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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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WASHINGTON STATE UNIVERSITY,

Petitioner,

v.

WASHINGTON STATE PERSONNEL APPEALS BOARD, and  
DAVID GRIMES, TERRY ST. MARY, STUART BENNETT,

Respondents.

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**BRIEF OF PETITIONER**

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## I. INTRODUCTION

The provision of fire protection services is generally the responsibility of every city and town with respect to a given geographical area. *See* RCW 35.103.030. The Washington State University-Pullman campus is located primarily within the jurisdictional boundaries of the Pullman Fire Department; however, WSU operated its own fire department for its Pullman campus for a number of years, as part of its Department of Public Safety. When fire protection services are provided by a city or town to a state-owned facility within its jurisdiction, the city or town may agree with the state-owned facility to share in the cost of such services. RCW 35.21.775. Where the assessed value of the state-owned facility is large enough, a cost-sharing contract is required. RCW 35.21.779.

There is no dispute that WSU had the authority to discontinue its fire department, which legally required the City of Pullman to undertake fire protection services for the WSU-Pullman campus. Consequently, the City of Pullman was entitled to seek payment from WSU for an equitable share of the cost of the services. Such a

statutorily required contract for cost sharing cannot be considered a contract for the performance of services traditionally or historically provided by state employees in violation of the prohibition on contracting out. Even if it were such a contract, it would not violate the prohibition on contracting out because the contract between WSU and the City of Pullman is not only statutorily authorized but, in fact, mandated. Accordingly, under the standard of review applicable to judicial review of administrative decisions, the Court should reverse the decision of the superior court to deny a petition for a writ of certiorari, conduct a review of the record before the PAB and reverse the decision of the PAB.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred in denying WSU's petition for a writ of certiorari and in granting the respondent's motion to dismiss on December 1, 2006.**
- B. The trial court erred in determining that the PAB's decision was not arbitrary or capricious.**
- C. The trial court erred in determining that the PAB's decision was not contrary to law or illegal.**
- D. The trial court erred in failing to provide tenable reasons for its decision to deny WSU's request for a writ of certiorari under the arbitrary or capricious standard or the contrary to law or illegal standard.**

- E. The PAB's decision granting summary judgment for the respondents and determining that the layoffs were not properly based on a lack of work was arbitrary and capricious, illegal, and erroneous.**

### **III. STATEMENT OF THE ISSUES**

- A. Whether the decision of the trial court to deny a petition for writ of certiorari of the Personnel Appeals Board decision of June 30, 2006, was based on tenable reasons or was otherwise an abuse of discretion?**
- B. Whether the PAB's decision was arbitrary or capricious or illegal such that it should be reversed?**

### **IV. STATEMENT OF THE CASE**

#### **A. Substantive Facts**

WSU is an institution of higher education whose primary mission includes research and academic instruction. The WSU Department of Public Safety is a division of the Office of Business Affairs. The Fire Department was one part of the Department of Public Safety. The WSU-Pullman campus is located primarily within the jurisdictional boundaries of the Pullman Fire Department; however, WSU operated its own fire department for its Pullman campus for a number of years. Fire services for the other WSU campuses and research stations have been provided by the city or fire district in which they are located. The need for fire services

located on the Pullman campus has decreased over the years as the University has been installing fire suppression systems designed to lessen the risk of a major on-campus fire in new buildings and in older buildings. WSU determined to cease operating a fire department and to get out of the business of providing such services to their students, faculty and staff on the Pullman campus. See Affidavit of Richard A. Heath. AR 193-195.<sup>1</sup> Clerk's Papers CP 47-49.

In May 2001, WSU and the City of Pullman entered into a Joint Fire Services Agreement to share some resources and personnel. Among other matters, under that agreement, the Fire Chief for the City of Pullman acted as the Chief of the Pullman Fire Department and the WSU Fire Department, and the Training Officer of the WSU Fire Department acted as the Training Officer for both departments. In continuation of this cooperation, the City and WSU discussed the possibility of WSU discontinuing its Fire Department.

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<sup>1</sup> AR as used in this brief denotes the Administrative Record before the PAB. The number is the stamped number on each page, placed on the Record by the PAB, prior to being sent to the trial court. Even though they had not been directed to do so, the PAB nonetheless sent the certified record to the trial court on August 25, 2006. CP 87. The administrative record does not contain a transcript or record of (hearing) proceedings as the matter was decided on motion and affidavits without oral testimony or argument.

In the absence of a fire department at WSU, the City of Pullman would be responsible for the fire suppression and related duties for the campus. AR 193-195. CP 47-49.

As a result of WSU being primarily within its jurisdictional boundaries, the City of Pullman became obligated to provide fire protection services to WSU's Pullman area campus. The City of Pullman, upon formation of their fire department by ordinance in 1889, undertook the duty and obligation to provide fire protection and emergency services within the City of Pullman (then the Town of Pullman). See Affidavit of Patrick Wilkins. AR 106-107. CP 50-51.

The City determined it could absorb the provision of fire services to the campus by its fire department provided it received an equitable share of the City's costs to provide fire services and emergency medical services, as required by statute. AR 193-195. CP 47-49.

WSU's collective bargaining agreement with the fire officers contemplated the City of Pullman taking over fire suppression services and required that the impact of such a decision be

bargained. WSU bargained the effects with the union as required. WSU directed a written proposal to the fire officers which offered, among other things, the opportunity for them to continue their employment at the City of Pullman at the same or a higher salary, an increased benefit package, and continuation in the same retirement system (LEOFF), while working out of the same fire station. The union requested additional time to consider the offer made by WSU and WSU granted that extension. WSU never received a response of any kind from the union about their proposals and the offer was ultimately withdrawn. See Affidavit of Steve DeSoer. AR 108-109. CP 52-53.

Subsequently on March 17, 2005, WSU, as required by RCW 35.21.779, entered into an agreement with the City of Pullman wherein WSU agreed to pay the City of Pullman an equitable share of the City's costs to provide fire protection and emergency medical protection services upon cessation of fire services by WSU. On May 15, 2005, WSU ceased to operate a fire department. The City of Pullman assumed its statutory responsibility to furnish fire and emergency medical protection services to the WSU-Pullman

campus, effective May 16, 2005. On June 16, 2005, the parties amended the agreement to include basic life support services that, under the March 17, 2005, agreement were to be provided by a student basic life support unit. AR 193-195. CP 47-49. AR 173-180. CP 54-61.

