

68376-4

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No. 68376-4

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

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WASHINGTON FEDERATION OF STATE EMPLOYEES,

Appellant,

and

UNIVERSITY OF WASHINGTON,

Respondent.

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE KIMBERLEY PROCHNAU

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

This matter comes before the Court on an appeal filed by the Washington Federation of State Employees (“WFSE” or “Union”) of a Superior Court administrative review decision, in which the trial judge reversed a Public Employment Relations Commission (“PERC” or “Commission”) ruling that the University of Washington (“University”) committed an unfair labor practice. Relying primarily on inapposite National Labor Relations Board (“NLRB”) precedent, and on a factual finding not supported by the record, PERC ruled that the University committed an unfair labor practice when it “attempted to bargain the configuration of [] bargaining units....”<sup>1</sup> in connection with the University’s on-going attempt to properly place certain employees working at Harborview Hospital in their appropriate job class.

The University asks this Court to affirm the trial court’s decision reversing the Commission’s ruling. The trial court correctly concluded that PERC committed an error of law in misapplying NLRB precedent and acted arbitrarily and capriciously in creating an unprecedented rule that a mere insistence by an employer that employees working in a certain job class be included in the bargaining unit that PERC certified to represent the work of that job class constitutes an attempt to bargain a reconfiguration of bargaining units and is an unfair labor practice. This

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<sup>1</sup> *University of Washington*, Decision 10490-C (PSRA, 2011) (“2011 ULP decision”) at p. 11. Administrative Record (“AR”)-27-1159.

unprecedented rule contradicts prior PERC rulings, which fostered communication between employers and unions during bargaining, and which permitted employers to reach agreement with unions as to the work jurisdiction of their bargaining units. This Court should also affirm the trial court's decision because PERC's finding of fact that the University attempted to bargain the reconfiguration of bargaining units in contravention of PERC's exclusive jurisdiction was not supported by substantial evidence in the administrative record. The evidence supports a contrary finding that the University was trying to preserve the work jurisdiction of bargaining units in accordance with PERC's prior unit configurations and the University's collective bargaining agreements. Finally, this court should affirm the trial court's decision because PERC violated its own rules and deprived the University of a fair adjudication when it found the University committed an unfair labor practice under a cause of action which was not included in its preliminary ruling issued pursuant to WAC 391-45-110.

## **II. ASSIGNMENTS OF ERROR**

The Respondent has not cross-appealed and does not have any assignments of error.

### III. STATEMENT OF THE CASE

#### A. First Reallocation<sup>2</sup> and First Unfair Labor Practice Complaint

The facts underlying this case extend back to 2003<sup>3</sup>, when the University determined, based on a reallocation evaluation, that employees in the Central Processing Technician (“CPT”) job class in the Department of Laboratory Medicine (“Lab Medicine”), some of whom worked at Harborview Medical Center, were performing work outside of their job class description.<sup>4</sup>

The University classifies its employees under job titles or classifications for which there are job specifications that describe the work that the employees perform.<sup>5</sup> A specific job code is associated with each job class specification.<sup>6</sup> The Washington State Department of Personnel also has a catalog of job classifications with distinct job specifications and job codes for each job classification.<sup>7</sup> The job class title Central Processing Technician, which appears as the job classification of the employees in question in a prior related decision by PERC, was eventually changed to Specimen Processing Technician<sup>8</sup> (“SPT”), which appears as the job classification for these same employees in the present case. The

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<sup>2</sup> “Allocation” is defined in WAC 357-01-020 as the assignment of a position to a class. “Reallocation” is defined in WAC-357-01-270 as the assignment of a position to a different class. “Class” or “classification” is defined in WAC 357-01-075 as a level of work.

<sup>3</sup> AR-11-66\*. The University PERC Decision 8878 (PSRA, 2005) contains facts which describe background facts relevant to this appeal.

<sup>4</sup> AR-11-675.

<sup>5</sup> See e.g., AR-11-760 – 764, AR-11-765 – 768, AR-11-769 – 770.

<sup>6</sup> Id.

<sup>7</sup> See e.g., AR-11-773 – 776, AR-11-777 – 788

<sup>8</sup> This job class series includes SPT and SPT Lead.

job descriptions of the two job class titles are identical, only the job class title changed.<sup>9</sup>

As a result of the 2003 reallocation evaluation, the University determined that work that Lab Medicine's processing technicians were performing should be reallocated to a higher job class, Clinical Laboratory Technician ("CLT").<sup>10</sup> The reallocation of work from the processing technician job classes to the higher CLT job class applied to all processing technicians in Lab Medicine. At the time of the reallocation, a relatively small number of Lab Medicine processing technicians who worked at Harborview Medical Center, were represented by WFSE, and the remaining Lab Medicine processing technicians working elsewhere at the University were unrepresented.

The collective bargaining agreement between WFSE and the University recognized that the SPT job class, and therefore the specific work describing that job class, was included in the Harborview bargaining unit, and was represented by WFSE.<sup>11</sup> However, the agreement did not include the CLT job class, and therefore the University understood that WFSE did not represent work described in the CLT job class description, and the CLT work was not in the work jurisdiction of the Harborview bargaining unit.<sup>12</sup> When the University reallocated the work of the Lab Medicine processing technicians and reclassified them to the higher CLT

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<sup>9</sup> Id.

<sup>10</sup> AR-11-661 – 662. The CLT class series includes CLT 1, CLT 2, and CLT Lead.

