somehow involves* management rights. For example, in *King County v. PERC*,[11] the Court of Appeals rejected King County's claim that its right to regulate jail security exempted it from a duty to negotiate with the nurses' Union as to whether nurses had to wear a badge identifying their names. The nurses' Union argued — and PERC had agreed — that this touched on employees' safety concerns, a working condition, and was therefore subject to the duty to

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[9] *Spokane County Fire District 9,* Decision 3661-A (PECB, 1991).

[10] As the Commission explained in *Yakima County,* Decisions 6594-C and 6595-C (PECB, 1999):

> In determining whether an issue is a mandatory subject of bargaining, the Commission weighs the extent to which the issue affects personnel matters. Where a subject relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. *International Association of Fire Fighters, Local 1051 v. Public Empl. Relations Commn. (City of Richland)*, 113 Wn.2d 197 (1989). The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of the impact on the bargaining unit. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

In *City of Richland,* Decision 6120 (PECB, 1997), the Examiner rejected an employer's attempt to cast as management right to determine "staffing" what essentially was skimming of bargaining unit work. He noted: "The Commission and its Examiners thus go beyond characterizations and labels to analyze the facts demonstrated by a full evidentiary record." *See also City of Wenatchee*, Decision 8802 (PECB, 2004) ("Whether a staffing proposal is a mandatory or permissive subject of bargaining depends on the nature of the proposal.").

[11] 94 Wn.App. 431, 438-39, 979 P.2d 130 (1999).

bargain. In upholding PERC, the Court of Appeals demonstrated an application of the balancing test:

> King County asserts that the jail's name badge policy is a fundamental management prerogative which directly affects the "operational integrity of the jail." It claims that if decisions such as this one "were required to be made through the Jail's negotiations with its eleven different bargaining units, the result would be chaos and possible loss of control over a facility which necessarily requires strict and careful control over matters affecting security." King County cites numerous sources which support its argument that decisions affecting the safety and security of correctional facilities must remain in the hands of the correctional administrator. To tailor those sources to the facts of this case, King County cites two cases which held that employers were not required to bargain with employees over uniform changes which were implemented to further the facilities' missions. Those cases are not helpful here, however, because the employees in those cases were not relying on personal safety concerns. When union members' reasons for objecting to a proposed policy are not compelling, their interests are clearly outweighed by those of an employer who relies on internal order and discipline as a reason for the policy. But here, the nurses object to the jail's policy because they believe it will jeopardize their safety, a much more significant concern than those raised in the cases King County relies on.[12]

In upholding PERC, the Court also cited the standard used by the National Labor Relations Board (which PERC often cites as persuasive authority),[13] that the "scope of bargaining" test involved whether the issue touched on a "legitimate concern" to the Union.[14]

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[12] *Id.*
[13] *See Nucleonics Alliance, Local 1-369 v. WPPSS,* 101 Wn.2d 24, 677 P.2d 108 (1984).
[14] *King County,* 94 Wn.App. at 440.

Likewise, in *Metro v. PERC*,[15] the employer argued that its decision over whether reorganization of a "commuter pool program" was one strictly of management rights. The Court rejected that claim and the employer's creative label, noting that the employees had been transferred to a different work group where they would be subject to new working conditions:

> We agree that Metro is not required to bargain over changes in the scope and direction of the commuter pool program which do not primarily concern conditions of employment. Metro may reorganize a significant facet of its operation without bargaining, so long as the wages, hours and working conditions of represented employees are not affected. It is clearly implicit in PERC's order, however, that restoration of the commuter pool program to its former status is limited to the wages, hours and working conditions of the five transferred employees represented by Local 17. Its order does not affect management personnel, nor does it infringe upon Metro's prerogative to change the direction of its operations. PERC's exercise of its power under RCW 41.56.160 to compel Metro to comply with its duties under RCW 35.58.265 presents no conflict with Metro's transportation function.[16]

2. Under the Balancing Analysis, Layoffs Stemming from an Employer Desire to Reduce Labor Costs Have Universally Been Found to Constitute a Mandatory Subject of Bargaining.

As indicated above, PECBA requires bargaining over "working conditions." Job security is a paramount "working condition."

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[15] 60 Wn. App. 232, 803 P.2d 41 (1991), *aff'd.* in part, *rev'd.* in part, 118 Wn.2d 621, 826 P.2d 158 (1992) (Supreme Court reversed separate aspect of decision which required Metro to submit dispute to binding interest arbitration).

[16] *Id.* at 238.

