

NO. 71019-2

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

EVERETT COMMUNITY COLLEGE (COMMUNITY COLLEGE
DISTRICT NO. 5),

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION and
AMERICAN FEDERATION OF TEACHERS WASHINGTON Local
1873,

Respondent.

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIV I
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I. INTRODUCTION

Everett Community College (College) seeks review of a decision by the Public Employment Relations Commission (PERC) that the College committed an unfair labor practice against the American Federation of Teachers, Local 1873 (Union). PERC found that the violation occurred when the College transferred work alleged to be exclusive to the faculty bargaining unit to non-bargaining unit employees. The findings made by PERC to support its decision are contradictory, and not supported by substantial evidence. In reaching its decision PERC also misinterpreted or misapplied the law. Further, on judicial review of PERC's decision, the superior court misinterpreted and/or misapplied the law when it assessed attorney's fees against the College pursuant to RCW 49.48.030, the recovery of lost wages statute.

II. ASSIGNMENTS OF ERROR

1. On remand from the superior court, PERC erred when it entered Finding of Fact No. 1 relating to the duties or work performed by the faculty bargaining unit that are not listed in the collective bargaining agreement but that is the exclusive and historical work of the bargaining unit, because the evidence in the record does not support the finding. CP at 119-21.

2. On remand from the superior court, PERC erred when it entered Finding of Fact No. 2 relating to the duties or work performed by educational planners as a group or individually that is found to be exclusively and historically work of the faculty bargaining unit, because the evidence in the record does not support the finding. CP at 121-22.

3. On remand from the superior court, PERC erred when it entered Finding of Fact No. 5 relating to conflicting evidence and/or the credibility of evidence pertaining to the exclusive and historical work of the faculty bargaining unit, because the evidence in the record does not support the finding. CP at 124-25.

4. On remand from the superior court, PERC erred when it entered Finding of Fact No. 6 relating to evidence showing the existence of the five factors set forth in *City of Snoqualmie*, Decision 9892-A (PECB, 2009) that must be proved to establish an unfair labor practice, because the evidence in the record does not support the finding. CP at 125-27.

5. On remand from the superior court, the PERC erred when it entered Finding of Fact No. 7 relating to conflicting evidence and/or the credibility of evidence supporting the finding as to the *City of Snoqualmie* factors, because the evidence in the record does not support the finding

and/or because the agency misinterpreted and/or misapplied the law. CP at 127-28.

6. On remand from the superior court, the PERC erred when it entered Finding of Fact No. 8 relating to the balancing of the *City of Snoqualmie* factors, because the evidence in the record does not support the finding and/or because the agency misinterpreted and/or misapplied the law. CP at 128-30.

7. The superior court erred and misinterpreted and/or misapplied the law when it awarded the American Federation of Teachers Washington attorneys' fees under RCW 49.48.030, because the underlying proceeding was not an action for the recovery of lost wages. CP at 1-3, 12.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RCW 34.05.570(3)(e), is a decision by the Public Employment Relations Commission that the College illegally transferred or "skimmed" work from the faculty bargaining unit to workers outside that unit supported by substantial evidence, when the Union failed to meet its threshold burden of proving that the work was historically and exclusively reserved to the bargaining unit? Assignment of Error Nos. 1 through 7.

2. Assuming that the Union met its initial burden, under RCW 34.05.570(3)(d) and RCW 34.05.570(3)(e), did PERC misinterpret or misapply the law when balancing the five *City of Snoqualmie* factors required to find a “skimming” violation when the evidence it cites is not supported by substantial evidence? Assignment of Error Nos. 1 through 7.

3. In a judicial review proceeding pursuant to the Administrative Procedures Act, chapter 34.05 RCW, is an award of attorney’s fees to a respondent permitted under RCW 49.48.030 when the proceeding is not an action for the recovery of unpaid wages, when the superior court does not render a judgment for recovery of wages or salary, and when RCW 49.48.030 does not expressly authorize an award of attorney’s fees in judicial review proceedings? Assignment of Error Nos. 8 through 9.

IV. STATEMENT OF THE CASE

During the 2008-2009 and 2010-2011 fiscal and academic years, Everett Community College confronted significant reductions to its state-funded operating budget totaling approximately \$9 million. CP at 580-81. During those years, the College was compelled to make significant staffing reductions. For the 2009-2010 academic year, the College eliminated a parent education program and did not renew the contracts of five full-time temporary faculty members, laid-off three classified staff,

and eliminated several administrative positions including a vice-president position.¹ CP at 582, 616. For 2010-2011, the College eliminated its food services department, laid-off three classified staff, reduced the hours of other classified staff, did not fill classified and exempt staff positions that were vacant due to retirements, eliminated another vice president position, and did not renew the contracts of four full-time temporary faculty members who were employed as counselors. CP at 582-83, 654-55.

Counselors serve an important function at the College. They provide academic advising and guidance to students. CP at 119 (Finding Nos. 1(f) and (g)). They provide limited personal and mental health counseling. CP at 119 (Finding No. 1(d)). They work to improve the performance of students who are at risk academically. *Id.* Counselors assist students to develop learning and study skills. CP at 120 (Finding No. 1(j)). They provide educational advising to students who want to transfer to four-year colleges and universities. CP at 121 (Finding 1(c)). As one counselor put it,

We would describe our work basically as a trilogy of academic, personal and career guidance. Some people call

¹ Classified employees are those employees who are subject to state civil service laws. RCW 41.06.040. They are granted collective bargaining rights pursuant to chapter 41.80 RCW. Faculty and administrators at community colleges are exempt from state civil service laws. RCW 41.06.070(2)(a). Faculty are granted collective bargaining rights pursuant to chapter 28B.52 RCW.

it counseling or advising, but it's basically helping students in a holistic way that looks at their academic needs, their career needs, and if they have personal barriers we'll help them with that, too.

CP at 451.

Unfortunately, when budget reduction necessitated the non-renewal of the four temporary faculty members employed as counselors, the number of counselors employed by the College was reduced from ten to six. CP at 654-55, 650. At the same time the College was facing a shrinking budget, it was experiencing an increasing demand for its education programs and the services it provides to students. CP at 618, 696-97. To meet this demand, the College formalized the process by which prospective, new and continuing students were provided information about college policies, procedures, and programs, and how it served various special populations of students. CP at 630-33, 670. Previously, such information was provided by various College employees, both faculty and non-faculty, "wherever a student landed." CP at 407-08, 632, 633-34, 701.

To centralize this process, the College created five new positions called education planners. CP at 630, 669-72. Although new positions, they were relatively cost-neutral to the College. CP at 609. The College reallocated funding for two classified positions in the counseling center to

education planner positions. CP at 587-88, 631. These positions were filled by classified employees (Nancy Kolosseus and Kathy May), and there was “a lot of overlap” between the work they did as classified employees in the counseling center and the work they do as education planners. CP at 610, 647. Funding for a third classified staff position in enrollment services was also reallocated as an education planner; the education planner who held this position (Linda Summers) also did much of the same work as an education planner that she did when she worked in enrollment services. CP at 610, 685-86. The two other education planner positions were funded from budget savings realized by not filling two classified staff positions and an exempt administrative position that were vacant due to retirements. CP at 587-88, 631, 682-83.