David Grimes, Terry St. Mary and Stuart Bennett, respondents, were reduced-in-force from their positions as Fire Officer II's at WSU, effective May 16, 2005, after their positions were abolished following closure of the WSU Fire Department. AR 196-197. CP 23-24. They were notified of their layoffs, December 13, 2004, by letter from their appointing authority, Steven Hansen, Police Chief and Director of Public Safety. The respondents were employees of the Fire Department and after its closure there was no work for the remaining Fire Officers. See Affidavit of Steven Hansen with reduction-in-force notice letters attached. AR 196-200. CP 23-27. The respondents appealed their reductions-in-force to the Personnel Appeals Board (PAB or Board) under the state's Merit System Rules in effect at the time of the reduction-in-force. AR 233-236, 263-266, 293-296.

On December 13, 2004, the respondents each met separately with Lisa Gehring, Human Resources Manager, to discuss their potential layoff options. Ms. Gehring provided each of the respondents with their layoff notice letter from Chief Hansen and their option form. Each of the respondents had held permanent status in the Fire Officer I and II classes only. There were no available options for the respondents within their layoff unit. The respondents were each offered over 50 potential options for positions outside of their unit, university-wide options, for which a qualifying exam would be required. See Affidavit of Lisa Gehring with letters confirming the reductions-in-force and layoff option forms attached. AR 201-219. CP 28-46.

Mr. Grimes returned his option form and indicated that he did not wish to be considered for any of the potentially available options for continued employment. Mr. St. Mary did not complete or return his option form. Mr. Bennett reviewed the options, ranked his first six most desirable options and took with him copies of the exams for those six options to complete and return. Mr. Bennett did not return the exams and later indicated that he did not want to claim a

position. As a result, none of the respondents were considered for possible continued employment in any of the potentially available options and were reduced-in-force effective May 16, 2005. AR 201-219. CP 28-46.

**B. Procedural History**

The fire officers timely appealed their layoffs to the Personnel Appeals Board pursuant to RCW 41.06.170. Each respondent filed separate and virtually identically appeals of their layoffs to the PAB on June 13, 2005. On January 23, 2006, the PAB granted a motion to consolidate the three appeals which had been filed by the fire officers. AR 250. The consolidated hearing was set for April 11, 2006. AR 251. On February 6, 2006, WSU filed its summary judgment motion to dismiss accompanied by the affidavits of Richard A. Heath, Steven Hansen and Lisa Gehring including attached exhibits. AR 184-219. CP 23-49. The fire officers then filed responsive documents on February 16, 2006, and WSU filed a reply memorandum with additional affidavits on February 24, 2006. AR 110-182, AR 90-109. The PAB indicated that they would

consider the motion on February 27, 2006, without oral argument. AR 89.

On June 30, 2006, the PAB issued its Order Granting Appeals on Summary Judgment in favor of the fire officers determining that the layoffs were not justified due to lack of work because the work was being contracted out, granted summary judgment to the fire officers, and ordered WSU to remedy the improper layoff action consistent with their findings and conclusions. AR 78-88. CP 65-74.

On July 28, 2006, WSU filed a petition for a constitutional writ of certiorari to Thurston County Superior Court seeking a review of the PAB order pursuant to article IV § 6 of the Washington State Constitution. CP 3-20. On December 1, 2006, the trial court issued an order denying WSU's petition and granting respondent's motion to dismiss. CP 98-99.

## **V. STANDARD OF REVIEW**

### **A. The Court's Jurisdiction and Review**

This Court has jurisdiction over this petition pursuant to the Court's inherent power to review agency actions. Const. art. IV § 6. *Dep't of Corrections v. Personnel Appeals Board.*, 92 Wn. App.

484, 967 P.2d 6 (1998). A constitutional or common law writ of certiorari to review an administrative action is warranted when "the petitioner's allegations, if true, clearly demonstrate that the... [administrative] actions were arbitrary, capricious, or contrary to law." *Foster v. King County*, 83 Wn. App. 339, 346, 921 P.2d 552 (1996) (citing *Kerr-Belmark Constr. Co. v. City Council*, 36 Wn. App. 370, 373, 674 P.2d 684, review denied, 101 Wn.2d 1018 (1984)).

"The right to be free from [arbitrary and capricious] action is itself a fundamental right and hence any arbitrary and capricious action is subject to review." *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693-94, 658 P.2d 648, (1983) (citing *Williams v. Seattle Sch. Dist. 1*, 97 Wn.2d 215, 221-22, 643 P.2d 426 (1982)). See also *Dept. of Agriculture v. State Personnel Board*, 65 Wn. App. 508, 828 P.2d 1145 (1992); *Dept. of Social and Health Services v. State Personnel Board*, 61 Wn. App. 778, 812 P.2d 500 (1991).

The purpose of a constitutional writ of certiorari is to enable the reviewing court to determine whether the proceedings below

were within the lower tribunal's jurisdiction and authority. *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292-293, 949 P.2d 370 (1998). The issue as to whether or not a writ should be granted is reviewed de novo. *Torrance v. King County*, 136 Wn.2d 783, 787, 966, P.2d 891, (1998) citing *Thomsen v. King County*, 39 Wn. App. 505, 514-515, 694 P.2d 40 (1985). However, the review is not a full appellate review but is limited to the administrative record below to determine "whether the decision complained of was or involved arbitrary and capricious or illegal actions thus violating the appellant's fundamental right to be free of such action. *Bridle Trails v. Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110, (1986).

**B. Review is Discretionary**

A decision to grant review of a writ of certiorari is discretionary with the trial court. If the court refuses to grant a writ they must have tenable reasons for doing so. *Klickitat County v. Beck*, 104 Wn. App. 453, 459, 16 P.3d 692, (2001), citing *Clark County Pub. Util. Dist No. v. Wilkinson*, 139 Wn.2d 840, 846, 991 P.2d 1161 (2000) and *Wash. Pub. Employees Ass'n, v. Wash. Pers. Res. Bd.*, 91 Wn. App. 640, 658, 959 P.2d 143 (1998). A

discretionary decision of the trial court will not be disturbed absent a clear showing of abuse of discretion or that discretion which is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482, p.2d 775 (1971). See also *Bridle Trails*, 45 Wn App at 252, noting that a superior court may exercise its inherent power of review as long as tenable reasons are given to support the discretionary ruling.