Specifically, the Commission noted that it "has repeatedly held that the decision to lay off employees is a mandatory bargaining subject."[17] The employer's obligation to bargain extends to temporary or short term layoffs.[18]

An employer may not evade the duty to negotiate a layoff by characterizing it as an "operational shutdown." Where an employer decides to lay off employees for "economic reasons rather than due to a change in the scope of its operations, such a layoff decision is a mandatory subject of bargaining."[19] As the Examiner noted in *North Franklin School*

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[17] *City of Kelso*, Decision 2633-A (PECB, 1988). *See Tacoma-Pierce County Employment and Training Consortium*, Decision 10280 (PECB, 2009) (noting that "because the employer's layoff decision had a significant impact on employees' wages, hours and working conditions, the decision is a mandatory subject of bargaining"). *City of Centralia*, Decision 1534-A (PECB, 1982); *City of Mercer Island,* Decision 1026-A (PECB, 1981); *South Kitsap School District* Decision 472 (PECB, 1978)). NLRB cases are similar: *Pan American Grain Co.*, 351 NLRB 1412 (2007) (affirming the ALJ's finding that the Respondent's decision to lay off employees was a mandatory subject of bargaining); *Tri Tech Services,* 340 NLRB 894, 895 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain.") (*citing Taino Paper Co.* 290 NLRB 975, 977-978 (1988); *Peat Mfg. Co.*, 261 NLRB 240 (1982)); *Davis Electric Wallingford Corporation, et al*, 318 NLRB 375 (1995) (finding that employer committed unfair labor practice when it unilaterally gave employees three (3) working days notice of layoffs and refused to bargain). *See also Quality Packaging Inc.*, 265 NLRB 1141, *2 (1982) (ordering the employer to cease and desist from "unilaterally altering its method of recalling employees from layoff without notice to or bargaining with the Union as the exclusive bargaining representative of its employees").

[18] *See East Coast Steel, Inc. and Shopmen's Local Union No. 807, of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 317 NLRB 842, 846 (1995) (finding that employer violated its duty to bargain when it failed to properly bargain temporary layoff of employees on three days due to predictable supply shortfalls).

[19] *Pan American Grain Co.*, 351 NLRB 1412, 1414 (2007) (*citing Adair Standish Corp.*, 290 NLRB 317, 319 (1988) (finding unlawful failure to bargain over economically motivated layoffs), enforced in relevant part 912 F.2d 854 (6th Cir. 1990); *see also*

District: "[T]he Commission has held, also consistent with federal precedent, that an employer has an obligation to bargain when a desire to reduce employee work hours is motivated solely for the purpose of reducing its labor costs."[20]

Historically, PERC has repeatedly rejected employer efforts to universally frame layoff decisions as a budgetary right within management's exclusive purview. In contrast, beginning with *South Kitsap School District,*[21] PERC has held that layoffs that are economically motivated are mandatory subjects of bargaining. Subsequent decisions by PERC have confirmed that "the decision to lay off employees is a mandatory subject of bargaining."[22] This obligation to bargain has been extended by the Commission to also include the policies and procedures associated with any layoffs.[23]

This approach adopted by PERC, and subsequently confirmed by the Washington State Courts, originated in decisions by the National Labor Relations Board ("NLRB") and Federal Courts interpreting the

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Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213-214, 85 S. Ct. 398, 13 L.Ed.2d 233 (1964).

[20] Decision 5945 (PECB, 1997).

[21] Decision 472 (PECB, 1978).

[22] *Tacoma and Pierce County Employment Training Consortium*, Decision 10280 (PECB, 2009) (*citing City of Kelso*, Decision 2633-A (PECB, 1988), *aff'd.* in part and *rev'd.* in part, 57 Wn. App. 721, 790 P.2d 185 (1990), review denied, 115 Wn.2d 1010, 797 P.2d 512 (1990)); *See also Yakima County*, Decision 11621 (PECB, 2013); *Stevens County*, Decision 2602 (PECB, 1987); *City of Centralia*, Decision 1534-A (PECB, 1983).

[23] *Tacoma and Pierce County Employment Training Consortium*, Decision 10280-A (PECB, 2009).

National Labor Relations Act ("NLRA"). The NLRB has, on repeated occasions, confronted the issue over whether the decision to layoff employees is a mandatory subject of bargaining, consistently finding that the decision to layoff when motivated by economic reasons is a mandatory subject of bargaining.[24] The premise behind much of this case law is the idea that the Union may be able to point out unforeseen problems with any layoffs or it may be able to convince the employer to retain the employees.[25] Even if the probability of convincing the employer otherwise is low, the Supreme Court has dismissed that argument, noting:

> [a]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.[26]

Elaborating on these basic standards and rulings, PERC has had repeated occasion to further expound upon the topic of layoffs and when such decisions are properly classified as mandatory subjects of bargaining. The resulting case law, when properly understood, actually provides a