<sup>11</sup> AR-11-883, 900 – 902

<sup>12</sup> AR-11-900-902

job class, it treated the processing technicians at Harborview as being unrepresented, as was the case with the other Lab Medicine processing technicians reclassified to the CLT job class.<sup>13</sup> As a result of this action by the University changing the representational status of the newly reclassified Harborview CLTs to unrepresented, the WFSE filed an unfair labor practice complaint.<sup>14</sup> WFSE alleged that by giving the work to unrepresented CLTs the University had “skimmed” work from the WFSE bargaining unit without first engaging in bargaining.<sup>15</sup>

On June 15, 2004, before the PERC hearing examiner rendered a decision on WFSE’s 2003 unfair labor practice complaint, PERC issued an order accreting employees performing laboratory technician work into the Healthcare Professional Laboratory Technician (HCPLT) bargaining unit, which was represented by the Service Employees International Union, Local 925 (SEIU 925). *University of Washington*, Decision 8392-B (PSRA, 2004) (the “SEIU 925 unit clarification decision.”) The CLT job class, which, prior to PERC’s SEIU 925 unit clarification decision, was not part of any bargaining unit’s work jurisdiction, apparently fell into the PERC’s description of the HCPLT bargaining unit<sup>16</sup>. PERC confirmed

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<sup>13</sup> AR-11-661 – 662. There may be references in the record to removal of employees from the bargaining unit, including employees in a unit, or transferring employees from one unit to another. These terms are synonymous with treating employees as represented by a union, unrepresented, or changing their representation from one union to another.

<sup>14</sup> AR-11-653 – 669. The 2003 unfair labor practice complaint is not subject to this appeal. The case presently before the Court involves a second unfair labor practice complaint filed by the WFSE on April 30, 2008. Reference to the 2003 complaint is made for the purpose of historical facts.

<sup>15</sup> *Id.*

<sup>16</sup> The WFSE claims that it owned CLT work, but Decision 8898 makes clear that WFSE owned work that employees in the SPT job class performed, which was only part of the

that the CLT job class was included in the SEIU 925 bargaining unit in an order issued June 22, 2010. *University of Washington*, Decision 11083 (PSRA, 2011). Based on PERC’s SEIU 925 unit clarification decision, the University considered the CLT job class, which fits the PERC’s description of CLT work (including work performed by the employees at Harborview), as being included in the SEIU 925 HCPLT bargaining unit and represented by SEIU 925.

Following the SEIU 925 unit clarification decision, the PERC hearing examiner in *University of Washington*, Decision 8878 (PSRA, 2005), found the University had committed an unfair labor practice by “skimming” Harborview SPT work without bargaining.<sup>17</sup> It ordered the University to reestablish the status quo ante, and to **bargain with the union** before permitting unrepresented employees to perform the work of the Harborview SPTs.<sup>18</sup> The University appealed the examiner’s decision, and the Commission affirmed and adopted the hearing examiner’s order. *University of Washington*, Decision 8878-A (PSRA, 2006) (the “2006 ULP decision”).

After the 2006 ULP decision was issued, the University’s legal counsel, Assistant Attorney General Jeff Davis, wrote a letter to legal counsel for the WFSE in an effort to resolve the matter so that the Harborview employees would be able to keep their CLT job

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work that employees in the CLT job class performed. The University was required to bargain the removal of any SPT work that CLTs performed out of the Harborview bargaining unit.

<sup>17</sup> AR-11-654

<sup>18</sup> AR-11-665 – 667

classification.<sup>19</sup> In his February 20, 2007, letter Mr. Davis first expressed the University's good faith understanding of the effect of reclassifying the employees to the CLT job class—that as CLTs they would be represented by SEIU 925, as a consequence of PERC's SEIU 925 unit clarification decision placing CLT work in that bargaining unit.<sup>20</sup> The WFSE's counsel disagreed to the reallocation, and demanded that the employees be reclassified and placed back into the WFSE bargaining unit.<sup>21</sup>

The University reclassified the Harborview employees back to their SPT job class, but it also entered into an agreement with the WFSE to "Y-rate" the employees' compensation, paying them at a higher wage than SPTs were supposed to receive under the collective bargaining agreement.<sup>22</sup> The University subsequently complied with PERC's order in the 2006 ULP decision by reestablishing the status quo, reclassifying the employees working at Harborview back to their SPT job class and treating them again as represented by the WFSE.<sup>23</sup> The PERC found the University in compliance with its order on March 22, 2007.<sup>24</sup>

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<sup>19</sup> AR-11-674 – 683

<sup>20</sup> AR-11-675 – 676

<sup>21</sup> AR-11-684, Decision 8392-B.

<sup>22</sup> AR-11-684, 685. There is no wage table in the collective bargaining agreement for the CLT job class series. Reclassification to the lower SPT job class would have meant a decrease in wages for the Harborview employees. The Y-rating kept the Harborview employees at the higher CLT rate of pay even though they were being classified downward. AR-11-902 (SPT Pay Table and Salary Range), AR-11-919 – 922 (Pay Table BO).

<sup>23</sup> AR-11-691

<sup>24</sup> AR-11-712

## **B. Second Reallocation Attempt and Bargaining**

Between the summer of 2007 and April 2008, when WFSE filed the unfair labor practice complaint that is that subject of this case (and which involves the same Lab Medicine employees working at Harborview), the University repeated its attempt to reallocate the employees, this time in accordance with the 2006 ULP decision.<sup>25</sup> Relying on its understanding that the previously unrepresented CLT job class and the work described by the class description were included in the SEIU 925 bargaining unit under the SEIU 925 unit clarification decision, the University entered into bargaining with the Union, insisting that an effect of the reallocation of the employees' work to the CLT job class would be that the employees would no longer be represented by the WFSE, but would be represented by SEIU 925.<sup>26</sup>

WFSE did not agree that the reallocation and the reclassification of the employees from the SPT job class to the CLT job class would effect a change in union representation.<sup>27</sup> WFSE insisted on representing the employees and the CLT work and demanded to bargain the Harborview employees' wages.<sup>28</sup> Because the parties could not agree on the effects of the reallocation, bargaining ended, the reallocation never was implemented and the Harborview employees were never reclassified to the higher job class.<sup>29</sup> The status quo remained unchanged.