**C. Arbitrary and Capricious Standard**

An administrative agency acts in an arbitrary or capricious manner if it takes “willful and unreasonable action, without consideration of facts or circumstances.” *Terhar v. Department of Licensing*, 54 Wn. App. 28, 34, 771 P.2d 1180, review denied, 113 Wn.2d 1008 (1989); *Sullivan v. Department of Transportation*, 71 Wn. App. 317, 321, 858 P.2d 283 (1993). An action is not arbitrary or capricious if it is exercised honestly upon due consideration, even though there may be room for two opinions or even though one may believe that conclusion to be erroneous. *Dupont-Ft. Lewis School District 7 v. Bruno*, 79 Wn.2d 736, 489 P.2d 171 (1971);

*Trucano v. Department of Labor & Industries*, 36 Wn. App. 758, 677 P.2d 770 (1984).

**D. The Illegal or Contrary to Law Standard**

Illegality in relation to a constitutional writ is not the same as illegality needed to support a statutory writ. Illegality in the statutory sense includes errors of law and allows review where a lower tribunal exercising a quasi-judicial function has made a legally erroneous ruling and there is no other adequate remedy. *Wash. Pub. Employees Ass'n, v. Wash. Pers. Res. Bd.*, 91 Wn. App. 640, 653, (1997). An alleged error of law is insufficient to invoke the court's constitutional power of review. *Id.*

In relation to a constitutional writ of certiorari, the illegality sufficient to support a writ refers to the agency's jurisdiction and authority to perform an act. *Wash. Pub. Employees Ass'n, v. Wash. Pers. Res. Bd.*, 91 Wn. App. at 657, citing *Saldin* at 292. The court in *Bridle Trails*, citing *Bouvier's Law Dictionary*, 443, 446-47 (1914), noted that constitutional review is available when an administrative agency actions are arbitrary and capricious or illegal,

and that such actions reflect the essence of exceeding one's authority. *Bridle Trails* at 252-253.

## VI. ARGUMENT

**A. The trial court did not provide tenable reasons for its decision denying the writ of certiorari. The decision was in error and an abuse of discretion.**

The order entered by the trial court on December 1, 2006, moments after the parties concluded oral argument was the essence of brevity. After the usual recitations regarding a review of the pleadings and arguments of counsel the order simply stated that the “Petition for Review is Denied” and the “Respondents’ Motion to Dismiss is granted and this petition is hereby dismissed with prejudice.” The order contains no reasons, tenable or otherwise, regarding the denial of the writ.

When the order is unclear regarding the reasoning of the trial court, the reviewing court can look to the oral transcript to determine the reasoning of the trial court. See *Marriage of Flynn*, 94 Wn. App. 185, 195, 972 P.2d 500 (1999), where the court carefully examined the transcript of the commissioner’s oral ruling along with the

implementing order to determine that no tenable reasons or grounds were stated.

The oral transcript from the December 2, 2006, hearing in this matter is found with the Clerk's Papers – CP 104-126. The court's oral opinion is found at CP 124-125. The first part of the oral opinion provides a general discussion on the common law writ and the surrounding standards for issuing such a writ. The court then opines that the standard has not been met and that nothing convinced the court that the decision was arbitrary and capricious. The court went on to say that the "issue of contrary to law requires more than a simple allegation that the law was incorrectly applied in this case," and added a comment that the threshold for convincing the court that the decision was contrary to law had not been met. CP 125.

The court did not provide tenable reasons for its decision to deny the writ and none are apparent from the comments in the oral opinion. No reasoning was provided as to why the court did not consider the PAB's ruling to be arbitrary or capricious or illegal. In order for the court to exercise its discretionary authority they must provide tenable reasons for denial of a writ of certiorari. The trial

court did not do so. The denial of the writ of certiorari without tenable reasons for doing so is an abuse of the trial court's discretion. Accordingly, the decision of the trial court should be reversed.

**B. The PAB's Decision Was Arbitrary and Capricious.**

The PAB entered an order which contained eight enumerated Findings of Fact in Section II. Section III of the order was entitled "Arguments of the Parties" and Section IV was entitled "Discussion and Conclusions of Law". Section IV enumerated 14 paragraphs, some of which are general discussions of various notions the PAB apparently considered in their deliberative process and some of them appear to be additional findings. A few of them contain conclusions of law. These Conclusions of Law (CL) are found at 4.9, 4.12, 4.14, and 4.15.

Findings of Fact (FF) 2.6, 2.7, and 2.8 as well as some of the scattered findings throughout the discussion are pertinent to this action.<sup>2</sup> WSU asserts that these findings are contrary to the

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<sup>2</sup> The Findings of Fact and enumerated Discussions/Conclusion of Law that WSU believes are pertinent in this matter are contained in Appendix A for the court's convenience.

conclusions of law that are the essence of the PAB's decision in this matter and that decision is arbitrary and capricious.

1. **The PAB arbitrarily and capriciously concluded that there was not a lack of fire protection work at WSU to support a layoff because the work was being contracted out to the City of Pullman.**

The Board determined that the layoffs of the respondents were contrary to the civil service rules because WSU failed to show there was a lack of work to support the layoffs. The Board based their entire ruling on their conclusion that WSU inappropriately contracted out a service formerly provided by civil servants. This ruling is in complete disregard of the facts and circumstances clearly indicating WSU made a core entrepreneurial decision to discontinue its campus fire department and was not responsible for the execution of fire suppression and related services on its campus after May 16, 2005. In compliance with the requirements of state law, WSU agreed to make mandatory payments to the City of Pullman. As such, WSU did not contract for those services; the theory that the PAB relies on to support its entire order. The PAB's decision was arbitrary and capricious.

Contained in Conclusions of Law (CL) 4.9 and 4.14 are the notions that, because the City of Pullman is providing fire protection services to WSU, there is no lack of work for WSU employees. CL 4.9 specifically refers to the inappropriate contracting out of these services by WSU to the City of Pullman and asserts that this contracting out cannot support the layoffs of the former fire officers. In addition, CL 4.14 also concludes that WSU has broad authority to govern and manage its affairs and recognizes that they (PAB) have no authority to decide the validity of the parties' interlocal agreement. CL 4.15 is a summary conclusion that summary judgment should be granted for the fire officers.