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[24] *See Amsterdam Printing and Litho Corp.*, 223 NLRB No. 66, 92 LRRM 1243 (1976); *Torrington Constr. Co.*, 198 NLRB 1158, 81 LRRM 1102 (1972); *Howmet Corp.*, 197 NLRB 471, 80 LRRM 1555 (1972); *Assonet Trucking Co., Inc.*, 156 NLRB 350, 61 LRRM 1048 (NLRB 1965); *Dixie Ohio Express Co.*, 167 NLRB 573, 66 LRRM (BNA)1092 (1967) *enforcement denied sub nom, NLRB v. Dixie Ohio Exp. Co.*, 409 F.2d 10, 70 LRRM 3336 (6th Cir. 1969); *See also* Morris, THE DEVELOPING LABOR LAW, 800 (2nd Ed. 1983) (listing "layoffs" under the heading of "obvious and settled examples" of mandatory bargaining subjects under NLRA).

[25] *See Dixie Ohio Express Co.*, 167 NLRB 573 (1967).

[26] *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 85 S. Ct. 398, 13 L.Ed.2d 233 (1964).

clear formula for determining when the decision to layoff is properly understood as a mandatory subject of bargaining.

Central to the inquiry by PERC in separating out those cases where layoffs have been deemed to be mandatory subjects of bargaining is *the employer's motivation process* that results in the eventual layoff. In *one set of cases* directly addressing layoffs, elaborated on below, PERC has identified the employer's main motivating factor as a *desire to reduce labor costs or an economic motivation* to change employee wages, hours, and working conditions. In these cases, the decision to engage in layoffs (and other work reductions like furloughs) itself has been found to be a mandatory subject of bargaining.

These decisions stand in contrast to a *second set of cases* where layoffs are an incidental result stemming from an original decision by the employer that involved a *programmatic change or an alteration to the services* to be provided by that employer, which, under the Balancing Analysis, more closely align with a traditional managerial prerogative. The Superior Court, at the behest of the County, has failed to properly distinguish between these two more nuanced, yet critically important differences, resulting in a significant error of law with respect to the classification of the layoff decision in this matter.

When an employer is motivated to reduce its labor costs or make other changes to wages, hours, and working conditions on a temporary or permanent basis, including laying off personnel and severing the employment relationship completely; it has repeatedly been found to be a decision implicating a mandatory subject of bargaining. In *City of Kelso*,[27] for example, the City unilaterally decided to contract out its firefighting work by partially annexing itself to the Cowlitz County Fire Protection District No. 2. The resulting annexation meant the City's firefighters would be laid off. In commenting on the City's motivation, PERC noted:

> Thus, a change driven primarily, if not exclusively, by considerations of labor costs was a foregone conclusion before the Union ever had a chance to present its views on the matter. At a later point in time, this Union was quite willing to offer substantial concessions to save the jobs of its members. We cannot know what concessions the union might have offered in January, 1985 to save the jobs of two if its members, since the employer did not give it the opportunity required by law.[28]

Thus, in concluding that labor costs motivated the ultimate decision to layoff, PERC found that "layoffs" are "among the types of issues where there is a duty to give notice and bargain."[29]

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[27] Decision 2633 (PECB, 1988).
[28] *Id.*
[29] *Id.*

Similarly, in *City of Bellevue*,[30] the Hearing Examiner originally found that the layoff decision was economically motivated. Within such a motivating structure, through the application of the subjects of bargaining balancing test, the Examiner found:

> The employer's decision to lay off its dispatchers caused the employees to lose wages, health care and continued investment in retirement benefits. This impact is being balanced with employer's interest to manage its workforce. On balance, in this case, the extent to which the employer's action impacts employee wages, hours and working conditions predominates over the extent to which the action is an essential management prerogative. There is no greater possible impact on an employee than the complete loss of the employment relationship. I find that the employer's decision to lay off ... is a mandatory subject of bargaining.[31]

In a recent and directly analogous case to our own involving King County and the Technical Employees Association, PERC confronted the question of whether furloughs (i.e. temporary layoffs) constituted a mandatory subject of bargaining. This case is of particular importance for the matter in front of this Court because, as PERC discussed, furloughs only differ from layoffs in that layoffs are "generally seen as a permanent

[30]Decision 10830 (PECB, 2010) (reversed in part on other grounds).

[31] While this decision was reversed, in part, by the full Commission on appeal, it did so upon concluding that the employer had decided to "get out of the business," which was a programmatic change and managerial prerogative. The ultimate decision to layoff, the Commission concluded, was only a consequence of the earlier decision to exit the dispatch business. The decision of the Commission, therefore, falls within the second line of cases described below that fit within the "programmatic decision" category. The Examiner's reasoning that economically motivated layoff decisions, themselves, constitute mandatory subjects of bargaining, remains an accurate statement of PERC's current case law.

or indefinite separation from work" whereas furloughs are "generally temporary in nature."[32] But, both topics directly affect the employment relationship and negatively impact employee wages. Also, in this case, the employer argued that its reason for unilaterally implementing the furloughs was to balance its 2009 budget, which is the same argument that Kitsap County makes herein.