Unlike counselors, education planners provide no academic, career, educational, personal or mental health counseling to students. CP at 671, 698, 703-04. *See also* CP at 671-87. Education planners provide entry-type advising and information; guide persons in the process of how to become students; advise students in admission processes, registration, degree requirements, and graduation procedures; provide information on College policies; refer students to services, such as counselors or program advisors; provide student orientations; perform informal transcript evaluations; help student select first quarter classes; and provide general

transfer information. CP at 122-23 (Finding Nos. 3 and 4), 350, 425, 490, 630, 669. These duties have historically been performed—and continue to be performed—by many different college employees including exempt employees, classified employees, and faculty. CP at 122 (Finding No. 3(a)), 123 (Finding No. 3(e)), 123-24 (Finding No. 4), 407-08, 632-33, 634, 672, 677-78, 682-83, 84-85.

The first education planner began employment in February 2010. CP at 669, 692. The faculty counselors were asked to provide input on the job description, which they did. CP at 421-24, 692. Subsequently, the College determined it must bargain the use of education planners with the union representing classified staff because they were doing work previously done by classified employees. CP at 592, 587-88, 610-11, 682-83, 685-86. The remaining education planners began employment in August and September 2010. CP at 705.

On April 26, 2010, the Union representing faculty at the College filed a grievance under its collective bargaining agreement with the College challenging the use of education planners.² CP at 409-12. The grievance claimed, in part, that:

In effect, work which is the core responsibility of academic employees [counselors], and which is currently being performed by academic employees will be

² The grievance procedures are contained in Section 14 of the collective bargaining agreement between the College and the Union. *See* CP at 217-21.

performed by Ed Planners who are not academic employees. This restructuring . . . transfers that work to non-academic employees, and does so in violation of the CBA [collective bargaining agreement].

CP at 410.

On May 26, 2010, the College denied the grievance. CP at 355-58.

On June 30, 2010, the Union filed an unfair labor practice complaint against the College with PERC. CP at 135-40. An amended complaint was filed July 27, 2010. CP at 143-46. The Union alleged that the College discriminated against the four temporary faculty by not renewing their contracts in reprisal for union activities, the College changed the working conditions of the remaining counselors without providing an opportunity to bargain, and the College transferred or “skimmed” work from the faculty bargaining unit and assigned it to the education planners. CP at 144-45. Because the Union alleged discrimination against the four temporary counselors, PERC refused to defer the issues to the binding arbitration that had been requested by the Union. CP at 154.

A hearing on the unfair labor practice complaint was held before a PERC hearing examiner on November 30 and December 1, 2010. CP at 429-708. On August 5, 2011, the PERC hearing examiner issued Modified Findings of Fact, Conclusions of Law and Order (Decision). CP at 782-98. The hearing examiner found the College did not discriminate against the four temporary counselors whose contracts were not renewed. CP at 784-86. The hearing examiner also found that the

College did not change the working conditions of the remaining counselors without providing an opportunity to bargain. CP at 786-90.

The hearing examiner did, however, find that the College committed an unfair labor practice by assigning education planners to do work that was reserved to the faculty bargaining unit. CP at 790-94. In other words, the hearing examiner found that the College committed a “skimming” violation. The hearing examiner ordered *inter alia* that the College restore the *status quo ante* by reinstating the wages, hours and working conditions of the full time counselors. CP at 797. Specifically, the hearing examiner ordered that the five positions filled by education planners be returned to the bargaining unit as full-time counseling positions. *Id.* She also ordered that the college offer “the non-terminated counselors the option to return to their positions within the CACC [Counseling, Advising, and Career Center].” *Id.*

On August 24, 2011, the College appealed the hearing examiner’s decision to the full Commission. CP at 801-03. On September 21, 2012, thirteen months later, PERC issued a short three page decision affirming the Hearing Examiner’s decision. CP at 853-55. PERC’s decision had no analysis of the issues raised by the College, and contained no findings as required by RCW 34.05.461(3); it simply deferred to the hearing examiner’s decision. CP at 854-55.

On October 3, 2012, the College filed a timely petition for judicial review of PERC’s decision in Snohomish County Superior Court. CP at 858-86. On February 12, 2013, the superior court remanded the case to

PERC with instructions to make specific findings of fact regarding bargaining unit work not listed in the parties' collective bargaining agreement that PERC found to be exclusive and historical work of the bargaining unit; work done by education planners that was exclusive bargaining unit work; work done by education planners that was not exclusive bargaining unit work; conflicting evidence and credibility determinations; and findings regarding the legal factors to be weighed by PERC when determining whether a skimming violation has occurred. CP at 131-32. PERC issued its supplemental findings on April 9, 2013. CP at 116-30.

On September 10, 2013, the superior court issued its decision denying the College's petition for judicial review. CP at 107-08. In addition to denying the petition, the superior court awarded the Union \$55,150 in attorney's fees pursuant to RCW 49.48.030. CP at 1-3, 111. The College's timely appeal to this court followed.

V. STANDARD OF REVIEW

Judicial review of administrative orders is governed by the Administrative Procedures Act (APA), Chapter 34.05 RCW. Administrative appeals invoke the appellate, not general, jurisdiction of the court. *Skagit Surveyors & Eng'rs v. Friends of Skagit Cy.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (quoting *Fay v. Northwest Airlines*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990)). Judicial review is not a trial

de novo, but is limited to the record of the administrative proceedings below. RCW 34.05.558; *Ault v. Highway Comm'n*, 77 Wn.2d 376, 378, 462 P.2d 546 (1969); *Porter v. Dep't of Retirement Sys.*, 100 Wn. App. 898, 903, 999 P.2d 1280 (2000). The specific procedures for judicial review are listed in RCW 34.05.510 *et seq.*

An appellate court reviews administrative decisions on the record of the administrative tribunal, in this case PERC, rather than the record of the superior court. *Sherman v. Moloney*, 106 Wn.2d 873, 881, 725 P.2d 966 (1986). This Court sits in the same position as the superior court and applies the standards of the APA directly to the record before PERC. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

Here, the College seeks relief pursuant to RCW 34.05.570(3)(d) and alleges that PERC erroneously interpreted and/or applied the law when it found that the College committed a skimming violation. It also alleges that the superior court erroneously interpreted and/or applied the law when it awarded attorney's fees pursuant to RCW 49.48.030. These issues present questions of law. This court reviews questions of law *de novo* by independently determining and interpreting the applicable law. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982); *Porter*, 100 Wn. App. at 903.