The PAB made these conclusions despite finding that WSU was required by law to pay for these services and that the City of Pullman was required by law to provide them. FF 2.6 clearly indicated that the City would be responsible for fire protection services when WSU closed their department and that WSU was required by statute to make payments to the City. FF 2.7 again recognizes that "the City of Pullman assumed its statutory responsibility to furnish fire and emergency medical protection

services.” FF 2.8 recognizes the authority of the parties’ Interlocal Agreement.

The PAB is finding on the one hand that state statutes required WSU to make payments to the City and that the City is obligated to provide services, while concluding on the other hand that the arrangement for WSU to pay for these services, authorized and required by law, is illegal such that WSU is prohibited from conducting these layoffs.

- a. The payments made by WSU to the City of Pullman are mandated by state law and the City of Pullman is obligated to provide the services.**

When WSU ceased to operate its own fire department, they became obligated by state statute to pay an equitable amount to the City of Pullman for fire protection services. RCW 35.21.775 speaks to the ability of state institutions to agree to make payments to a municipality for fire protection services. RCW 35.21.779 requires such payments when a state agency or institution makes up more than ten percent of the total assessed valuation of the city or town.

The implementing WAC describes these contracts as compulsory. WAC 365-80-130 – Eligible Municipalities, is part of

the WAC for the Community Trade and Economic Development and is authorized by RCW 35.21. That WAC reads as follows:

Section 4, chapter 117, Laws of 1992, provides that when a municipality has one or more state agencies located within its city limits, the municipality and the agency or agencies may enter into fire protection contracts. Section 6, chapter 117, Laws of 1992, provides that in cities or towns where the estimated value of state facilities, as determined by the department, equals ten percent or more of the municipality's total assessed valuation, the state agency shall enter into a compulsory fire protection contract to provide the municipality with an equitable share of its fire protection services costs. An exception is provided where fire protection services are performed by state staff and equipment or by a fire protection district pursuant to RCW 52.30.050.

RCW 35.21.775 reads as follows:

**Provision of fire protection services to state-owned facilities.**

Subject to the provisions of RCW 35.21.779 whenever a city or town has located within its territorial limits facilities, except those leased to a nontax-exempt person or organization, owned by the state or an agency or institution of the state, the state or agency or institution owning such facilities and the city or town may contract for an equitable share of fire protection services for the protection and safety of personnel and property, pursuant to chapter 39.34 RCW, as now or hereafter amended. Nothing in this section shall be construed to require the state, or any state agency or institution, to contract for services which are performed by the staff and equipment of such an entity or by a fire protection district pursuant to RCW 52.30.020.

RCW 35.21.779 reads, in part, as follows:

**Fire protection services for state-owned facilities –  
Contracts with the department of community,  
trade, and economic development – Consolidation  
of negotiations with multiple state agencies –  
Arbitration.**

1) In cities or towns where the estimated value of state-owned facilities constitutes ten percent or more of the total assessed valuation, the state agency or institution owning the facilities shall contract with the city or town to pay an equitable share for fire protection services. The contract shall be negotiated as provided in subsections (2) through (6) of this section and shall provide for payment by the agency or institution to the city or town.

*Emphasis added.*

(2) A city or town seeking to enter into fire protection contract negotiations shall provide written notification to the department of community, trade, and economic development and the state agencies or institutions that own property within the jurisdiction, of its intent to contract for fire protection services. ...

(3) The department of community, trade, and economic development shall review any such notification to ensure that the valuation procedures and results are accurate. The department will notify each affected city or town and state agency or institution ...

(5) In the event of notification by one of the parties that an agreement cannot be reached on the terms and conditions of a fire protection contract, the director of the department of community, trade, and economic development shall mediate a resolution ...

(6) If the parties reject the recommendation of the director and an impasse continues, the director shall direct the parties to arbitration. ...

(7) The provisions of this section shall not apply if a city or town and a state agency or institution have contracted pursuant to RCW 35.21.775.

In the context of these statutes, RCW 35.21.779 (1) obligates WSU to pay an equitable share for fire protection services to the City of Pullman. RCW 35.21.775, subsequent to the provisions of RCW 35.21.779, allows the city or town and the state agency to come to an agreement regarding how much this payment should be. In the event that the city or town and the state agency do not or cannot agree on an amount, which they are allowed to do by RCW 35.21.775, RCW 35.21.779 (2) through (6) provides the procedures to be undertaken to arrive at a payment amount. Those procedures direct the city or town to contact the Department of Community, Trade and Economic Development (CTED) for assistance and possible mediation in setting a payment amount. If these efforts are unsuccessful, the statute requires the director of CTED to order the parties into arbitration.

In either case, if WSU agrees with the City of Pullman on an amount under RCW 35.21.775, or they have CTED or an arbitrator intervene to set the amount under RCW 35.21.779, WSU is obligated to pay its equitable share. WSU and the City of Pullman

did agree on what the payment amount should be and they did so under the authority of RCW 35.21.775 which, again, references RCW 35.21.779. Page 8 of the agreement does acknowledge that in the event the agreement is discontinued the parties would immediately invoke the provisions of RCW 35.21.779 and the related WAC's to set the amount. AR 62, Section VIII.

If not for this statute requiring payment for fire services by state agencies, there likely would be no agreement, and no purported contract for the PAB to rely on in making their arbitrary decision that WSU contracted out for these services. The PAB's decision ignored the undisputed facts presented to them.

Likewise, the City of Pullman is obligated to provide fire protection services. The City of Pullman, upon formation of their fire department by ordinance in 1889, undertook the duty and obligation to provide fire protection and emergency services within the City of Pullman (then the Town of Pullman). When WSU ceased to provide their own fire protection, the City took over that obligation and WSU became obligated to pay.

**b. Courts in Washington recognize the obligations of the parties.**

The courts have also recognized the duty of a municipality to provide fire protection services and the requirement of state agencies to pay for those services. In *Ellensburg v. State*, 18 Wn.2d, 709, 826 P.2d 1081 (1992), the Washington Supreme Court was asked to decide how much the state was required to pay to the City of Ellensburg for fire protection services pursuant to RCW 35.21.775. The statute was triggered by virtue of the presence of Central Washington University in the City of Ellensburg. The version of that statute in effect at that time, did not make reference to RCW 35.21.779, which was not enacted until 1992 (Laws 1992 c. 117, § 6) about the time the court was rendering its decision in *Ellensburg*. RCW 35.21.775 additionally contained a sentence (not contained in the current version) requiring CTED (then the Department of Community Development -DCD) to present, in the biennial budget submitted to the governor, an amount sufficient to fund any fire protection service contracts negotiated under that statute. RCW 35.21.779 when enacted, spelled out, in some detail, the

requirements of the payments and the process for setting those payments when the parties did not enter into an agreement.