On appeal to the full Commission, PERC agreed with the Examiner's finding that the employer's "chief motivation for imposing furloughs was to reduce labor costs,"[33] making the furlough decision a mandatory subject of bargaining. Specifically, it found:

> In reaching this conclusion, the Examiner found that the employer's stated reason for deciding to implement furloughs was to achieve labor savings, and not to eliminate services. The Examiner noted that the employer had the right to determine and manage its own budget, and considered the impact of the looming financial crisis. These facts did not make the decision to furlough employees a permissive one. We agree.[34]

Further, the Commission went on to contrast the *King County*[35] case with *Wenatchee School District*,[36] and in so doing highlighted the critical distinction in this body of case law that the Superior Court failed to properly apply. "Unlike *Wenatchee School District*, where the respondent

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[32] *King County,* Decisions 10576-A, 10577-A, 10578-A (PECB, 2010).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Decision 3240 (PECB, 1990).

made a wholesale change to the scope of its operation, this employer's decision to close its offices *does not constitute a programmatic change to an employer service*, rather the decision to implement furloughs simply precludes certain services from being available on ten days of the year."[37] King County was not making changes to the services it provided; rather, it was using the furloughs to achieve a savings in labor costs and help balance its 2009 budget. As a result, with this motivating mechanism at play, the issue of furloughs, like layoffs, was found to be a mandatory subject of bargaining.

Programmatic or service changes have been at the heart of second line of cases relied upon by the County in earlier proceedings, to which the Superior Court apparently relied upon as authority for the mistaken conclusion that layoffs are not a mandatory subject of bargaining. Three of the cases previously cited to by the County—*City of Anacortes*,[38] *City of Bellevue*,[39] and *City of Kirkland*[40]—all involved significant changes to the employer's operation where PERC concluded the employer had decided to "get out of the business" with respect to a previous service it had provided. In each of these cases, the cities decided to cease operating an independent emergency communications center and instead join with

[37] *King County, supra.* (emphasis supplied).
[38] Decision 6830-A (PECB, 2000).
[39] Decision 10830-A (PECB, 2012).
[40] Decision 10883-A (PECB, 2012).

other municipal jurisdictions to form a new regional communication center through an interlocal agreement. While the outcome of these changes was always layoffs, the original and central decision concerned the scope of the operations provided by an employer. The point here is well made by the full Commission on the appeal in the *City of Bellevue* matter, where the Commission ultimately concluded:

> The employer's decision to go out of business is an essential management prerogative that is a permissive subject of bargaining. Thus, the employer did not have a duty to bargain the decision to close its operations. Laying off employees was a result of the decision to close its operations, not a separate decision.[41]

The layoffs in all three cases were found to be *only incidental* to an underlying management prerogative to alter its service level and close some of its operations. Unlike the first set of cases detailed above, where no such service level changes were implicated and the motivating mechanism behind the layoffs was a desire to reduce labor costs; in these cases, layoffs were only a necessary consequence of an underlying programmatic change that PERC ruled the employer ultimately had the right to determine.

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[41] *City of Bellevue, supra.*

3. The Superior Court Misapplied the Balancing Test and Committed an Error of Law in Finding that the Layoffs in this Case Were Non-Mandatory Subjects of Bargaining

The application of the subjects of bargaining balancing test in this case weighs in favor of deeming the layoff decision made by Kitsap County as a mandatory subject of bargaining. The duty to collectively bargain includes the requirement to meet at reasonable times and negotiate in good faith over personnel matters, including wages, hours, and working conditions. Laying off employees to reduce labor costs, as occurred here, strikes at the heart of employee wages and working conditions.

Layoffs have a direct and obvious impact on employee wages because severing the employment relationship ends the employee's rights to wages from their employer in entirety. PERC has also found that the topic of job security, implicated by the subject of layoffs, is a core "working condition" within the category of mandatory subjects of bargaining. Although certain operational elements touching on managerial prerogatives are implicated in this case, on balance, the close proximity with which a layoff decision designed to reduce labor costs sits in relation to the meaning of a "wage, hour, or working condition" militates toward concluding that this decision was a mandatory subject of bargaining. As noted by the Hearing Examiner in *City of Bellevue*:

"[T]here is no greater possible impact on an employee than the complete loss of the employment relationship."[42]

The case at hand also fits squarely within a line of related cases decided by both PERC and the Courts wherein employment actions – like layoffs or furloughs – are found to constitute mandatory topics of bargaining because the employer's motivation for such decisions was economically based as a way of reducing labor costs. For instance, in *City of Kelso*,[43] PERC rightly concluded that the City's motivation in contracting out the firefighting work was driven by its efforts to reduce its labor costs rather than a decision to get out the business of providing fire services to city residents. The impetus for the layoffs – to reduce labor costs – tipped the balance in favor of such a decision constituting a mandatory subject of bargaining and lent itself to resolution through the collective bargaining process. As discussed by PERC, if the City had properly given notice and an opportunity to bargain, the union could have presented other cost saving measures mitigating the need for layoffs while still helping the City achieve the costs savings it desired.