The College also seeks relief pursuant to RCW 34.05.570(e), and alleges that the findings made by PERC to support its decision and order are not supported by substantial evidence. The findings subject to review by this Court are those made by the full Commission on remand from the superior court. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 404-05, 858 P.2d 494 (1993); *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 49-50, 121 P.3d 731 (2005). See CP at 116-30, 853-55. The court may sustain the factual findings made by the agency only if they are supported by evidence that “is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e) (emphasis added). See also *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Heinmiller*, 127 Wn.2d at 607; *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 542-43, 869 P.2d 1045 (1994). If substantial evidence does not support the findings made by PERC, then relief must be granted pursuant to RCW 34.05.570(3).

VI. ARGUMENT

A. **To Sustain An Alleged Unfair Labor Practice, The Evidence Must Show That The College Assigned Work Historically And Exclusively Reserved To Faculty To Non-Faculty Employees, And That There Was A Duty To Bargain That Change.**

Transferring bargaining unit work to non-bargaining unit employees without bargaining the change is known as “skimming.” *Evergreen School District*, Decision 10546 (PECB 2009). To sustain a skimming violation, PERC must first find that the Union proved that the transferred work was bargaining unit work. *City of Snoqualmie*, Decision 9892-A (PECB 2009). Bargaining unit work is work “historically performed by bargaining unit members” and work that only the bargaining unit members have the right to perform. *Department of Corrections*, Decision 11060 (PRSA 2011). “If the work falls outside the scope of work normally performed by bargaining unit employees, the employer has no duty to bargain.” *Wapato School District*, Decision 10744 (PECB 2010) (emphasis added).

Here, PERC erroneously concluded that the Union met its threshold burden, namely that education planners perform work historically and exclusively performed by the faculty bargaining unit. Many of the findings of fact made by PERC to support its erroneous legal conclusion are contradictory. Some work that PERC found to be

exclusive to the bargaining unit, it also found to be historically performed by non-bargaining unit employees. The remaining findings are not supported by substantial evidence.

Even if the threshold showing is made, PERC must still balance five factors to determine whether a duty to bargain existed. *City of Snoqualmie*, Decision 9892-A (PECB 2009). *Id.* These are: (1) whether non-bargaining unit personnel performed the work before; (2) whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skill, or working conditions; (3) whether the transfer involved a significant detriment to bargaining unit members, i.e. whether it changed working conditions or significantly impaired anticipated work opportunities; (4) whether the employer's motivation was solely economic; and (5) whether there has been an opportunity to generally bargain about changes in existing practices. *Id.*

Assuming for the sake of argument that PERC did not err in making the threshold determination, it erred when it balanced the five factors. PERC's findings with regard to the factors are not supported by substantial evidence. PERC misapplied the law to conclude that the College committed an unfair labor practice.

B. The Evidence Does Not Show That Education Planners Perform Bargaining Unit Work.

PERC erred when it concluded that the Union met its threshold burden and proved that education planners perform work historically and exclusively reserved to the faculty bargaining unit. To support its erroneous conclusion, PERC ignored its own precedent and relied upon the wording in the education planner job description. It speculated and inferred credibility determinations by the hearing examiner when none were made. It made findings that contradict themselves, and cited to evidence and testimony that does not support the propositions that are asserted. Because PERC's conclusion that the Union met its threshold burden is not supported by substantial evidence, there can be no finding that an unfair labor practice occurred and PERC's decision should be reversed.

1. PERC's reliance on the education planner job description is contrary to its own precedent, and its conclusion that the language of the job description is more credible than the testimony of the individual who wrote it without merits.

PERC relied extensively on its interpretation of the language of the education planner job description to find that an unfair labor practice occurred. CP at 121-22 (Finding Nos. 2(a), (c), (d), (e), and (j)), 122-23 (Finding Nos. 3(b) and (c)), 123-24 (Finding Nos. 4(d), (f), (g), and (h)). See CP at 413-19. This reliance on the wording used in the education

planner job description is error and contrary to the agency's own established precedent. PERC does not rely on job descriptions as conclusive evidence of an employee's duties and responsibilities. *See e.g. Everett Community College*, Decision 10392 (PECB, 2009); *Washington State University*, Decision 9613-A (PSRA, 2007); *City of Winslow*, Decision 3520-A (PECB, 1990). The hearing examiner acknowledged this when overruling an objection to testimony about the job description, noting "PERC does not rely solely on job descriptions and other such documents about positions." CP at 672-73. Yet, the findings made by PERC on remand depend on that job description to support a finding that the threshold showing was made. PERC misapplied its own precedent and committed error.

2. PERC's assessment of credibility of witnesses is based on speculation, is not supported by the evidence, and is contrary to its own findings.

The APA requires that "[a]ny findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified." RCW 34.05.461(3). A reviewing court will generally accept the fact-finder's determinations of witness credibility and the weight to be given to reasonable but competing inferences. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

In this case, that standard should not apply. The hearing examiner made no findings regarding the credibility or persuasiveness of any witness's testimony during the hearing. CP 790-94. On remand, however, the full Commission, whose review was limited to the record and who observed none of the testimony, made several credibility findings to prop up otherwise insubstantial evidence. CP at 125 (Finding No. 5(a)), 127-28 (Finding No. 7). Even then, PERC's findings are based on inferences and assumptions that the hearing examiner found some evidence more credible or compelling. These findings are not supported by the record, and should not be accorded any deference.

Christina Castorena is the dean who wrote the job description and supervised both faculty counselors and education planners; she was the only witness with direct personal knowledge of the work education planners perform, and the only witness who testified with any specificity about the duties of education planners. CP at 125 (Finding No. 5(a)), 652-54, 656-59, 669-91. PERC acknowledged that Dean Castorena distinguished how the duties set forth in the job description differed from the work performed by the bargaining unit. CP at 125 (Finding 5(a)). However, PERC then "inferred" that the hearing examiner found the job description more persuasive than the testimony of the person who wrote it. *Id.* It is error for PERC to label this as a finding of credibility or

persuasiveness by the hearing examiner. In this context, PERC's inference that such a determination was made is pure speculation without any substance, and therefore reversible error under RCW 34.05.570(3).

PERC also made erroneous credibility findings regarding the witnesses called by the College. It found the testimony of V.P. for Administration Jennifer Howard's testimony about the duties of education planners not credible by saying she does not supervise them and does not observe their work. CP at 128 (Finding No. 7(e)). But at the same time, PERC declines to give weight to the testimony of Dean Castorena who supervises both education planners and counselors and observes the work of both groups of employees, and again relies on the speculative and insubstantial inference that the hearing examiner did not find her testimony credible. CP at 128 (Finding No. 7(c)). PERC's finding on credibility is illogical and without substance.

PERC also states that it gives more weight to that of the counselors "some of whom actually worked with the education planners." *Id.* This is not substantial evidence because PERC does not identify who these counselors are and it does not cite to the record to support its determination because no such evidence in the record exists. None of the counselors testified they know what the duties of the education planners are. CP at 468, 531, 537, 547. Instead, Dean Castorena was the only

witness that testified based on direct and personal knowledge of the actual duties performed by education planners. Again, PERC's reason for ignoring the substantial evidence is its insubstantial and illogical inference about the hearing examiner.