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<sup>25</sup> AR-11-939

<sup>26</sup> AR-11-946

<sup>27</sup> AR-11-943

<sup>28</sup> AR-11-948

<sup>29</sup> AR-11-952

### **C. Procedural History Underlying the Current Appeal**

The Union filed its second unfair labor practice complaint claiming that the University refused to bargain wages for the employees in the SPT job class.<sup>30</sup> Pursuant to WAC 391-45-110, PERC's Unfair Labor Practice Manager, David Gedrose, issued a Deficiency Notice, explaining that it was "not possible to conclude that causes of action exist at this time for the allegations of the complaint."<sup>31</sup> The Union filed an amended complaint<sup>32</sup> and Mr. Gedrose subsequently issued a preliminary ruling (the "Preliminary Ruling") stating that, assuming all of the facts alleged in the Union's complaint were true and provable, the following causes of action were stated:

Employer interference with employee rights in violation of RCW 41.80.110(1)(a) and refusal to bargain in violation of RCW 41.80.110(1)(e), by failing or refusing to meet and negotiate with the exclusive bargaining representative of its employees concerning wages for specimen laboratory technicians...<sup>33</sup>

A three day adjudicatory hearing was held before PERC Hearing Examiner Katrina Boedecker pursuant to WAC 391-45-270, and WAC 10-08.<sup>34</sup> At the close of the adjudicatory hearing the parties filed post hearing briefs<sup>35</sup>, and the hearing examiner rendered her findings, conclusions, and initial order on July 31, 2009, finding that the University did not commit

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<sup>30</sup> AR-1-4 – 125

<sup>31</sup> AR-2-126

<sup>32</sup> AR-3-128 – 135

<sup>33</sup> AR-4-136

<sup>34</sup> AR-10-161 – 651 (Transcript of Hearing), AR-11-653 – 973 (Hearing Exhibits)

<sup>35</sup> AR-12-974 – 998 (Post-Hearing Brief of Complaint WFSE); AR-13-999 – 1021 (Employer University of Washington Post-Hearing Brief)

an unfair labor practice, and ordering the complaint dismissed.<sup>36</sup> The WFSE filed an appeal of Examiner Boedecker's decision to the Commission.<sup>37</sup>

The parties filed appeal briefs,<sup>38</sup> and the Commission issued an order on June 30, 2010, vacating Examiner Boedecker's decision and remanding the case to the Executive Director for reassignment to another hearing examiner for a decision on the record<sup>39</sup>. The Executive Director reassigned the case to Hearing Examiner Walter Stuteville for reconsideration. Examiner Stuteville reviewed the adjudicatory record and on September 17, 2010, rendered his findings, conclusions and initial order in favor of the University, again finding that the University did not commit an unfair labor practice as charged.<sup>40</sup> The union appealed Examiner Stuteville's decision to the Commission.<sup>41</sup> The parties filed a second set of appeal briefs on Examiner Stuteville's decision.<sup>42</sup>

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<sup>36</sup> AR-14-1022 – 1037

<sup>37</sup> AR-15-1039 – 1043

<sup>38</sup> AR-17-1047 – 1065 (WFSE Brief in Support of Appeal); AR-18-1068 – 1075 (Respondent UW's Response to Complainant's Brief). The union filed a reply and the University filed an objection to that reply because there is no authority for filing a reply brief and a reply was not requested by the Commission.

<sup>39</sup> AR-21-1087 – 1088. The Commission found that although Examiner Boedecker had conducted a proper hearing, a substantial portion of the rationale and text of her decision as copied verbatim from the employer's post-hearing brief. To protect the impartiality and integrity of the agency, the Commission ordered that another hearing examiner reconsider the record and render a decision.

<sup>40</sup> AR-22-1090 – 1108

<sup>41</sup> AR-23-1110 – 1113

<sup>42</sup> AR-24-1117 – 1135 (WFSE Brief in Support of Second Appeal); AR-26-1138 – 1146 (UW Response to Complainant's Brief in Support of Second Appeal).

By decision dated March 1, 2011, the Commission modified the decision of Examiner Stuteville, and added an additional finding of fact, and a conclusion that the University violated the exclusive jurisdiction of PERC to reconfigure bargaining units, and thereby committed an unfair labor practice. *University of Washington*, Decision 10490-C (PSRA, 2011) (the “2011 ULP decision”)<sup>43</sup>. The University filed an appeal under the Administrative Procedures Act, RCW Chapter 34.05 (the “APA”), to the King County Superior Court.<sup>44</sup> The Superior Court reversed the Commission’s decision and ordered the reinstatement of Examiner’s Stuteville’s order dismissing the WFSE’s complaint.<sup>45</sup> The WFSE filed a notice of appeal to this Court.<sup>46</sup>

#### **D. Reallocation Process Included in Bargaining Agreement**

The collective bargaining agreement between the WFSE and the University which applies to employees in the Harborview bargaining unit contains a reallocation provision.<sup>47</sup> That provision reads in part:

#### ARTICLE 47 – ALLOCATION/REALLOCATION<sup>48</sup>

47.1 Policy. The Employer will allocate positions on a “best fit” basis to the most appropriate classification at the University of Washington. Allocations shall be based on a position’s duties, responsibilities, or qualifications.

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<sup>43</sup> AR-27-1158 – 1159. The Commission affirmed two other issues both of which are not before this Court.

<sup>44</sup> Clerk’s Papers (CP) 1 – 72

<sup>45</sup> CP 136 – 141

<sup>46</sup> CP 142 – 150

<sup>47</sup> AR-11-881 – 883.

<sup>48</sup> AR-11-881.

Reallocations shall be based on a permanent and substantial change in the duties, responsibilities, or qualifications of a position or application of the professional exemption criteria set forth in RCW 41.06.070(2). The University will notify the Union of any proposed reallocations of occupied bargaining unit positions into non-bargaining unit positions.

...Disputes regarding allocation and reallocation within the bargaining unit shall be resolved through the Review and Appeal processes set forth below and are not subject to Article 24 Grievance Procedure.

Article 48 of the bargaining agreement entitled “CLASSIFICATION” shows that the parties do recognize the job classifications covered under the agreement in Appendix I of the agreement as describing the work that is included in the Harborview bargaining unit.<sup>49</sup> Article 47.2 indicates that there are position descriptions for each job class that describe specific duties.<sup>50</sup>

Appendix I of the collective bargaining agreement includes the SPT job class series, but does not include the CLT job class series.<sup>51</sup> Each job classification listed in Appendix I has associated with it an individual job code, which correlates to the job code of the job class specification that describes the work of the job class.<sup>52</sup> Each job class listing also is associated with a specific pay table and pay range. This is the means by which the parties can determine the work jurisdiction of the bargaining unit and the pay associated with that work.