Likewise, in *King County*,[44] PERC has already addressed, and rejected, employer claims that certain employment actions – in that case

[42] Decision 10830 (PECB, 2010).
[43] Decision 2633 (PECB, 1988).
[44] *King County*, Decisions 10576-A, 10577-A, 10578-A (PECB, 2010).

mandatory furloughs – when done to achieve budgetary goals should fall in favor of being declared a managerial prerogative. Even with budgetary constraints in mind, PERC has found that this does not supersede the fact that when the employer's main motive is to reduce labor costs (in contrast to program or service reductions), actions like layoffs or furloughs are mandatory subjects of bargaining. As PERC noted, while King County had the right to manage and set its budget, if it wants to achieve particular savings in its budget through furloughs, it has to negotiate that decision with the union.

The situation herein, therefore, is unlike a separate line of PERC cases, previously relied upon by the County, where layoffs were deemed to be a secondary or tertiary effect of an original decision that involved a programmatic or service change for which the employer was entitled to make unilaterally. Those cases would only be applicable to the legal parameters of this case if the facts of this case demonstrated that, for example, the layoffs stemmed from a decision by the County to close a section of the jail or reduce or eliminate a particular program it had offered, thus decreasing the need for a particular staffing level. These are not the facts at hand.

The County has not submitted any evidence concerning any change to the scope of the jail enterprise in Kitsap County, including any

programmatic revisions. In contrast, the record clearly demonstrates that the County perceived that some type of fiscal contraction at this time was necessary, for a variety of proffered reasons, and it chose to achieve reductions in the budget for the County jail through the reduction in Union represented personnel (in the form of mandatory layoffs) to save on labor costs.[45] This point is not in serious contention.

It would be one matter if the County had shut down a section of the jail or gone out of the business in its entirety, which it has some degree of managerial prerogative to determine. As PERC has made clear, any layoffs stemming from an earlier management decision to change the scope of the enterprise is not, in and of itself, bargainable because the subsequent layoffs only stem from an earlier decision for which the County could unilaterally determine.

In this case, however, there were no such programmatic changes. The County simply decided it wanted to save on labor costs to meet a self-imposed budget reduction, and it accomplished that by unilaterally determining to layoff two members of the Guild.[46] When economic savings and a reduction in labor costs are the motivating factors precipitating the layoff, it is clear that the layoff decision itself becomes a mandatory subject of bargaining.

[45] CP 599 ¶11.
[46] *Id.;* CP 96-97 ¶18-19.

The logic behind this result is born out in the meaning of collective bargaining and the process associated therewith. To the extent any employer determines that it wants to reduce labor costs, and in turn reduce the budget for a particular department, it may have the right to establish those global objective. *But the means by which those reductions are achieved, which invariably affect the wages of employees, are bargainable.*

For example, relying on the facts of this case, the County could have approached the Guild concerning its desire to reduce its labor costs and propose that this be achieved through layoffs. One response from the Guild may be to analyze the employer's budget situation and suggest alternative solutions to achieve the required budgetary savings. Alternatively, the Guild may be able to offer ideas to achieve certain operational efficiencies that may permit the employer to achieve some, or all, of the required savings without the need for layoffs. Or, perhaps with a fresh set of eyes and further contemplation, the employer may reconsider the need to cut the budget at levels previously determined.

In the alternative, even accepting the budget reductions as is, the Guild could offer various concessions that its members are entitled to receive under the contract, but that it may be willing to give up or temporarily forego, in order to avoid layoffs. It could, for instance,

propose that instead of laying off two members, that the entire membership take a certain number of furlough days in the year. Alternatively, it could propose a suspension of certain premium or specialty pays, or their removal from the collective bargaining agreement in their entirety, reducing the County's overall costs while maintaining the existing number of personnel. Changes in the work schedule may be yet another alternative that could be explored to meet the required savings.

There are any number of possible outcomes, but the point here is that the net effect of the new budget reality must be the product of bilateral negotiations because such discussions have a direct and immediate impact on the wages and working conditions of employees. To paraphrase the above-quoted decision by the U.S. Supreme Court, it is not always clear that these discussions will result in a meaningful agreement, but the collective bargaining laws are founded upon the legislative determination that it is worth the effort. The County undeniably refused to even have those discussions with the Guild due to its belief that it could unilaterally impose the layoffs, and as a result these discussions and a possible agreement, were never allowed to happen.