PERC also disregards Dean Castorena's testimony about the differences between the duties of counselors and education planners. CP at 128 (Finding No. 7(d)). The finding is without substantial evidence and arbitrary for two reasons. First, PERC found that most of the duties listed in Finding No. 7(d) were not exclusive to the faculty bargaining unit. CP at 122-24 (Finding Nos. 3 and 4). Second, PERC relied instead on the testimony of counselor Christina Sullivan who, it found, worked directly with education planners. CP at 128 (Finding No. 7(d)). But PERC does not cite to the record to support this finding, and it cannot because Ms. Sullivan never testified she worked directly with the education planners; she testified she knew who they were and worked in the same location. CP at 551-52. She did not offer any other testimony as to the specific duties education planners have, and did not testify that she observed their work. CP at 549-57. Rather, Ms. Sullivan testified, as did Dean Castorena, that the duties listed in the education planner job description have historically been performed by non-bargaining unit members as well as bargaining unit members. CP at 556.

Finally, PERC discounted Dean Castorena's testimony that education planners were trained and instructed to not perform duties exclusively and historically reserved to the bargaining unit because it "does not equate to a reality that those employees are not performing those duties." CP at 128 (Finding No. 7(b)). *See* CP at 420, 689-92. This finding is nonsensical and is not substantial evidence. At issue was whether the Union proved that the College transferred work reserved to the bargaining unit, not whether the College proved employees performed work he or she was not supposed to perform. PERC appears to have relieved the Union of its burden to prove a skimming violation and shifted it to the College to prove that it did not.

For all of these reasons, PERC's after-the-fact findings inferring there were credibility determinations are not supported by the record, and are contrary to the evidence in the record. This type of speculation that credibility determinations were made by the hearing examiner is not what the APA contemplates when it authorizes a fact-finder to rely on and express credibility determinations. *See* RCW 34.05.461(3). Under the facts of this case, Findings of Fact on Remand Nos. 5 and 7 provide no substantial basis for propping up the ultimate finding that the College committed an unfair labor practice.

3. The supplemental findings made by PERC on remand are contradictory, not supported by substantial evidence, and do not support the conclusion that education planners perform bargaining unit work.

As ordered by the superior court, PERC made supplemental findings regarding the exclusive and historical work of the faculty bargaining unit and how that work was performed by education planners. CP at 119-22 (Finding of Fact on Remand (Finding) Nos. 1 and 2). Although PERC cited to specific portions of the record to support the findings it made, these citations do not support the findings made. Other findings regarding exclusive and historical work of the faculty bargaining unit are contradicted by findings made by PERC regarding work that is not exclusive to the bargaining unit. Again, there is not substantial evidence to support findings necessary to conclude that the Union met its threshold burden.

i. Providing students with information about College procedures and programs, and referring them to College services is not exclusive bargaining unit work.

PERC found that helping students select courses, register for classes, and assisting with services such as financial aid was the exclusive and historical work of the faculty bargaining unit. CP at 119 (Finding No. 1(e)). It also found that when education planners advise new students on admissions processes, registration, and course selection after the completion of placement tests, transcript evaluation, degree requirements, graduation procedures, and entry information, they do work

exclusively and historically performed by the bargaining unit. CP at 121 (Finding No. 2(a)).

The evidence cited by PERC shows the opposite. A 2008 memorandum of understanding (MOU) between the College and the Union relied upon by PERC, lists work that the College and the Union agreed was not the exclusive and historical province of the faculty bargaining unit. CP at 407-08. This work includes many of the activities PERC found to be exclusive to the bargaining unit, including: orienting students to the college, its policies, support services, and educational programs; providing information about educational programs, important dates and deadlines, college policies and procedures, entrance and graduation requirements, curriculum guides, prerequisites, and similar information; assisting students in selecting classes for their first quarter; referring students to appropriate support services; unofficial transcript evaluations (official evaluations are provided in Enrollment Services, also by non-faculty); and identifying appropriate open classes and assisting students with the registration process. *Id.*

Moreover, no witness testified that the duties set forth in Finding Nos. 1(e) and 2(a) were exclusively reserved to the bargaining unit. In the testimony cited by PERC, two counselors describe their general duties as counselors; neither testified that education planners perform the duties found by PERC to be exclusive to the bargaining unit. CP at 451-52, 465, 540.

Furthermore, other findings by PERC contradict those it made to find that education planners perform bargaining unit work. Contrary to Finding Nos. 1(e) and 2(a), PERC found providing detailed information about the College's policies, program, and services and referring students to appropriate services was not exclusive bargaining unit work. CP at 124 (Finding Nos. 4(f) and (g)). Contrary to Finding 2(a), PERC specifically found entry advising includes transcript evaluation. *Id.* (Finding No. 4(d) and (h)). Contrary to Finding Nos. 1(e) and (2)(a), PERC found that helping students select first quarter courses, and courses after completion of placement tests, was not exclusive bargaining unit work. CP at 124 (Finding Nos. 4(i) and (j)). *See* CP at 407-08, 673-76. Contrary to Finding No. 2(j), PERC found that providing information to students about college services and educational programs, referring students to appropriate services, and referring students to appropriate advisors was not work exclusive to the bargaining unit. CP at 123-24 (Finding Nos. 4(c), (d), (f), (g), and (i)). PERC's conclusion that this work is exclusively reserved to the bargaining unit is contradicted by its own findings.

Finally, PERC found that education planners do bargaining unit work when they interpret and explain entry assessment test scores. CP at 121 (Finding No. 2(e)). However, PERC made no finding that this was exclusive bargaining unit work. CP at 119 (Finding No. 1). Further, Finding No. 2(e) is overwhelmed and contradicted by Finding No. 4(j) in which PERC specifically found that education planners do not interpret

and explain placement test scores, and that this was not exclusive bargaining unit work. CP at 124 (Finding 4(j)). These latter findings are consistent with the evidence, while the former is not. CP at 675-76.

ii. Providing information to on-going students is not exclusive bargaining unit work.

PERC found that education planners “advise” first quarter and undecided students and transfer students planning to major in human services or social work, and that this is exclusive bargaining unit work. CP at 119 (Finding No. 1(b)), 121 (Finding No. 2(b)). Exhibit 8, cited by PERC, generally describes the services provided by counselors and education planners in the counseling center; it does not detail the responsibilities of education planners. CP at 347. In contrast, Exhibit 35 advises students to see an education planner to “get entry advising; understand your placement test scores and know what classes to take, general transfer information and registration assistance.” CP at 425. These are duties PERC found were not reserved to the bargaining unit. CP at 123 (Finding Nos. 4(c), (d), (g), (h), (i), (j), (k)). Exhibit 33, also relied on by PERC, clearly states that advising for human services transfer students is the responsibility of counselors, not education planners. CP at 420.