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<sup>49</sup> AR-11-883, AR-11-900 – 902.

<sup>50</sup> AR-11-881

<sup>51</sup> AR-11-900 – 902

<sup>52</sup> Id.

#### IV. SUMMARY OF ARGUMENT

The Commission found that the University “maintained its insistence that, once the process of reallocating was complete, the newly reallocated employees would be transferred into a different bargaining unit represented by a different bargaining representative.” The Commission relied on that finding to support its conclusion that the University thereby committed an unfair labor practice in its “attempt[] to bargain a reconfiguration of the bargaining units represented by WFSE and SEIU....” The Commission adopted this rule based on an NLRB ruling which was challenged and upheld in *Boise Cascade Co. v. NLRB*, 860 F.2d 471 (D.C. Cir., 1988).

PERC erred because it misapplied the rule in *Boise Cascade* to the University’s conduct finding that it committed an unfair labor practice, and in effect created an unprecedented rule which prohibited attempted conduct concerning the aligning of bargaining units in accordance with job class work descriptions. The NLRB did not establish a rule on attempting to bargain any subject. The Board ruled that an employer who unilaterally implemented a reconfiguration of bargaining units after it reached impasse on that subject with its unions, was a violation of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5) (1982). 860 F.2d at 473. The University did not unilaterally implement a reconfiguration of bargaining units.

PERC erred also because its prior decisions contradict its conclusion that the University’s conduct, seeking agreement with a union

about the work jurisdiction of bargaining units, was unlawful. The Commission's conclusion that the University met its duty to bargain in good faith contradicts its conclusion that the University committed an unfair labor practice. These errors in law require reversal of the PERC's decision.

The evidence on the record fails to substantially support the Commission's finding that the University proposed that employees, whose work was reallocated to a higher job class, be transferred to a different bargaining unit. PERC's characterization of the facts that the University purposely sought to usurp PERC's exclusive authority to configure bargaining units is erroneous. On the contrary, the evidence supports a finding that the University sought to preserve the configuration of the units, relying on PERC's configuration of bargaining units at the University and on work jurisdictional boundaries of bargaining units defined by job classes listed in the collective bargaining agreement. The evidence substantially supports a finding that the University insisted the union agree to what the University understood in good faith to be an unavoidable effect of the reallocation.

PERC also erred because it violated its own rule under WAC 391-45-110 that a preliminary ruling frames the issues and limits the causes of action for adjudication of unfair labor practice complaints. The preliminary ruling in this case failed to state a cause of action for "attempting to bargain the reconfiguration of bargaining units." The University did not have an ample opportunity to be heard on that cause of

action, and that cause of action was never argued by the parties, and never mentioned by the hearing examiners who decided the case.

## V. ARGUMENT

### A. PERC's decision is reviewable under the standards of review set forth in the APA.

WFSE argues that this Court should defer to the decision of the PERC because PERC has statutory authority under RCW 41.80 to prevent unfair labor practices, to issue appropriate remedial orders, and has expertise in the area of labor relations.<sup>53</sup> However, this Court has consistently recognized that its role involves more than merely being a rubber stamp for agency action. This Court reviews PERC's administrative decisions under the standards of review set forth in the APA, to ensure that it properly carries out the provisions of RCW 41.58. The APA provides, in relevant part, that a court may grant relief from agency actions if it determines that:

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- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

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<sup>53</sup> Opening Brief of Appellant, pp. 18 – 19.

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

RCW 34.05.570. This Court has recognized that, in reviewing an agency's order, it "sit[s] in the same position as the superior court and appl[ies] the review standards set forth in the [APA]." *Serres v. Washington Dept. of Retirement Systems*, 163 Wn.App. 569, 580-81, 26 P.3d 173 (2011), *review denied*, 173 Wn.2d 1014, 272 P.3d 246 (2012).

RCW 34.05.570(3)(d) requires relief from an agency order when the the decision is based on an erroneous interpretation or application of law. An agency's interpretation of a statute or regulation is a question of law reviewed de novo. When reviewing questions of law, we may substitute our determination for that of the agency.

*Id.* Citations omitted.

Resolving issues of law is the responsibility of the Court, and the Court may substitute its judgment for that of the agency if the agency has erroneously interpreted or applied law. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982), cited with approval in *International Ass'n of Firefighters, Local 469 v. PERC*, 38 Wn.App. 572, 686 P.2d 1122 (1984).

For the reasons set forth in detail below, the trial court correctly concluded that PERC's decision was based on an error of law, was unsupported by substantial evidence in the record, and was arbitrary and

capricious. Under the standards of review set forth in the APA, and in light of other PERC precedent as described below, this Court should conclude that the PERC erred in ruling that the University committed an unfair labor practice when it merely insisted, in the context of good faith bargaining (and consistent with the express provisions of the collective bargaining agreement), that reallocation of the Harborview employees to a different job class would mean they would be represented by another union.

**B. PERC erred as a matter of law by misapplying *Boise Cascade* to find the University committed an unfair labor practice.**

While it is not inappropriate for PERC to look to precedent established by the NLRB, (*see Pasco Police Officers*, 132 Wn.2d 450, 458-59, 938 P.2d 827, 832-33 (1997)), in this case, PERC's *misinterpretation* of an NLRB precedent, which it chose to rely on in support of its decision that the University had committed an unfair labor practice, should not be given any deference.

The rule that PERC applied to the University's conduct in bargaining with WFSE regarding the reallocation of work performed by the Harborview employees is that any attempt to bargain the reconfiguration of bargaining units is an unfair labor practice. PERC relied on *Boise Cascade* in establishing this rule. The Commission explicitly stated:

Support for our conclusion can also be found in cases interpreting the National Labor Relations Act (NLRA). In *Boise Cascade Co. v. NLRB*, 860 F.2d 471 (D.C. Cir. 1988),

the Court of Appeals for the D.C. Circuit found that an employer committed an unfair labor practice **when it attempted to bargain the configuration of a bargaining unit of employees.**<sup>54</sup>

Emphasis added.