The collective bargaining statute gives paramount importance to the fact that in a represented environment, public employers cannot unilaterally impose conditions of employment on employees that affect

their wage, hours, or working conditions. The County can set their budget, but if their decision to set it at a particular level necessarily impacts a wage, hour, or working condition, then they are obligated to bargain over the means by which that is achieved. Without such a requirement, employers could effectively nullify the entire purpose of RCW Chapter 41.56 by unilaterally resetting their budgets to fundamentally alter collective bargaining agreements and the terms and conditions of employment specified therein. The absurdity of such a result was not intended by the Legislature, and it should be rejected here.

It is undoubtedly the case here that the reason underlying the layoffs of the two corrections officers in this case was an effort by the County to *reduce labor costs*. The Board of County Commissioners reduced the budget for the jail, and the means by which the County and Sheriff's Office chose to achieve the required savings was to do layoffs. In contrast, there is no evidence or argument from the County that the layoffs flowed from a change in their operations, such as a closing of a portion of the jail or a decision to "get out of the business" entirely. As such, this was *not an instance of a programmatic or service change* that only secondarily resulted in layoffs. Despite the County's best efforts to confuse the subject and portray PERC's cases on this topic as disjointed, when this motivating mechanism behind the layoffs is understood – either

a desire to save on labor costs or programmatic service changes – then the different outcomes in these cases becomes far more clear.

PERC has repeatedly and consistently determined that while an employer can set its budget, if it seeks to achieve a reduction in its labor costs through layoffs or other forms of salary reduction, then the layoff decision itself is properly categorized as a mandatory subject of bargaining under the Balancing Analysis. A similar determination is warranted in this case.

C. The Superior Court Erred in Failing to Find that Kitsap County Committed an Unfair Labor Practice Based on Their Refusal to Bargain the Layoffs

1. It is an Unfair Labor Practice for a Public Employer to Refuse to Engage in Collective Bargaining Concerning Mandatory Subjects of Bargaining.

A core PECBA requirement is that negotiations *precede* any decision to change "wages, hours or working conditions." An employer commits a ULP by effecting changes in wages, hours, or working conditions of Union represented employees without *first*: "(a) giving notice to the Union; (b) providing an opportunity for bargaining *before* making the decision on a proposed change; and (c) bargaining in good faith to agreement or impasse *prior to* unilaterally implementing any change."[47] For bargaining units subject to the statutory "interest

[47] *Skagit County*, Decision 8886 (PECB, 2005) (emphasis supplied) (*citing City of Vancouver,* Decision 808 (PECB, 1980) "The notice must be given in such a manner as

arbitration" provisions,[48] such as the Guild in this case, a classification of a subject as negotiable carries an additional consequence — no change is permitted without either the "consent" of the other party or a resolution by the interest arbitration panel.[49]

"When the Commission finds a refusal to bargain violation under the statutes it administers, it automatically finds that the employer derivatively interferes with employee rights."[50] "When an employer commits a refusal to bargain violation by making a unilateral change, the Commission finds that the action has 'an intimidating and coercive effect' on employees."[51] "Thus, if an employer unlawfully implements a unilateral change to a mandatory subject of bargaining, the employer's violation of RCW 41.56.140(4) also results in a derivative violation of RCW 41.56.140(1)."[52]

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to allow time for the union to 'explore all the possibilities, provide counter-arguments and offer alternative solutions or proposals regarding the issue raised by the proposed change.'").

[48] RCW 41.56.430-492 (includes subchapters 430, 440, 450, 452, 465, 470, 473, 475, 480, 490 and 492).

[49] RCW 41.56.470.

[50] *Mason County*, Decision 10798-A (PECB, 2011); *Battle Ground School District*, Decision 2449-A (PECB, 1986).

[51] *Battle Ground School District*, Decision 2449-A (PECB, 1986).

[52] *Walla Walla County*, Decision 11877 (PECB, 2013).

2. The Evidence Overwhelmingly Demonstrates that the County Committed a Refusal to Bargain and Interference Violation in Contravention of RCW 41.56.140

The record is clear and uncontested that the County failed to provide adequate notice and an opportunity to bargain its desire to layoff two members of the Guild at the outset of the 2012 calendar year. The record is not in dispute concerning the following points, and those facts, even when viewed in the light most favorable to the County, clearly support the conclusion that the County committed a ULP for its refusal to bargain, and derivative interference, in violation of RCW 41.56.140.