Furthermore, none of the testimony cited by PERC supports Finding No. 2(b). Counselor Earl Martin gave conclusory testimony that education planners do the work he used to do; he gave no specifics. CP at 456. Counselor Gina Meyers said education planners do work “that’s

counselor-like,” but also admitted the work they do was not exclusive bargaining unit work of the bargaining unit. CP at 537-38. Dean Castorena described education planners as persons who provide entry information, guide people in the process of how to become a student, talk to students about next steps after placement tests, and give information about the degrees and programs the College offers. CP at 669. These are the same duties PERC specifically found were not reserved to the bargaining unit. CP at 123-24 (Finding No. 4). The evidence cited by PERC contradicts and does not support Finding No. 2(b).

PERC found that “advising” continuing students was bargaining unit work, and education planners assist “more than entry level, or first quarter students.” CP at 120 (Finding No. 1(k)), 121 (Finding No. 2(g)). In the testimony cited by PERC, counselor Earl Martin was unable to describe the duties of education planners and said he “thinks” they do entry advising. CP at 468. However, PERC found entry advising was not work exclusive to the bargaining unit. CP at 123 (Finding Nos. 4(c) and (d)). Moreover, providing continuing students with information about College services and processes has never been work exclusive to the bargaining unit work, and no witness testified that it was. CP at 407-08, 671-72, 701-02. To the extent Finding Nos. 1(k) and 2(g) mean that only faculty can provide information to students beyond their first quarter of study, they are both irrational and not supported by substantial evidence.

PERC found that education planners do bargaining unit work and provide general transfer advising and informal transcript evaluations to assist students with transferring to and from other colleges and universities. CP at 121 Finding of Fact No. 2(c)). Exhibit 10, which is cited by PERC, is a page from the College's website describing what education planners do. CP at 350. No witness testified education planners do the type of transfer advising that counselors do as described in Finding No. 1(c), and PERC cites to no such testimony. *See* CP at 119 (Finding No. 1(c)). Exhibit 33, also cited by PERC, states that education planners explain transfer and professional/technical program requirements, and provide university transfer information. CP at 420. All of this information is available on the College's intranet or in College publications, and has routinely and historically been provided to students by non-bargaining unit employees. CP at 407-08, 679-80. It is not exclusive bargaining unit work.

iii. Organizing faculty workshops and student orientations is not exclusive bargaining unit work.

PERC found that education planners do bargaining unit work when they develop training sessions for faculty and staff, and work with faculty to develop workshops for other faculty. CP at 121 (Finding No. 2(c)). In testimony cited by PERC, counselor Gina Myer said she used to do the "undecided" workshop for faculty, but also admitted that Nancy Kolosseus, a classified employee who later became an education planner, "also did that workshop with me." CP at 531. *See also* CP at 609-10,

686-87. In testimony cited by PERC, Dean Castorena testified that classified employees historically helped coordinate and organize—but not lead—workshop sessions for faculty. CP at 677-78. The evidence cited by PERC does not support its own finding.

PERC found that education planners do bargaining unit work when they lead student workshops and orientation sessions. CP at 121 (Finding No. 2(d)). However, PERC did not find that these duties were exclusive to the bargaining unit. CP at 119 (Finding No. 1). This finding is also overwhelmed and contradicted by PERC’s finding that both bargaining unit and non-bargaining unit employees participated in student orientation. CP at 123 (Finding No. 4(b)). *See* CP at 407-08, 632-33. The only testimony on this point was that education planners lead workshops on how students get started at the College. CP at 676.

PERC found that education planners “advise” faculty, staff and administrators, noting “[t]his is the same type of work described in the collective bargaining agreement article 6.11.B.” CP at 121 (Finding No. 2(f)). It did not define what it meant by “advise.” In the testimony cited by PERC, Dean Castorena testified generally about placement tests, registration processes, etc. CP at 673. When asked whether education planners “advise” faculty, staff and administrators about student development and retention, she stated, “[W]e’ve really developed a culture on our campus where every employee is responsible for student development and retention.” CP at 674-75. She did not testify education planners perform work described in the collective bargaining agreement.

iv. PERC's inference that education planners counsel students is not supported by the record.

PERC found that education planners provide career counseling. CP at 122 (Finding No. 2(i)). PERC cites to the testimony of counselor Gina Myers who related an incident when an education planner determined a student needed career counseling and put the student back into the "system" to see a counselor. CP at 548. A second education planner then called the student back and "did whatever she did to meet those career needs." *Id.* Dr. Myers did not testify as to what the student and education planner discussed, and any conclusion that the education planner provided career counseling is speculation and without substance. No other testimony or evidence was offered on this point, and the finding is unsupported.

PERC found that education planners do bargaining unit work by assisting students in clarifying objectives, connect students with resources, direct students to faculty advisors, provide students with curriculum guides, and refer them to support services. CP at 122 (Finding 2(j)). It also found referring students to program faculty or program advisors was exclusive bargaining unit work. CP at 120 (Finding No. 1(i)).

PERC cites to the education planner job description and the testimony of Dean Christina Castorena, the individual who wrote the job description. CP at 413-19, 681. Dean Castorena did not testify these duties were exclusive to the bargaining unit; no one did. CP at 407, 420,

658. She explained that the information referenced in the finding is available in College publications. CP at 680-81. Curriculum guides list degree and certificate requirements, and can be found at various places around campus including the counseling center and enrollment services. *Id.* Because the guides are widely available, PERC's finding that only faculty may provide them to students defies logic and the evidence. PERC's finding is also overwhelmed and contradicted by its findings that all employees on campus historically answer student questions about services and programs, help students understand their available options, refer students to services on campus, provide detailed information about college programs, and refer students to appropriate faculty advisors. CP at 123-24 (Finding No. 4).

v. When working with special student populations, education planners do the work of classified staff.

PERC made several findings regarding the work education planners do with special student populations. CP at 122 (Finding Nos. 2(k), (l), (m), and (n)). Clearly, the provision of career, academic, and personal counseling to the population served by the Diversity and Equity Center (and to all students) is exclusive and historical bargaining unit work. No witness testified that education planners do this work, and the Union never made such a claim. There is no evidence to support any finding that working with special student populations is exclusive and historical bargaining unit work.

PERC found that an education planner performed bargaining unit work when she acted as faculty liaison. CP at 120 (Finding No. 1(m)), 122 (Finding Nos. 2(h) and 2(k)). The cited evidence does not support the finding. Counselor Earl Martin testified counselors acted as liaisons to College divisions, and that he “understood” education planner Nancy Kolosseus was in that role; he was no more specific than that. CP at 473. Counselor Gina Myers talked about being a faculty liaison by organizing workshops for faculty. CP at 531. PERC ignored the fact she also admitted that Ms. Kolosseus, an education planner, previously performed this work as a classified employee. *Id.* Myers’ testimony is consistent with Dean Castorena who testified the liaison role was “to be a single point of contact for faculty who are looking for information or want to disseminate information to the education planners.” CP at 686.