While the University does not concede that it even attempted to bargain the “reconfigure a bargaining unit” (see below), even if it did, *Boise Cascade* does not establish that such an attempt is, by itself, an unfair labor practice. The rule established by the NLRB and affirmed by the U.S. Court of Appeals for the D.C. Circuit in *Boise Cascade* was that, because union configuration was a determination reserved exclusively to the NLRB and therefore not a mandatory subject of bargaining, it was an unfair labor practice for the employer to **unilaterally implement** its proposal to the unions to reconfigure bargaining units after a bargaining impasse on the proposal was reached. 860 F.2d at 473, 475. A careful reading of *Boise Cascade* reveals that, in making its determination that an unfair labor practice had been committed by the employer, the Board clearly relied on the fact that the employer, Boise Cascade Co., had **unilaterally implemented** a sweeping change in the configuration of bargaining units after bargaining the configuration issues to impasse.

In its 2011 ULP decision, the Commission found that the University bargained in good faith with WFSE on wages, but that during the course of bargaining the University insisted that once the reallocation of the Harboview employees was implemented, a transfer of the

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<sup>54</sup> Decision 10490-C, p.7.

employees from one bargaining unit to another should take place.<sup>55</sup> . In contrast to the facts in *Boise Cascade*, here, when bargaining ceased after WFSE disagreed with the University regarding the effects of reallocation, the University did *not* unilaterally implement the reallocation, nor did it transfer the employees from the WFSE bargaining unit to the SEIU 925 bargaining unit.<sup>56</sup> In other words, no unfair labor practice under the precedent established in *Boise Cascade* occurred.

The NLRB and the D.C. Circuit did not rule in *Boise Cascade* that proposing the reconfiguration of bargaining units or merely engaging in bargaining regarding a reconfiguration was *per se* unlawful. Nor did the NLRB or the D.C. Circuit establish a rule involving an “attempt” to bargain. The PERC provided no justification in its decision why it was necessary to extend the NLRB rule established in *Boise Cascade* to attempted bargaining conduct. This is a clear indication that the PERC misapplied the NLRB’s rule.

It is apparent that PERC misapplied the NLRB rule in *Boise Cascade* to the University’s conduct. It is apparent that in considering the conduct of the employer in *Boise Cascade* as analogous to that of the University in this case, the Commission believed that the University attempted to reconfigure bargaining units in spite of PERC’s exclusive statutory authority to do so. The Federal Court of Appeals for the District of Columbia Circuit described the facts in this way:

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<sup>55</sup> Decision 10490-C, p. 12, Finding of Fact 12.

<sup>56</sup> AR-11-946 (Letter from Lou Pisano to Lindsay Bruce rejecting WFSE’s last offer.)

In 1965, Boise Cascade purchased a paper mill in International Falls, Minnesota. At that time, and through 1984, the employees were divided into nine bargaining units, each with its own collective bargaining agreement. Each contract contained jurisdictional provisions defining the work covered by the agreement and provided that this work would be performed only by employees operating under that contract. In the jurisdiction clause or in a separate paragraph, each contract also described the employees represented by the particular union. In 1984, Boise Cascade proposed the elimination of the jurisdictional rules so as to enable it to require employees in the various classifications to perform work outside their particular crafts. Specifically, the company bargained for the ability to assign maintenance employees to maintenance tasks entirely unrestricted by their unit designations.

860 F.2d at 473. The conduct of Boise Cascade is not analogous to the University's conduct. The facts clearly show that the University was not attempting to eliminate jurisdictional rules to enable it to require employees to work outside their job classes. Rather, the University was attempting to place employees in their proper job class and to *preserve* work jurisdiction boundaries of the bargaining units as it understood them to be defined in the collective bargaining agreements. No unfair labor practice of the type found in *Boise Cascade* was committed, and the Board erred in concluding otherwise.

**C. PERC's decision was arbitrary and capricious in that it contradicts PERC's own prior precedent, and contradicts its finding that the university bargained in good faith.**

**1. PERC's decision against the University contradicts its prior rulings in other cases, but does not provide reasons distinguishing the University's conduct in this case.**

The University, in the present case, actually attempted to comply with PERC's 2006 ULP decision, which involved the same reallocation,

reclassification, and transfer of Lab Medicine processing technicians at Harborview out of the WFSE bargaining unit. Ironically, PERC found in the present case, that the University engaged in (or attempted to engage in) the same conduct that was at issue in PERC's 2006 ULP decision. The only difference is that in the present case, the CLT job class had been included in the SEIU 925 bargaining unit by the 2004 SEIU 925 Unit Clarification Decision. PERC never ruled in its 2006 ULP decision, as it did in its 2011 ULP decision, that the University's reallocation, reclassification and transfer of work and employees out of the bargaining unit as an unlawful reconfiguration of bargaining units. It does not sufficiently explain in its 2011 ULP decision why an additional fact of including employees in a bargaining unit configured to represent that work turns that conduct into an unfair labor practice. In its 2006 ULP decision, PERC described the facts as follows:

A significant detriment to bargaining unit members occurred when the employer reclassified employees in the...central processing technician classification [to the CLT classification] which effectively transferred bargaining unit work to non-bargaining unit employees. When the employer reclassified the bargaining unit positions in question to reflect the bargaining unit work performed, the employer transferred the work as well as the employees performing the work to a different bargaining unit (represented by a different union) that represented the different classification. The employer did not re-staff the vacated positions after the reclassification.

Decision 8878-A, p. 9. PERC characterized the University's conduct as merely a "fail[ure] to provide an opportunity to bargain the change to bargaining unit work," but did not characterized it as an unlawful attempt

to reconfigure bargaining units. *Id.*, p.10. PERC went on to find in its 2006 ULP decision:

The record demonstrates that the employer initiated the reclassification process on its own initiative, without first bargaining in good faith to impasse with the union not only about the reclassifications, but also as to the effects that those reclassifications would have on bargaining unit employees.

The employer argues that not only were the reclassifications required to ensure that employees were being paid for work actually performed, but the reclassification also conformed with the parties' collective bargaining agreement. We agree with the employer that Article 22.3 of the collective bargaining agreement permits the employer to reallocate bargaining unit positions in accordance with Chapter 251-06 WAC. We disagree, however, that the reclassification provisions of the parties' collective bargaining agreement permit the employer to freely transfer or skim bargaining unit work without first bargaining with the union to impasse.