On October 24, 2011, the Guild President at that time was contacted by two members who told her that each of them had just met with Chief Newlin and were told that they would likely be laid off as of January 1, 2012. Immediately upon learning of this information, President Cousins drafted a demand to bargain letter and delivered that to the Chief's secretary on the same day. The demand letter clearly and unambiguously asserted the Guild's desire to bargain both the decision and any associated effects concerning the proposed layoff of these two Guild members and corrections officers. Prior to learning of the layoffs from the two affected members, the Guild had never been provided any direct or advanced notice of the layoff decision.

Subsequently, the Guild made an information request to the County concerning the pending layoffs, and the parties agreed to set up a face-to-face meeting on November 8, 2011 with Chief Newlin and the County's labor negotiator, Fernando Conill. Not having an opportunity to fully review all of the requested information prior to this November 8th meeting, the parties primarily discussed some of the budgetary impacts prompting the layoffs and some possible mitigating measures concerning the impacts of the layoffs. No further meetings were scheduled or held, despite the Guild's efforts to continue to negotiate the matter.

After having the opportunity to review all of the requested information, the Guild's representative emailed Mr. Conill to again reiterate the Guild's earlier demand to bargain both the layoff decision and its effects as well as to offer the County the Guild's perspective on the budgetary necessity of any layoffs. Subsequent to this email, Mr. Conill responded to the Guild and took a definitive position that the County had no legal obligation to bargain the layoff decision and that it would not do so, only agreeing to bargain over any "impacts" of the decision. Mr. Conill also indicated that the decision to conduct the layoffs had already been made and would be proceeding as scheduled.

Several other written communications continued between the parties, but no further meetings ever occurred, and the County steadfastly

maintained its position that it did not have to bargain the decision to engage in layoffs. On December 22, 2011, the County commenced the proceedings herein by filing a declaratory judgment lawsuit in Mason County Superior Court. The parties have had no further communication about bargaining this issue since the County filed its claim in Mason County.

Based upon these facts, it is undeniably the case that the County committed an unfair labor practice when it is properly understood that the layoff decision was, itself, a mandatory subject of bargaining. All elements supporting the finding of a statutory violation are in place. The County never provided advanced notice of the proposed change to the Guild, nor did it provide a meaningful opportunity to bargain with the Guild. The changes were then unilaterally imposed on the Guild when two of its members were laid off. The Guild is a statutorily eligible interest arbitration group, meaning that changes in mandatory subjects of bargaining can only occur upon mutual agreement or through an interest arbitration decision and award. Neither of those events occurred herein, and thus the County's implementation of this change is a refusal to bargain and interference violation in contravention of RCW 41.56.140.

D. A Comprehensive Award, Including Attorney's Fees, is Warranted to Remedy a ULP and the Unlawful Withholding of Wages

1. PECBA Provides Broad Remedial Power to the Courts to Remedy Unfair Labor Practices

The Washington State Supreme Court has taken notice of the fact that the purpose of the PECBA "is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right."[53] With that goal in mind, when an employer commits an unfair labor practice by failing to engage in collective bargaining, the PECBA grants PERC the authority to remedy the violation(s) in order to protect the purpose of the statute. To that end, RCW 41.56.160 expressly authorizes and requires PERC or the courts to issue remedial orders following ULP findings, noting:

> (1) The Commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders...
>
> (2) If the Commission determines that any person has engaged in or is engaging in an unfair labor practice, the Commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy

[53] *Metro. Seattle v. Public Employment Relations Commn.*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992) (citing *Yakima v. International Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991)).

> of this chapter, such as the payment of damages and the reinstatement of employees.[54]

The phrase "appropriate remedial orders" has been interpreted by the State Supreme Court to mean "those [orders] necessary to effectuate the purposes of the collective bargaining statute and to make PERC's lawful orders effective."[55] To achieve this goal, the Court of Appeals has observed:

> [the] function of the remedy in an unfair labor practice case is to restore the situation, as nearly as possible, to that which would have occurred but for the violation. The remedy must help restrain violations and remove or avoid the consequences of the violations.[56]

Consistent with this charge, the Commission has, on numerous occasions, commented on its remedial power and what it considers to be a "standard remedy" for a unilateral change ULP violation in contrast to what it considers more "extraordinary remedies." "The standard remedy for an unilateral change unfair labor practice violation includes ordering the offending party to cease and desist and, if necessary, to restore the *status quo*; make employees whole; post notices of the violation; publicly read the notice; and order the parties to bargain from the *status quo*."[57]

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[54] RCW 41.56.160 (emphasis supplied).
[55] *Metro. Seattle,* 118 Wn.2d at 633.
[56] *Metro. Seattle v. Public Empl. Relations Commn.*, 60 Wn. App. 232, 240, 803 P.2d 41 (1991) (overruled on other grounds).
[57] *University of Washington*, Decision 11499-A (PSRA, 2013) (*citing State – Department of Corrections*, Decision 11060-A; *Kitsap Transit*, Decision 11098-B citing *City of Anacortes,* Decision 6863-B (PECB, 2001)).