The court in *Ellensburg* noted that RCW 35.21.775 places two duties on the State: The state shall contract with the city or town for fire protection services, and the DCD shall present an amount in the budget to the governor, sufficient to fund these contracts. Thus, the court recognized the statutory duty on the state to pay. *Ellensburg* at 712. See also *Fire Protection District v. Housing Authority*, 123 Wn. 2d 819, 872 P.2d 516 (1994), which required a housing authority to make similar payments to a fire protection district as required by RCW 52.30.020.

The *Ellensburg* court also spoke to the duty upon the municipality to provide fire protection services even without a contract for reimbursement. They noted that RCW 28B.35.190, which allows regional universities to contract for fire protection services, contains a proviso that states that neither a failure of the trustees to so contract “nor anything herein shall detract from the lawful and existing powers and duties of political subdivisions of the state to provide the necessary fire protection equipment and services to persons or property within their jurisdiction.” The court then pointed out that this statute meant the legislature

recognizes a duty on the municipality to provide fire protection services even without a contract for reimbursement of costs. *Ellensburg* at 714.

**c. The Agreement with the City of Pullman was not a prohibited contract but a compulsory payment.**

Prohibitions against contracting out of civil service work relate to an inappropriate purchase by contract of the same services previously performed by civil servants under the same or similar working conditions. *Black's Law Dictionary* defines a contract as "An agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligation." *Black's Law Dictionary*, 5<sup>th</sup> Edition. (1979)

The PAB's decision completely ignored the arguments presented that the agreement between WSU and the City was not a true contract because it did not create the obligations spelled out therein. The agreement was instead, simply the parties' method of memorializing their mutual obligations that were created elsewhere.

It is well settled that an agreement to do that which one is already obliged to do is not sufficient consideration to support a

contract. *Boardman v. Dorsett*, 38 Wn. App. 338, 341, 685 P.2d 615 (1984) citing *Johnson v. Tanner*, 59 Wn.2d 606, 609, 369 P.2d 307(1962).

A contract then, in its typical sense, is an agreement which creates an obligation to do or not to do a particular thing. The agreement between WSU and the City of Pullman did not create new obligations requiring the provision of, and payment for, fire protection. These obligations were created elsewhere. WSU was required to pay an equitable share for, and the City of Pullman was obliged to provide, fire protection services.

The agreement itself also recognizes the free standing obligation of the City. Part III, paragraph D, of that agreement states, "It is understood and agreed that provision of fire protection and emergency medical services to the University facilities and campus by the City is not dependent upon this Agreement or upon the existence of any agreement between the parties." AR 57-64 at 59. The parties, by this agreement, recognize that the City of Pullman is obligated to provide these services, the agreement notwithstanding.

The agreement between WSU and the City of Pullman did not create the mutual obligations as they were created by state law. Thus, at least one of the essential elements for a valid contract was missing and the PAB decision resting entirely on the existence of a valid contract is contrary to law and arbitrary and capricious. The PAB exceeded their authority by so holding. The PAB wantonly ignored the requirements that these statutes imposed on WSU and the responsibility for assuming fire suppression services imposed on the City in rendering their decision, despite the fact that they acknowledged the obligations in their findings. Their actions were arbitrary and capricious.

From a reading of the definition of a contract, the duties outlined by statute and as recognized by the Supreme Court, and the agreement between the parties themselves, it is clear that the interlocal agreement did not create necessary obligations to support a contract. If the parties mutually agreed to cancel this contract, the result would be that the City of Pullman would continue to provide fire protection services and could seek assistance from CTED in

setting the amount that WSU would be obligated to pay as their equitable share for those services.

**d. WSU was getting out of the business of providing its own fire protection services.**

Courts have recognized the right of an employer to get out of a particular business in the context of contracting out. In *Keeton v. Department of Social and Health Services* (DSHS), two employees were laid off when the DSHS decided to close their bakery at Lakeland Village after it became financially imprudent to continue to operate the bakery. The court, in granting judgment in favor of the DSHS, pointed out the difference between contracting out and getting out of the business and determined that the DSHS could choose to get out of the business of bread baking and purchase bread off the shelf. See *Keeton v. Social and Health Services*, 34 Wn. App 353, 661 P.2d 982 (1983).

The *Keeton* court turned to cases arising under the National Labor Relations Act as instructive and noted that contracting out is a term of art which encompasses “the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment,” citing

the Supreme Court case of *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) which held that such contracting out decisions needed to be bargained. See also, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) which held that the effects of a decision to close a part of a business need to be bargained but the decision itself did not. The *Keeton* court noted that the DSHS was abolishing one aspect of its operations, and analogized this case to cases arising under the National Labor Relations Act which involve the partial closing of one's business, citing *Adams v. NLRB*, 350 F.2d 108 (8<sup>th</sup> cir. 1965) *Keeton* at 358, 359. The *Keeton* court noted that the term contracting out was a technical term which evolved in the context of labor relations and that the actions of the DSHS in replacing the work of the two bakers with a commercially prepared product was not within the technical meaning of "contracting out work" as used in the area of labor relations. *Keeton* at 361.

In the *Adams* case, the employer made a decision to liquidate the part of its business which handled distribution of milk products. *Adams* distinguished the *Fibreboard* case and noted that in

*Fibreboard* the independent contractor performed the same maintenance work previously performed by company employees on the company premises with company machines and equipment and the contractor was under the direct control of the company, supervised by company officials, and functioning as an integral part of the company. *Adams* went on to note that there was more involved in the Adams Dairy than just the substitution of one set of employees for another, but rather a change in the basic operating procedure when the dairy liquidated that part of the business regarding milk distribution. The *Adams* court concluded that the company did not need to bargain with the union about their decision to cease a part of their business, and noted that such a requirement would significantly abridge its (Adams) freedom to manage its own affairs. *Adams* at 110,111.