*Id.* Again it addresses the University's alleged skimming of bargaining unit work, but does not mention an unlawful reconfiguration of bargaining units. PERC affirmed the hearing examiner's order that the University:

b. Restore the status quo ante by restoring the work of central processing technicians to the WFSE bargaining unit at HMC.

c. **Give notice to and, upon request, negotiate in good faith with Washington Federation of State Employees, before transferring bargaining unit work outside the bargaining unit.**<sup>57</sup>

Emphasis added. Decision 8878-A, p.10. The University's conduct in this case was an attempt simply to comply with PERC's order to bargain with the WFSE on the transfer of bargaining unit work and the employees

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<sup>57</sup> AR-11-668 (Findings of Fact, Conclusions of Law and Order of Christie Yoshitomi).

performing that work outside the bargaining unit. PERC's conclusion in this case that the University committed an unfair labor practice by merely attempting to bargain the same reallocation, reclassification and effects of reclassification which formed the factual basis for PERC's 2006 ULP decision is a flagrant contradiction in its own rulings.

The 2011 ULP decision also contradicts PERC's prior decision in *Snohomish County*, Decision 9540-A (PECB 2007).<sup>58</sup> The facts in this prior decision were cited by the Commission in footnote 6 of the 2011 ULP decision, and are closely analogous to the facts of the present case. The Commission attempts to distinguish *Snohomish County* from the present case, however, other prior PERC decisions contradict this distinction.

The Commission in *Snohomish County* recognized that an employer may remove work from a bargaining unit and place it in another, that parties "may on occasion agree that certain positions or work jurisdictions are included or excluded from the bargaining unit," and that "parties often include a description of the employees subject to the negotiated contract within the collective bargaining agreement, and these descriptions do not always match the unit description used by this agency." Decision 9540-A, p. 3. The Commission commented in *Snohomish County*, that "[w]hile parties may on occasion agree that

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<sup>58</sup> Although certain differences exist between the Personnel System Reform Act (PSRA) and the Public Employees Collective Bargaining Act (PECB), cases decided under the PECB are generally applicable to PSRA cases. *Community College District 19 – Columbia Basin*, Decision 9210 (PSRA, 2006), *State – Department of Natural Resources*, Decision 8458-B (PSRA, 2005).

certain positions or work jurisdictions are included or excluded from the bargaining unit, those agreements are not binding upon the agency.” *Id.*

The Commission noted in the 2011 ULP decision at issue in this case that “[t]he employer made it perfectly clear...that the work performed by the employees represented by WFSE ‘should be reallocated to SEIU’ and that the employer was unwilling to accept any alternative proposal by WFSE.”<sup>59</sup> This description of the University’s conduct is the same as the conduct of Snohomish County that PERC described in Decision 9540-A. The conduct that the Commission considered legitimate in *Snohomish County* is reflective of Jeff Davis’ February 20, 2007, letter to the Union’s counsel, in which Mr. Davis explained that the University understood that PERC had included the CLT work in SEIU 925’s bargaining unit.<sup>60</sup> Were it not for PERC’s SEIU 925 unit clarification decision to place laboratory technicians in the SEIU 925 bargaining unit, the University would have assumed that the employees would have been reallocated to a non-bargaining unit position. The Union actually shared the same understanding that SEIU 925 represented CLTs, and, ironically, *it* suggested that the University add a CLT job class to WFSE’s Harborview unit.<sup>61</sup>

The distinction that PERC draws between *Snohomish County* and the present case contradicts yet another prior PERC decision, *University*

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<sup>59</sup> Decision 10490-C, p. 10

<sup>60</sup> AR-11-675.

<sup>61</sup> AR-11-948.

of *Washington*, Decision 8216-A (PSRA, 2004). That decision consisted of an unchallenged order by a PERC hearing examiner that the University and the WFSE were permitted to include a secretarial job classification and an employee occupying that position in the bargaining unit without PERC action. The Commission fails to explain why in the present case it found it was unlawful for the University to “attempt to bargain” the inclusion of the CLT job class in the SEIU 925 HCPLT bargaining unit pursuant to PERC’s SEIU 925 unit clarification decision, while in Decision 8216-A it did not find it unlawful for the University and WFSE to agree to include a job class in a WFSE bargaining unit.

Finally, the 2011 ULP decision contradicts the rule established by PERC in *City of Redmond*, Decision 8879-A (PECB 2006), that conditional offers are part of the bargaining process:

Conditional Proposals Standard

Conditional offers are a lawful means to explore alternatives. *Whatcom County*, Decision 7244-B (PECB, 2004). This Commission encourages parties to engage in free and open exchanges of ideas as part of the collective bargaining process. See WAC 391-45-550.

*Id.*, p. 3. PERC’s 2011 ULP decision implicitly contradicts its expressed policy in *City of Redmond* by making unlawful the mere communication of a proposal and viewpoint that a reallocation would result in the transfer of employees from one bargaining unit to another was an unfair practice. The University merely expressed to the WFSE its good faith belief that the reallocation and consequent reclassification of the Harborview employees to a job class that was not listed in the WFSE collective bargaining

agreement did conform to the PERC's configuration of the SEIU 925 bargaining unit.

PERC's ruling that that expression of this good faith belief is an unfair labor practice contradicts its prior rulings governing bargaining conduct. This contradiction highlights the arbitrary and capricious nature of the Commission's action and justifies a reversal of the Commission's decision.