PERC found that an education planner provided transfer information and did bargaining unit work. CP at 122 (Finding 2(k)). This finding is overwhelmed and contracted by PERC’s finding that the transfer specialist work was previously performed by a non-bargaining unit employee and is not bargaining unit work. CP at 123 (Finding No. 3(e)). Dean Castorena, the only witness who offered specific testimony on the issue, testified that the transfer specialist schedules transfer fairs, coordinates visits to campus by university representatives, and acts as a point of contact for the College’s contact person, all duties previously performed by a non-bargaining unit employee. CP at 682-83.

PERC found that the education planner who works with students in the Diversity and Equity Center (DEC) performs work previously done by a counselor. CP at 120 (Finding Nos. 1(m) and 1(p), 122 (Finding Nos. 2(k) and (l)). In the testimony cited by PERC, Dean Castorena described how these duties were previously performed by two classified employees, not faculty or counselors. CP at 684. This testimony is consistent with other findings by PERC that the education planner in the DEC does work previously performed by non-bargaining unit employees and that the work is not exclusive to the bargaining unit, facts acknowledged by the counselors who testified. CP at 123 (Finding No. 3(e)), 124 (Finding No. 4(e)), 568, 572-74. The education planner in the DEC is not doing bargaining unit work.

PERC found that the education planner who works with the College Success Foundation program does bargaining unit work. CP at 120 (Finding Nos. 1(m) and (p)), 122 (Finding Nos. 2(k) and (m)). PERC cites to testimony by Janice Loveless, who was the College Success Foundation program contact at the College in 2009-2010. CP at 567-70. However, Dr. Loveless never testified that being the contact for the College Success Foundation program was exclusive bargaining unit work and the record shows otherwise. Prior to Dr. Lovelace, responsibility for the program lay with Dean Castorena and, before her, the director of the TRIO grant program, both of whom were administrators and not members of the bargaining unit. CP at 683-85. Acting as the College Success Foundation contact person is not exclusive

bargaining unit work, and Finding Nos. 1(m), 1(p), 2(k), and 2(m) are unsupported.

PERC found that an education planner works with opportunity grant students. CP at 122 (Finding 2(k) and (n)). The finding is vague and less than clear. PERC made a finding as to the specific duties performed by the counselor who served opportunity grant student prior to the 2010-2011 academic year. CP at 120 (Finding No. 1(n)). However, it made no finding that an education planner performs these duties or any duties reserved to the bargaining unit. It did find that some of the administrative functions of the opportunity grant program are not exclusive bargaining unit work. CP at 122 (Finding No. 2(n)), 123 (Finding No. 3(f)). The record shows that the education planner performs only administrative duties, and not bargaining unit work. CP at 687.

PERC's findings regarding the education planner who works with foster youth contradict themselves. PERC found that working with foster youth was exclusive bargaining unit work. CP at 120 (Finding No. 1(m)). However, it also found that working with foster youth was historically the work of classified staff. CP at 123 (Finding 3(e)). Only the latter finding is supported by evidence in the record. The education planner working with foster youth previously performed these same duties as a classified employee. CP at 554, 685-86. There was no testimony or other evidence that working with foster youth was exclusive bargaining unit work.

In summary, PERC's findings that education planners perform work historically and exclusively reserved to the faculty bargaining unit

are not supported by the record. Many of PERC's findings on this issue contradict themselves. Some findings are based on inferences that are not supported by logic or the evidence. In other instances, the evidence cited by PERC to support its findings instead defeat them. This is insubstantial evidence. PERC erred when it concluded that that the Union met its threshold burden of proving that the work done by education planners has historically and exclusively been reserved to the faculty bargaining unit, and that no other employees of the College had the right or ability to perform this work. As a result, there can be no finding that an unfair labor practice has occurred, and PERC's decision should be reversed.

C. Even If The Threshold Burden Has Been Met, A Fair Weighing Of The Five *City Of Snoqualmie* Factors Does Not Lead To The Conclusion That A Duty To Bargain Existed.

PERC must do a fair balancing of five factors to determine whether a duty to bargain existed. *City of Snoqualmie*, Decision 9892-A (2009 PECB). These five factors are: (1) whether non-bargaining unit personnel performed the work before; (2) whether the work was fundamentally different from regular bargaining unit work in terms of duties, skills, or working conditions; (3) whether the transfer involved a significant detriment to bargaining unit members, i.e. changed working conditions or significantly impaired anticipated work opportunities; (4) whether the College's motivation was solely economic; and (5) whether there has been an opportunity to bargain generally about changes in

existing practices. *Id.* A balancing of the *City of Snoqualmie* shows there was no duty to bargain the use of education planners.

1. The undisputed evidence is that non-bargaining unit personnel have historically performed the work done by education planners.

PERC's addressed the first *City of Snoqualmie* factor based on its faulty findings that education planners perform bargaining unit work. *See* CP at 125 (Finding 6(a)). PERC concluded this factor "weighed heavily" in favor of a duty to bargain. CP at 129 (Finding 8(a)). As argued above, education planners do not do any of the work historically done by faculty counselors such as providing academic, career, educational, and personal counseling. CP at 671-82. Education planners provide entry-type advising and information, guide persons in the process of how to become students, advise students in admission processes, registration, degree requirements, graduation procedures, and general transfer planning. CP at 122-23 (Finding Nos. 3 and 4), 350, 425, 490, 630, 669. The information and services they provide have historically been performed—and continues to be performed—by many different college employees including exempt employees, classified employees, and faculty. CP at 122 (Finding No. 3(a)), 123 (Finding No. 3(e)), 123-24 (Finding No. 4), 407-08, 632-33, 634, 672, 677-78, 682-83, 84-85.

Because the work of education planners more closely resembles the work performed by classified employees—not faculty—the College bargained the conditions of employment for education planners with the union that represents classified staff. CP at 592, 609-10. Some of the education planners continue to perform work they did as classified staff in other departments, while others perform work previously done by retired exempt and classified employees. CP at 537-38, 592, 609-10, 682-84, 685-86, 686-87.

PERC noted a 2008 Memorandum of Understanding between the College and the Union that memorialized a shared understanding of those activities that are not exclusive to the bargaining unit, including: orienting students to the College, its policies and procedures, support services, and educational programs; providing routine information about educational programs, entrance and graduation requirements, curriculum guides, and prerequisites; assisting a student in selecting first quarter classes; referring students to support services; referring students to program faculty and advisors; referring students to the Counseling, Advising and Career Center for counseling services; providing unofficial transcript evaluations; and helping students identify appropriate open classes and assisting students with the registration process. CP at 407. The job description for education planners and the testimony of Dean Castorena show that most, if

not all, of the duties performed by education planners fit within this list. CP at 413-19, 633-34, 670-82.

Thus, the first factor should have weighed heavily against the Union: duties of education planners have historically been performed by persons who are not members of the faculty bargaining unit.

2. The duties, skills, and working conditions of education planners is fundamentally different from those of the faculty bargaining unit.

PERC found no fundamental difference between the work of counselors and education planners, and that this factor “weighs heavily” in favor of a duty to bargain. CP at 127 (Finding 6(e)), 129 (Finding 8(e)). These findings are not supported by substantial evidence, and therefore PERC unfairly weighs the second factor.