The Public Employment Relations Commission (PERC) also addressed the question of “contracting out” versus “getting out of the business.” The City of Kelso had attempted to contract with the Cowlitz District to provide fire suppression services. After an unfair labor practice was filed by the International Association of Fire

Fighters, PERC determined that the decision to contract out was a mandatory subject of bargaining. See *City of Kelso*, Decision 2120-A (PECB, 1985) (Kelso I).

Several months after the PERC decision in Kelso I, legislation was passed raising the population maximum for a city to annex to a fire district from 10,000 to 100,000 which enabled the City of Kelso to seek outright annexation to the Cowlitz District. Subsequently, both the City and the Cowlitz District passed resolutions to start the annexation proceedings and the voters approved the annexation in November 1985. Due to a lag in levy collection, the Cowlitz District could not collect taxes for fire suppression until 1987. The City then agreed to pay the Cowlitz District from December 1, 1985, through 1986, and the Cowlitz District would assume responsibility for fire suppression on December 1, 1985. All City of Kelso firefighters were laid off December 1, 1985. PERC, on an appeal from an Examiner's Ruling, concluded that the City of Kelso's decision to seek annexation with the Cowlitz District was not a mandatory subject of bargaining. *City of Kelso*, Decision 2633 -A (PECB, 1988) (Kelso II).

PERC distinguished between three slightly different situations. The first was the initial decision to contract out with the Cowlitz District for fire suppression. PERC determined, in reiterating their decision in Kelso I, that this was a mandatory subject of bargaining. The second was the decision to agree to make a payment to the Cowlitz District after the annexation was effective but before the District could levy taxes between December 1, 1985, and January 1, 1987. PERC determined that this, too, needed to be bargained. The third situation was the City's decision to pursue annexation and PERC held that there was no duty to bargain this decision, but the effects of that decision were a mandatory subject. PERC held that situations which fundamentally affect the scope and direction of the enterprise need not be bargained and that this occurs when management seeks to relieve itself from any legal involvement whatsoever in a product or service it formerly produced and it truly "goes out of the business."

In reaching their conclusion, PERC agreed with the Examiner's ruling that annexation was a core entrepreneurial decision exempt from bargaining. PERC noted that when an

employer merely contracts out work it retains rights and liabilities with respect to that work – some specified under the contract and some implied by law. Specifically, PERC reasoned that under the situation in Kelso I, when the City contracted out for services prior to the annexation, the City retained both legal rights and legal responsibilities concerning fire suppression and presumably could have been liable to third parties for the negligent performance of services by its contractor. They noted that when services are contracted out, the employer has not truly “gone out of the business” of providing those services.

PERC’s decision in Kelso II was appealed and certified to the Court of Appeals which affirmed in part and reversed in part and remanded back for further proceedings on other issues. *Fire Fighters v. Kelso*, 57 Wn. App. 721, 790 P.2d 185 (1990). The court determined that the City was out of the fire suppression business and no longer had authority or responsibility to maintain its fire department effective with the certification of the election results in November 1985. They reversed the holding of the PERC that determined that the laid off firefighters would be reinstated with

back pay from December 1, 1985, through December 31, 1986. *Fire Fighters* at 729.

The PAB ignored the discussion presented by WSU regarding the meaning of the term contracting out as laid out by the (PERC) in the cited Kelso cases. The PAB excused their summary dismissal of this argument by speaking to their lack of jurisdiction over labor issues. The cited discussion was presented for the meaning of the term and not for precedent related to labor issues. The PAB ignored this distinction and their decision was arbitrary and capricious.

2. **The PAB arbitrarily and capriciously concluded that RCW 41.06.382 did not permit the contracting out of the work to the City of Pullman.**

The PAB concluded in CL 4.12 that RCW 41.06.382 is clear and unambiguous and they declared that the agreement between the City of Pullman and WSU did not comply with these statutory requirements.

RCW 41.06.382, now repealed, spelled out that institutions of higher education were not prohibited from purchasing services by contract with individuals or business entities if such services were regularly purchased by valid contract at such institution prior to

April 23, 1979, unless the effect were the termination of classified employees or classified employee positions. WSU does not assert that they can contract out for fire suppression services because they regularly contracted for such services prior to April 21, 1979. Indeed, they did not, and this RCW is not applicable to the issues surrounding this matter. Rather, WSU maintains that the arrangement with the City of Pullman is not a prohibited contract.

The *Keeton* court was asked to consider this statute in their decision regarding the bakers. They concluded that RCW 41.06.380 (the corollary to RCW 41.06.382 for general government agencies) was not applicable to the bakers' situation because it applied to existing contracts that were meant to be grandfathered in. *Keeton* at 359-360. In like manner, this statute does not apply to this case.

The PAB, in reaching their conclusion that WSU inappropriately contracted out fire suppression services, relied almost entirely on RCW 41.06.382 and the Western Washington University case involving police services. CL 4.6, 4.8, 4.12, 4.13. The Western case, *Western Washington University v. Washington Federation of State Employees*, 58 Wn. App. 433, 793 P.2d 989

(1990), involved WWU's decision to contract with the City of Bellingham for police services and to reassign or layoff their police officers. There was no indication in that case that a statute obligated WWU to pay an equitable share to the City of Bellingham for police services as WSU was required to do for fire services.

The PAB incorrectly analogized WSU's decision to get out of the fire suppression business to the WWU case. This analogy is misplaced in that WSU did not contract for fire suppression services as WWU did for its police services. In fact, WWU conceded that it was contracting out for police services but asserted that it was allowable because the contractor was another government entity, an assertion which the court rejected. In contrast, WSU asserts the opposite – they are not contracting out for services – but simply paying their equitable share as required by the law.

The PAB, in CL 4.7, also discussed another case in support of their decision, *Cunningham v. Community College Dist 3*, 79 Wn.2d, 793 (1971). This case involved the contracting out of work wherein the institution apparently retained the rights and responsibilities of the work. In *Cunningham* it was food service and, among other restrictions, the contractor was to employ only employees acceptable to the college. This

case involved a typical contracting out scenario and did not involve the institution's attempt to get out of the business. *Cunningham* is not dispositive.

- a. **Unlike the WWU case, the transfer of fire protection services was contemplated in the parties' collective bargaining agreement.**

The Western Washington case examined the decision of the Higher Education Personnel (HEP) Board which held that the parties' collective bargaining agreement specifically prohibited WWU from contracting out for police services for the positions covered by the agreement and that there was no lack of work shown to support a layoff.