**2. The PERC's unchallenged conclusion that the University met its obligation to bargain in good faith contradicts the Commission's conclusion that the University attempted to bargain a prohibited subject.**

In its 2011 ULP decision, the Commission affirmed the hearing examiner's findings and conclusions that the University "did not violate its good faith bargaining obligation".<sup>62</sup> This conclusion contradicts the Commission's conclusions that the University nonetheless committed an unfair labor practice. "A finding that a party has refused to bargain is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining." *Vancouver School District*, Decision 11315 (PECB, 2012), *citing Spokane School District*, Decision 310-B (EDUC, 1978). A finding that the University bargained in good faith therefore contradicts the finding that it refused to bargain, which is what the WFSE, of necessity (because "refusal to bargain" was the "cause of action" stated in the Preliminary Ruling), asks this Court to infer. The WFSE implies that the Commission found the University guilty of a refusal to bargain by

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<sup>62</sup> Decision 10490-C, p. 8.

conditioning bargaining on agreement to reconfigure bargaining, a subject reserved exclusively to PERC.<sup>63</sup> The Commission never made such a ruling, but instead affirmed the examiner's conclusion that the University met its obligation to bargain in good faith.<sup>64</sup>

PERC in contrast found that the University met its duty to bargain in good faith the subject that the WFSE alleges that it demanded to bargain—i.e., wages for the Harborview SPTs. The University's bargaining conduct on this mandatory subject of bargaining was above reproach. The purported unlawful conduct of attempting to bargain a prohibited subject consisted of the University communicating its good faith belief, which was rejected by the union. This disagreement caused an end to discussions, and no action was taken on the reallocation. PERC's ruling that the University's mere communication of a proposal to reconfigure bargaining units is an unfair labor practice contradicts its contemporaneous finding that the University bargained in good faith and is therefore arbitrary and capricious.

The evidence in this case clearly shows that the University never attempted to usurp or circumvent the PERC's jurisdiction, in anything like the way the employer in *Boise Cascade Co.* had usurped the NLRB's jurisdiction. By stark contrast, the University sought in good faith to preserve PERC's configuration of the WFSE and the SEIU 925 bargaining

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<sup>63</sup> "The Commission concluded that the University committed a refusal to bargain violation prescribed by RCW 41.80.110(1)(e) (the ground in the preliminary ruling) when it attempted to bargain the configuration of the WFSE and SEIU bargaining units." Brief of Appellant, p. 32.

<sup>64</sup> Decision 10490, p.8.

units, and to respect the work jurisdiction of each unit as it is reflected in the description of job classes in each bargaining agreement. As PERC ruled, the University met its obligation to bargain in good faith.

**D. PERC’s finding that the university “proposed” that the employees be transferred to the SEIU 925 bargaining unit once they were reallocated in derogation of PERC’s exclusive jurisdiction is not supported by substantial evidence on the record.**

In its 2011 ULP decision PERC, when it explained the legal standard applicable to the issue of bargaining over the configuration of bargaining units, stated:

WFSE argues that even if the parties’ collective bargaining agreement recognizes the Department of Personnel and the Personnel Resources Board’s joint responsibility to ensure that employees are allocated to the proper job classification, the employer is still obligated to bargain the effects that its decision has on mandatory subjects of bargaining. *See, e.g., Wenatchee School District*, Decision 3240-A (PECB, 1990)(even though an employer may not be obligated to bargain the decision to make an entrepreneurial change, it still must bargain the effects that the decision to make the change has on mandatory subjects of bargaining). WFSE asserts that the Examiner committed reversible error by not making a finding that the employer failed to bargain in good faith the effects of its reallocation decision because the employer entered negotiations with the fixed position of transferring the employees to the SEIU bargaining unit.<sup>65</sup>

PERC rejected WFSE’s argument, and concluded that University did not fail to bargain in good faith. *Id.* This specific ruling is not subject to review,<sup>66</sup> but sheds light on the University’s bargaining conduct with the

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<sup>65</sup> Decision 10490-C, p. 7.

<sup>66</sup> WFSE did not cross appeal this ruling by PERC in this APA review.

WFSE concerning the reallocation of the employees work and the effects of the reallocation.

The University bargained with WFSE with the understanding that the CLT work was represented by SEIU 925, in accordance with the 2004 SEIU 925 unit clarification decision, and that an unavoidable effect of the reallocation and reclassification was the change in representation of the employees from WFSE did not represent CLTs to SEIU 925 who did.

Mr. Davis's letter to WFSE's counsel establishes that this was the University's understanding. This understanding was also evident in Lou Pisano's letter to both SEIU 925 and WFSE representatives, and his testimony at the adjudicatory hearing that having employees in the same classification doing the same work in two different unions was untenable.<sup>67</sup> As PERC acknowledges in its 2011 ULP decision, the collective bargaining agreement between the WFSE and the University includes a provision on reallocation of work to job classes out of the bargaining unit. The bargaining agreement also acknowledges that the parties define the work jurisdiction of bargaining units by listing job classifications, which are associated with job codes, which in turn refer to job class descriptions. Appendix I of the collective bargaining agreement lists the SPT job class, but does not list the CLT job class. In a subsequent order, PERC clarified its definition of the SEIU 925 HCPLT bargaining

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<sup>67</sup> Other CLTs in Laboratory Medicine not working at Harborview were in the SEIU 925 bargaining unit. AR-11-940. Mr. Pisano testified that it was his understanding that SEIU 925 owned the job classification. AR-10-542.

unit, by listing job classes. *University of Washington*, Decision 11083 (PSRA, 2011).

The evidence strongly supports the conclusion that the University's conduct in bargaining or attempting to bargain with the union was based on a good faith belief, and not based on an intention to usurp PERC's exclusive jurisdiction to configure bargaining units. The University did not attempt to reconfigure the bargaining units, but to preserve them.

**E. PERC violated its own rule that a preliminary ruling frames the issues at an adjudication when it found the University guilty of an attempt to bargain reconfiguration of bargaining units.**

PERC's Executive Director, who issues preliminary rulings through her Unfair Labor Practice Manager, David Gedrose, did not include a cause of action in the Preliminary Ruling in this case for "attempting to bargain reconfiguration of bargaining units."<sup>68</sup> The causes of action stated in the Preliminary Ruling and for which evidence was taken and arguments made only included:

Employer interference with employee rights in violation of RCW 41.80.110(1)(a) and refusal to bargain in violation of RCW 41.80.110(1)(e), by failing or refusing to meet and negotiate with the exclusive bargaining representative of its employees concerning wages for specimen processing technicians.<sup>69</sup>

The Union never amended its complaint to allege a cause of action of attempting to bargain the reconfiguration of bargaining units, either before or during the adjudicatory hearing. The parties did not brief the issue

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<sup>68</sup> AR-11-136 – 137

<sup>69</sup> AR-11-136

either during or after the adjudicatory hearing.<sup>70</sup> Neither of the hearing examiners who rendered decisions in this case mentioned that cause of action.<sup>71</sup> The parties never briefed the issue on review of the examiners' decisions by the Commission.<sup>72</sup>

The purpose of preliminary rulings, to frame the issues for adjudication, would be meaningless if the Commission could determine from the proven facts whether **any** unfair labor practice had been committed regardless of whether or not it was noted as a cause of action by the complainant, the ULP Manager, the respondent, or the hearing examiner.