The work done by counselors and education planners is fundamentally different. Counselors perform duties that require specialized training and expertise. CP at 186. They help students in a “holistic way” that looks at their academic, career, and personal needs to reduce barriers to achievement. CP at 451, 453-54. They provide advice and guidance in the context of a student’s abilities, background, academic preparation, goals, and aspirations. CP at 465. Counselors perform their work through the application of theories obtained through their professional training, assess a student’s problems, weigh different options,

and use professional judgment to arrive at a solution. CP at 465, 467. No witness testified that education planners provide counseling services to students.

The core duties of education planners are fundamentally different. These include: disseminating routine information; providing entry information to students; guiding individuals through the process of how to become a student; navigating the registration process; providing information on graduation procedures; referring students to appropriate faculty advisors; referring students to on-campus support services; and making referrals to College counselors for academic, career, and personal counseling. CP at 592-93, 630, 669, 671-82. Moreover, PERC found that this work is not exclusive bargaining unit work. CP at 122-23 (Finding Nos. 3 and 4). Education planners also work with special student populations, doing work historically performed by classified or exempt staff and that is not exclusive bargaining unit work. CP at 123 (Finding Nos. 3(d), (e), and (f)), 124 (Finding No. 4(e)), 609-10, 682-87.

Because the work done by education planners is fundamentally and substantively different from the work done by the faculty bargaining unit, PERC did not fairly apply this factor. It does not weigh towards a duty to bargain.

3. The use of education planners did not result in a significant detriment to bargaining unit members.

PERC concludes that a detriment to bargaining unit members occurred because non-bargaining unit employees perform bargaining unit work, and that this factor “weighs heavily” towards a duty to bargain. CP at 125-25 (Finding No. 6(b)), 129 (Finding No. 8(b)). There is not substantial evidence to support these findings.

First, as argued above, the evidence and PERC’s own findings do not support findings that the education planners are performing the same work as counselors. Second, the Union presented no evidence to show that the use of education planners resulted in a significant detriment to bargaining unit members, or that it significantly impaired anticipated work opportunities for unit members. Third, PERC made no findings that any working conditions of the counselors were changed or their work opportunities impaired, nor could it. The evidence showed uniformly that the core duties and responsibilities of counselors and the terms and conditions of their employment remain unchanged. CP at 625-26, 664-67.

Consistent with this, all of the counselors who testified said the duties of the positions they occupied had not changed and none testified they had suffered a detriment. *See e.g.* AR at 452, 454, 535-36, 541.

Further, in its initial decision PERC specifically found that after education planners were hired:

The tenured counselors' duties and responsibilities were unchanged when they chose to move into positions occupied by the temporary counselors. Even though they did less entry-level academic advising, the tenured counselors performed the same job duties as they previously did, they were paid the same rate, and continued to work 30 contract hours per week – including 19.5 hours of direct student contact – just as they did during the 2009-2010 academic year.

CP at 789-90.

The Union never challenged this finding.

Ultimately, the only detriment faced by the counselors was that faced by all employees when the state legislature compelled the College to make staffing reductions in response to state budget cuts. But reducing staff due to budget cuts does not equate to an unfair labor practice. In the absence of evidence of a change in working conditions or opportunities, there can be no finding that the decision to use education planners resulted in a detriment to the faculty bargaining unit. PERC's finding to the contrary is not supported by substantial evidence, and therefore PERC unfairly weighed this factor.

4. Neither the evidence nor PERC's findings show that the College's motivation was solely economic.

To establish a duty to bargain, there must be an assessment whether the College's motivation was "solely economic." PERC found that the College's decisions to reduce staffing levels, which included

classified and exempt staff as well as counselors, were motivated by reduced state budget allocations. CP at 126 (Finding 6(c)). This is consistent with the evidence in the record. *See* CP at 592, 609-10, 616-18. It does not follow, however, that the decision to use education planners was motivated solely by economics, a point PERC concedes. *See* CP at 126 (Finding No. 6(c)(v)), 129 (Finding No. 8(c)).

There is no dispute that the College faced serious budget reductions in 2010-2011. CP at 580-83, 654-55. There is also no dispute that while its resources were shrinking, the College was experiencing an increasing demand for its education programs and the services it provides to students. CP at 618, 696-97. By using education planners, the College could meet this demand by efficiently providing new and continuing students with information about college policies, procedures, and serving various special populations of students. CP at 630-33, 670. Moreover, the work performed by education planners has historically been performed by all groups of College employees including faculty, classified employees, and exempt employees. CP at 122-24 (Finding Nos. 3 and 4), 407-08, 632, 633-34, 701.

The College's decision to employ education planners was motivated to serve the needs of its students. The College's budget is a finite resource that is largely beyond its control. When cut, it must reduce

its operating budget. For the instruction division, this meant that the number of faculty positions had to be reduced. CP at 613-14, 616-18, 638-40. There is no evidence in the record to support any finding that the decision was motivated solely—or even primarily—by economics. Again PERC erred because this fourth factor does not weigh in favor of a finding of a duty to bargain.

5. The College and the Union bargained generally about changes in existing practices.

The final factor is whether there has been an opportunity for the College and the Union to bargain generally about changes in existing practices. PERC engaged in minimal analysis of this factor: it simply found that the college did not bargain the use of education planners and presented the Union with a *fait accompli*. CP at 126 (Finding No. 6(d)). This finding is circular and assumes a duty to bargain exists, rendering the *City of Snoqualmie* factors superfluous. Further, PERC focuses on the self-evident fact that this change was not bargained avoids the actual factor posed by *City of Snoqualmie*, namely whether there is an opportunity to bargain generally about changes in existing practices.

The College has been willing to—and in fact has—bargained with the Union regarding changes in existing practices. The College and the Union bargained changes to existing advising practices processes when

they negotiated additional duties for faculty as part of the move towards mandatory advising. CP at 366-67, 596-97, 614-16, 637-38. These negotiations occurred at the same time decisions were being made to employ education planners. As a result of these negotiations, the College and the union signed a letter of agreement setting out additional advising duties for faculty and giving faculty additional pay to compensate for the additional work. CP at 366-67.

Nor is this a case where the College was unwilling to bargain the issue of hiring education planners. The College did not bargain the issue with the Union because education planners do not perform the work of academic employees and are not taking work away from that bargaining unit. CP at 592. Education planners do, however, perform some work that is traditionally done by classified staff. *Id.* Some education planners perform the same work they performed in other classified positions or perform work that was performed by other classified employees. CP at 610, 631-32, 646-47, 682, 685-87. Because they perform duties normally performed by classified staff, in May 2010 the College bargained with the union representing those employees. CP at 592-93, 606. Again, this is not a case where the College was hesitant to bargain the issue.