The Court of Appeals determined that the police officers were not exempt from the civil service rules and that the finding of the HEP Board that the work was merely being transferred to the City of Bellingham was not challenged by WWU. The court determined that the claimed lack of work necessary to support a layoff could not be supported when the work was not being discontinued. *WWU* at 440, 441. The *WWU* case did not deal with a claim of getting out of the business and the court did not deal with that issue. The *WWU* case was decided by the same 3-judge panel from this Division of

the Court of Appeals that decided the *Kelso* case referenced above just several months earlier and wherein this body sanctioned the City of Kelso's attempt to get out of the fire suppression business.

The *WWU* case is distinguished from the situation at WSU in several respects. WWU conceded that they were contracting out the work but asserted that since it went to another government agency it was not prohibited, a contention that the court rejected. WWU also conceded the finding of the HEP Board that the work was merely being transferred to the City of Bellingham. WWU also contended that their statutory authority to establish a police force meant that their police officers were exempt from civil service rules.

In contrast, WSU does not assert or contend that they are contracting out the work, or that it is merely being transferred to another entity or that the fire officers are exempt from the civil service rules. Rather, WSU disputes that their decision to get out of the fire protection business is an invalid contracting out situation for all of the reasons stated earlier.

The HEB Board in the *WWU* case also found that the collective bargaining agreement prohibited the contracting out of

police duties. The agreement between WWU and the Washington Federation of State Employees stated in part, “the employer shall not contract or sub-contract work typically performed by Unit B personnel except where such action will not reduce hours of work for Unit B employees... .”

Again, in contrast, the collective bargaining agreement that was in effect at the time of the layoffs at WSU contemplates the possible transfer of fire department operations to an outside entity. Article 34 of that agreement reads as follows: “Article 34 – Successors - The impact of any decision by the Employer to transfer the Fire Department operations to another authority shall be subject to bargaining with the Union. Such transfer of service shall be in accordance with RCW 41.06 as it now exists or hereafter may be amended and applicable case law.” One of the respondents, Mr. Grimes, was a signatory on that agreement. See Affidavit of Steve DeSoer. CP 52-53. Clearly, the parties, at the time of the signing of the collective bargaining agreement, contemplated the possibility that WSU would get out of the fire protection business.

In accordance with Article 34, WSU bargained the effects of their decision to cease operating a fire department and the subsequent assumption of their statutory duties to provide that service by the City of Pullman. Steve DeSoer met with Mr. Dave Grimes, IAFF Local 3543 President, to attempt to reach an agreement that would allow, among other provisions, the remaining fire officers from WSU to continue employment as fire officers with the City of Pullman at the same or higher salary, with an increased benefit package, and in the same retirement system. The union requested additional time to consider the offer made by WSU and WSU granted that extension. WSU never received a response of any kind from the union about their proposals and the offer was ultimately withdrawn. See Affidavit of Steve DeSoer. CP 52-53.

In keeping with the collective bargaining agreement, WSU attempted to engage in effects bargaining with the union. What better effects can you have than the offer of continued employment at the same or greater salary with greater benefits? Yet the IAFF failed to negotiate or respond to the proposal. Not even a courtesy "no thanks" was given to Mr. DeSoer. WSU complied with the

agreement. They attempted to mitigate the impact of their decision to get out of the business. They offered continued employment with the City of Pullman and when the layoffs occurred they offered innumerable options for each of the respondents to consider. WSU bargained the impacts and the subsequent layoffs were accomplished in accordance with RCW 41.06. Further, no applicable case law prohibited WSU from getting out of the business.

**C. The PAB's Decision was illegal.**

The PAB's conclusions, CL 4.14, attempt to recognize that WSU has broad authority to govern and manage its affairs, yet in the same breath they are attempting to prohibit them from eliminating positions in a department that no longer exists because they believe there is work for them to do. However, the undisputed facts support that neither WSU nor any third party contractor on their behalf are providing work in, by, or for that defunct department. Further, it is undisputed that WSU no longer has a fire department but the PAB's decision attempts to require them to continue to employ fire officers.

The PAB's actions were arbitrary and capricious and an illegal use of their authority by attempting to prohibit WSU from

laying off employees for which no work is available. Their arbitrary and capricious decision is an illegal use of their authority and jurisdiction, and should be reversed.

**D. The Writ of Certiorari should be granted and the PAB's decision should be overturned.**

The PAB based their entire ruling on a conclusion that WSU had inappropriately contracted out a service that had formerly been provided by civil servants. In doing so they disregarded the uncontrovered facts and circumstances that were before them. WSU made a management decision that operating a fire department was not necessary and was not consistent with its core mission of educating students, and that the City of Pullman could undertake that responsibility and provide fire suppression services as a part of its core mission. WSU, with the cooperation of the City of Pullman, made extensive good faith efforts to mitigate the impact of the closure of their fire department on the affected employees. These efforts included guaranteed continued employment for the former WSU fire officers with the City of Pullman. The fire officers rejected these efforts.

WSU has made a core entrepreneurial decision to cease a part of its operation, that of providing fire suppression services. In doing so, they have gone out of the business of fire suppression and no longer have the responsibility to maintain a fire department. They have not replaced bargaining unit employees with those of an independent contractor to do the same work under similar conditions. They have not contracted out for those services in the context of labor relations, but instead they have gone out of the fire protection business as the City of Kelso did. They have not retained the rights and liabilities for fire suppression as would be the case in a typical third party contract. WSU has gone out of the business of fire suppression as they have a right to do, and this created a legitimate lack of work in the fire department. The PAB's decisions requiring them to retain employees for a department that does not exist is arbitrary and capricious and illegal.

## **VII. CONCLUSION**

For the foregoing reasons, WSU respectfully requests that the Court determine that the trial court erred by not producing tenable reasons for their decision to dismiss WSU's petition for a writ of

certiorari; that no tenable reasons exists for denying the writ of certiorari; that the decision of the PAB was arbitrary and capricious and illegal; and that the decision of the PAB should be overturned.

Accordingly, WSU respectfully requests that this Court reverse the decision of the trial court, and after consideration of the record before the PAB reverse the decision of the PAB and enter judgment in favor of WSU.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of March, 2007.