"The purpose of ordering a return to the status quo is to ensure the offending party is precluded from enjoying the benefits of its unlawful act and gaining an unlawful advantage at the bargaining table."[58]

On top of the array of standard remedies, on occasion PERC has found justification in the statute to issue "extraordinary remedies," which are reserved for situations involving egregious or repetitive misconduct, including in some cases dilatory tactics if it constitutes a pattern of conduct showing a patent disregard of a party's good faith bargaining obligations.[59] The typical extraordinary remedy is awarding attorneys' fees and costs.[60] Less common extraordinary remedies include totally voiding a labor agreement, ordering interest arbitration, and requiring labor relations training.[61]

Any remedial order can also include monetary damages.[62] In the case of standard remedies, a make whole remedy is a form of monetary damages. "Generally, a 'make whole' remedy requires any wages, benefits, or working conditions that were lost or unlawfully modified as a

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[58] *Kitsap County*, Decision 10836-A (PECB, 2011) (citing *Lewis County*, Decision 10571-A (PECB, 2011)).
[59] *See PUD 1 of Clark County,* Decision 3815-A (PECB, 1992).
[60] *See e.g. City of Bremerton*, Decision 6006-A (PECB, 1998); *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *PUD 1 of Clark County*, Decision 3815 (PECB, 1991); *City of Kelso*, Decision 2633 (PECB, 1988).
[61] *See e.g. Snohomish County*, Decision 9834-B (PECB, 2008); *Western Washington University*, Decision 9309-A (PSRA, 2008).
[62] *City of Tukwila,* Decision 10536-B (PECB, 2010).

result of the employer's unilateral act to be restored or reinstated."[63] No remedy can be punitive and it cannot be something that is beyond what can be obtained at the bargaining table.[64]

2. Attorney Fees are Appropriate to Remedy Violations and in Wage Withholding Actions

Pursuant to RAP 18.1, the Guild respectfully requests that this Court grant it attorneys' fees and costs on appeal. This request is supported by RCW 49.48.030, the statute that provides for the award of attorneys' fees in a wage recovery case.

RCW 49.48.030, in pertinent part, states: "[I]n any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against [his] employer or former employer." In *International Association of Fire Fighters, Local 46 v. City of Everett*,[65] the Supreme Court of Washington held this statute applied to labor unions recovering wages for its members through a CBA grievance:

> We have previously recognized Washington's long and proud history of being a pioneer in the protection of employee rights. The Legislature evinced a strong policy in favor of payment of wages due employees by enacting a

[63] *Kennewick Public Hospital District 1*, Decision 4815-A (PECB, 1996) (citing *METRO*, Decision 2845-A (PECB, 1988)).

[64] *Kitsap Transit*, Decision 11098-B (PECB, 2013) (citing *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce County*, Decision 1840-A (PECB, 1985); RCW 41.56.160).

[65] 146 Wn.2d 29, 35, 42 P.3d 1265 (2002).

> comprehensive [statutory] scheme to ensure payments of wages. Attorney fees are authorized under remedial statutes to provide incentives for aggrieved employees to assert their statutory rights. Furthermore, remedial statutes should be liberally construed to advance the Legislature's intent to protect employee wages and [to] assure payment. Therefore, the terms of RCW 49.48.030 must be interpreted to effectuate this purpose.

3. The Guild is Entitled to a Comprehensive Award and Attorney's Fees to Remedy the County's Unlawful Actions

The Guild's position is that the full array of standard remedies is warranted in this case based on the County's unlawful acts. As a result, the Guild respectfully requests that the County be required to restore the *status quo ante* by reinstating the two affected officers with full benefits, immediately, and issuing a bargaining order to the County that it negotiate in good faith with the Guild concerning any decision, and all associated effects, related to any proposed layoff of Guild members.

To complement the reinstatement of the officers, the County should also be ordered to make the affected employees whole through the reinstatement of any loss of financial compensation, benefits, and out-of-pocket expenses incurred as a result of each employee's layoff. The Guild also seeks the standard posting of notices and requirement that the finding of a ULP be read into the public record at an open meeting of the Board of County Commissioners.

CERTIFICATE OF SERVICE

I certify that on January 12th, 2015, I caused to be served via electronic mail and U.S. Mail a true and accurate copy of the foregoing *OPENING BRIEF* and this *CERTIFICATE OF SERVICE* in the above-captioned matter on:

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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 12th day of January, 2015 at Seattle, Washington.

CLINE & CASILLAS

Donna Steinmetz
Paralegal