Exceeding the scope of the Preliminary Ruling violated the University's right to a fair adjudication. In an analogous context, Justice Johnson commented in his opinion, concurring in part and dissenting in part with the majority opinion in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 166 P.3d 1198 (2007), as follows:

...the Board's conduct in this matter violates the same core common law principles that support the due process doctrine: openness and fair play. The rationale for open and balanced proceedings is spelled out in the Administrative Procedure Act (APA), chapter 34.05 RCW, the GMA, and growth management hearings boards procedures. These sources of authority embody fundamental principles of fairness that entitle parties to notice and the opportunity to respond to materials used against them in Board

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<sup>70</sup> AR-12-975 – 996, AR-13-999 – 1017

<sup>71</sup> AR-14-1022 – 1037, AR-22-1090 – 1108

<sup>72</sup> AR-17-1047 – 1065, AR-18-1068 – 1075, AR-19-1078 – 1080, AR-25-1117 – 1135, AR-26-1138 – 1146

proceedings and decisions. Improper procedures are also grounds for reversal.

161 Wn.2d at 441 (citations omitted.) Here, reversal is appropriate because the University was deprived of ample notice and opportunity to respond to an allegation that it usurped the PERC's exclusive jurisdiction by attempting to bargain the reconfiguration of bargaining units. It was denied fundamental fairness in the adjudication of the WFSE's Complaint.

The PERC Executive Director screens the complaint to determine if the factual allegations state any cause of action, and summarizes the allegations in a preliminary ruling. WAC 391-45-110 states in pertinent part:

(b) The preliminary ruling *limits the causes of action before an examiner and the commission*. A complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling. [Emphasis added.]

The Commission has affirmed this rule in prior decisions:

Thus, the preliminary ruling under WAC 391-45-110 and a detailed complaint that conforms with WAC 391-45-050 serve to provide sufficient notice to the responding party regarding complained-of facts and issues to be heard before an examiner.

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The examiner assigned to hold an evidentiary hearing can rule only upon the issues framed by the preliminary ruling or a properly amended complaint or motion. See *King County*, Decision 6994-B (PECB, 2002).

*Washington State University*, Decision 9614-A (PSRA, 2007). Here, PERC failed to include in the Preliminary Ruling a cause of action based

on the University's insistence that the WFSE agree that the reclassified employees be transferred to the SEIU 925 bargaining unit.

As it has in other cases, PERC could have issued a preliminary ruling that imposing an improper pre-condition to bargaining is an unlawful refusal to bargain and therefore an unfair labor practice. *See Adams County*, Decision 4006 (PECB, 1992) (employer conditioned bargaining with a union on meeting in a certain location after working hours). It failed to do so.

In this case, Mr. Gedrose merely stated causes of action for interference and refusing to bargain wages for specimen processing technicians. The Preliminary Ruling did not put the University on notice that it had to defend against a cause of action for attempting to bargain a prohibited or illegal subject. The PERC, in finding the University guilty of an unfair labor practice not included in the Preliminary Ruling deprived the University of a fair opportunity to be heard.

## VI. CONCLUSION

The standard for arbitrary and capricious agency action was expressed in *Matter of Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983) as follows:

Arbitrary and capricious action has been defined as "willful and unreasoning action, without consideration and in disregard of facts or circumstances." *Lillions v. Gibbs*, 47 Wash.2d 629, 633, 289 P.2d 203 (1955). Action taken **after giving respondent ample opportunity to be heard**, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been

reached, is not arbitrary or capricious. *Washington State Employees Ass'n v. Cleary*, 86 Wash.2d 124, 542 P.2d 1249 (1975); *Bishop v. Houghton*, 69 Wash.2d 786, 420 P.2d 368 (1966).

Emphasis added. 99 Wn.2d at 482 – 83.

PERC's mistaken reliance on *Boise Cascade* in adopting a rule that an attempt to reconfigure bargaining units is an unfair labor practice makes its action unreasoned. The failure of PERC to give the University ample opportunity to be heard on a cause of action that was not included in the preliminary ruling prevents the agency to exercise due consideration. The Commission's violation of the its own rule concerning the framing of the issues of the adjudication by the preliminary ruling deprived the University of an ample opportunity to be heard on the cause of action of attempting to bargain the reconfiguration of bargaining units. The Commission's reversal of the hearing examiner's dismissal of the union's complaint was arbitrary and capricious.

The WFSE encourages this Court simply to defer to the PERC on matters concerning unfair labor practices. The Court should be concerned with this request. As stated by the U.S. Court of Appeals for the 9<sup>th</sup> Circuit:

We...“must determine whether the [Corps] articulated a rational connection between the facts found and the choice made.” *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir.2001). Our review “must not ‘rubber-stamp’ ... administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *Id.* (quoting *NLRB v. Brown*, 380 U.S. 278, 291-92, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965)) (first alteration in original).

*Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1118 – 19 (Cir. 9, 2004), cited in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d at 435, footnote 8. PERC has not articulated a rational connection between the facts that the evidence in this case substantially supports and the ruling that it made. PERC has not, in this case, carried out its statutory mandate expressed in RCW 41.58.005, “to provide...a more uniform and impartial adjustment and settlement of complaints...and disputes arising out of employer-employee relations.” This court should not merely be a “rubber stamp” for PERC’s decision, but should, in this case, reverse PERC’s 2011 ULP decision, *University of Washington*, Decision 10490-C, and order the dismissal of the union’s complaint.

**DATED** this 25th day of June, 2012.

Respectfully submitted,

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