In the end, even if the Union met the threshold showing that education planners perform bargaining unit work, a balancing of the

factors set forth in *City of Snoqualmie* show there was no duty to bargain the decision to hire education planners. Non-bargaining unit employees historically provided the type of duties and responsibilities performed by education planners. Much of the work done by education planners with the special student populations was previously performed by classified or exempt employees at the College. No significant detriment to bargaining unit members and there was no in their conditions of employment or reduction of opportunities. PERC concedes the College's motivation was not solely economic. The record also shows that the College has been willing to, and in fact has, bargained with the Union regarding changes in existing practices.

PERC's findings on the five factors set forth in *City of Snoqualmie* lack substantial evidence and reflect an erroneous interpretation of those factors. PERC's conclusion that the College committed an unfair labor practice should be reversed.

D. RCW 48.49.030 Does Not Support an Award Of Attorney's Fees To A Respondent in A Judicial Review Proceeding Under The Washington Administrative Procedures Act.

In its order denying the College's petition for judicial review, the superior court awarded the Union attorney's fees pursuant to RCW 49.48.030. CP at CP at 1-3, 111. In doing so, the superior court erroneously interpreted and applied the statute because it does not

expressly allow for attorney's fees to be awarded in actions filed under the Administrative Procedures Act.

Attorney's fees are not recoverable in any litigation absent specific statutory authority, contractual provision, or recognized ground in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996); *Clark v. Horse Racing Comm'n*, 106 Wn.2d 84, 92, 720 P.2d 831 (1986). This applies in administrative appeals. *Clark*, 106 Wn.2d at 92. In judicial review proceedings under the APA, a reviewing court "may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law." RCW 34.05.574(3) [emphasis added]. This statute limits attorney fee awards except where authorized by statute. *Moen v. Spokane City Police Dep't*. 110 Wn. App. 714, 719, 42 P.3d 456 (2002).

The superior court relied RCW 49.48.030. That statute provides in relevant part,

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer.

RCW 49.48.030.

This only authorizes attorney's fees as an incentive to aggrieved employees who must sue to recover unpaid wages owed to them. *Int'l*

Ass'n of Fire Fighters Local 46 v. City of Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002); *Trachtenberg v. Dep't of Corrections*, 122 Wn. App. 491, 493-94, 93 P.3d 217 (2004). See also *Snoqualmie Police Ass'n v. City of Snoqualmie*, 165 Wn. App. 895, 909, 273 P.3d 983 (2012).

The language of RCW 49.48.030 does not support an award of attorney's fees here. This was not an action filed or initiated by the Union. Rather, the Union was a respondent in a judicial review proceeding filed by the College for review of PERC's decision finding that an unfair labor practice occurred. This petition for judicial review was the sole judicial proceeding before the superior court and this Court. Moreover, the College's petition for judicial review proceeding was not an action for the recovery of unpaid wages or salary. The superior court sat in its appellate capacity and it was limited to reviewing an administrative decision of PERC. There was no "judgment" for wages or salary as required by the statute.

This Court faced a similar question in *Trachtenberg*, 122 Wn. App. at 491. In that case, Trachtenberg appealed his dismissal by the Department of Corrections to the Personnel Appeals Board. *Id.* at 493. After the Board reinstated Trachtenberg with back pay, he filed suit in superior court for attorney's fees pursuant to RCW 49.48.030. *Id.* The superior court denied his request and Trachtenberg appealed. *Id.* This

Court held that administrative appeals are not “actions” for purposes of attorney fee awards under RCW 49.48.030. *Id.* at 496. Further, because the Board did not have authority to award attorney’s fees or enter a judgment for unpaid wages or salary, RCW 49.48.030 could not support an attorney fee award. *Id.* at 496-97. *See also, Cohn v. Dep’t of Corrections*, 78 Wn. App. 63, 69, 895 P.2d 857 (1995).

The same rationale applies in this case. First, the underlying case is an administrative proceeding before PERC. Second, PERC has broad authority to issue remedial orders that could include an award of attorney’s fees. RCW 41.56.160; *State v. Board of Trustees of Central Washington University*, 93 Wn.2d 60, 69, 605 P.2d 1252 (1980). But PERC can only award attorney’s fees as an extraordinary remedy when PERC finds a repetitive pattern of illegal conduct, egregious or willful bad acts, and/or when an employer is offering frivolous or meritless defenses to the allegations. *Id.*; *Wash. Dep’t of Transportation v. PERC*, 167 Wn. App. 827, 836-37, 274 P.3d 1094 (2012). Significantly, although the Union requested that it be awarded attorney’s fees both as extraordinary relief and pursuant to RCW 49.48.030, PERC denied the request. CP at 137, 796-98, 853-55. But nothing in RCW 41.56.160 or PERC’s rules allows an award of attorney’s fees pursuant to RCW 49.48.030. Because PERC had no

authority to award attorney's fees pursuant to RCW 49.48.030, the superior court lacked that authority as well.

Finally, attorney fee awards in judicial review proceedings under the APA are only allowed only to the extent "expressly authorized by another provision of law." RCW 34.05.574(3) (emphasis added). Nothing in RCW 49.48.030 expressly allows for an award of attorney's fees in judicial review proceedings of a PERC decision. The statute contemplates a judgment for unpaid wages or salary as a necessary predicate for an award of attorney fees. The Union made no request for any such award or judgment, and the superior court did not make any award or judgment for compensation.

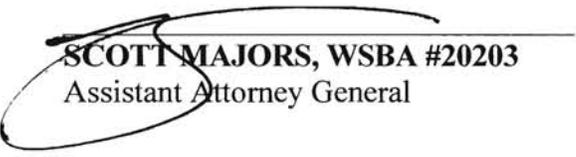
The superior court misinterpreted and misapplied RCW 49.48.030 when it made an attorney fee award here. Regardless of the Court's review of the underlying PERC decision, the superior court's order awarding attorney's fees should be reversed.

VII. CONCLUSION

For the reason stated herein, Everett Community College requests that the Court find that no unfair labor practice has occurred, reverse the decision of the Public Employment Commission, and reverse the order of the superior court awarding the Union attorney's fees.

RESPECTFULLY SUBMITTED this 23rd day of January, 2014.

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NO. 71019-2
COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

EVERETT COMMUNITY COLLEGE
(COMMUNITY COLLEGE DISTRICT
NO. 5),

Appellant,

v.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION and
AMERICAN FEDERATION OF
TEACHERS WASHINGTON LOCAL
1873,

Responden

DECLARATION OF
SERVICE

I affirm under penalty of perjury of the laws of the State of Washington that the following is true and correct to my best knowledge and belief:

1. My name is Dawn R. Perala and I am employed as a Paralegal for counsel for appellant.

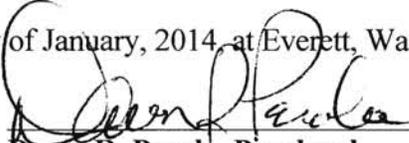
2. On **January 23, 2014**, I sent via legal messenger and/or U.S. Mail a true and accurate copy of **APPELLANT'S OPENING BRIEF** to the following persons:

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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