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## Appendix I

### Pertinent Findings of Fact

2.6 WSU and the City of Pullman entered into a Joint Fire Services Agreement in May 2001 to share some resources and personnel. Under that agreement, the Fire Chief for the City of Pullman acted as the Chief of the Pullman Fire Department and the WSU Fire Department and the Training Officer of the WSU Fire Department acted as the Training Officer for both departments. In the years following this agreement, the City and WSU discussed the possibility of WSU discontinuing its Fire Department, which would result in the City of Pullman becoming responsible for fire suppression and related duties for all of Pullman, including the WSU campus. The City determined it could absorb the provision of fire services to the campus by its fire department provided it received an equitable share of the City's costs to provide fire services and emergency medical services, as required by statute

2.7 On March 17, 2005, WSU entered into an agreement with the City of Pullman wherein WSU agreed to pay the City of Pullman an equitable share of the City's costs to provide fire protection and emergency medical protection services upon cessation of fire services by WSU. On May 15, 2005, WSU ceased to operate a fire department. The City of Pullman assumed its statutory responsibility to furnish fire and emergency medical protection services to the WSU-Pullman campus, effective May 16, 2005. On June 16, 2005, the parties amended the agreement to include basic life support services that, under the March 17, 2005 agreement, were to be provided by a student basic life support unit.

2.8 The Interlocal Agreements made between WSU and the City of Pullman contain recitals that "under authority of Ch. 39.34 RCW, RCW 28B.30.150 and RCW 35.21.775 the University may agree to pay the City an equitable share of the City's costs of providing fire and emergency medical protection services."

## Pertinent Discussion/Conclusions of Law

4.2 The question presented in this appeal is whether Washington State University violated WAC 251-10-030 when Appellants were laid off from their Fire Officer positions due to a lack of work after WSU decided to abolish its fire department and enter into an Interlocal Agreement with the City of Pullman for payment of an equitable share of the city's cost for providing fire protection services on the WSU campus.

4.6 RCW 41.06.382 [formerly 28B.16.240, effective until July 1, 2005] prohibited contracting for services unless such services were regularly purchased by valid contract prior to April 23, 1979, and also provided that “no such contract may be executed or renewed if it would have the effect of terminating classified employees or classified employee positions at the time of execution or renewal of the contract.”

4.7 The prohibition of “contracting out” has been addressed in several court decisions cited by the parties in their memoranda. Appellants rely on Cunningham v. Community College District No. 3, 79 Wn. 2d 793, 489 P.2d 891 (1971), in which the state supreme court ordered reinstatement of food service employees who were laid off when the college decided to purchase food services from a contractor. The former statute, RCW 28B16.240, was apparently enacted in response to Cunningham to provide limited exceptions to the holding in that case.

4.8 In a case more similar in its facts to the present appeals, Western Washington University entered into an interlocal cooperation agreement with the City of Bellingham to provide police services on the WWU campus. Western Washington University v. Washington Federation of State Employees, 58 Wn. App. 433, 793 P.2d 989 (1990). WWU likewise planned to abolish its existing campus police department and its campus police officer positions. The court found that the holding in Cunningham was dispositive on the issue of whether employees subject to the state Higher Education

Personnel Law could, in effect, be made exempt without recourse by the university's exercise of statutory authority to establish a police force. WWU at 439. The court upheld the Higher Education Personnel Board's conclusion that there was not a "lack of work" which justified the layoff of the employees pursuant to WAC 251-10-030. The HEP Board had found that that the work was merely being transferred to the City of Bellingham. Based on the finding, the HEP Board concluded that the WWU's decision to abolish the campus police force did not result from a "lack of work" because such work was not being discontinued. WWU at 441.

4.9 We similarly conclude that there was not a lack of fire protection and suppression work at the Pullman campus of WSU to support a layoff under WAC 251-10-030(1). This work is undisputedly being done by the City of Pullman. As the court stated in the WWU decision, "a 'lack of work' for purposes of layoffs under WAC 251-10-030, cannot be justified on the basis that the claimed work shortage is occasioned by the contracting out of such work to others." WWU at 442.

4.10 Respondent relies on Keeton v. Department of Social and Health Services (DSHS), 34 Wn. App. 353, 661 P.2d 982 (1983), in which DSHS decided to close a bakery it operated at Lakeland Village. The Keeton court made a distinction between contracting out and getting out of a particular line of business, relying on a line of cases under the National Labor Relations Act discussing "contracting out" as a term of art in labor relations law. The court determined that DSHS could get out of the bakery business and purchase bread from a vendor. The court also distinguished purchasing of goods from contracting for services in construing a similar prohibition of contracting in RCW 41.06.380, then applicable to general government agencies.

4.11 Respondent also cites the results of decisions by the Public Employment Relations Commission and later court review of the City of Kelso's decision to contract with the Cowlitz District for fire suppression services. While the discussion is informative of how questions arising in the context of labor relations may be addressed, our jurisdiction is limited

to deciding these appeals under the state civil service law (Chapter 41.06 RCW) and the higher education personnel rules (Title 251 WAC).

4.12 RCW 41.06.382 is clear and unambiguous. The statute only permits purchasing services by contract if regularly purchased by valid contract prior to April 27, 1979 (which the 2005 agreement between WSU and the City of Pullman was not) and prohibits executing or renewing such contracts if it would have the effect of terminating classified employees or classified employee positions (which was the clear effect of the agreement). The court in WWU also addressed the university's argument that the statute does not prohibit contracting out work performed by civil service positions to other governmental agencies. The court held that RCW 28B16.240 [41.06.382] does not embody "a legislative intent to exclude governmental recipients of such contracts for the general prohibition against the contracting out of civil service positions." WWU at 442.

4.13 The effective date of the repeal of RCW 41.06.382 was after the date of the layoffs. According to the note following RCW 41.06.170 governing employee appeal rights,

The transfer of the powers, duties, and functions of the personnel appeals board to the personnel resources board under RCW 41.06.111 and the transfer of jurisdiction for appeals filed under section 213, chapter 354, Laws of 2002 after June 30, 2005, shall not affect the right of an appellant to have an appeal filed on or before June 30, 2005, resolved by the personnel appeals board in accordance with the authorities, rules, and procedures that were established under chapter 41.64 RCW as it existed before July 1, 2004." [2002 c 354 § 214.]

4.14 This Board does not disregard Respondent WSU's broad authority under Chapter 28B.30 RCW as an institution of higher education to govern and manage its affairs. Further, we have no jurisdiction to decide the validity of the Interlocal Agreements entered between WSU and the City of Pullman to provide for fire protection and emergency medical services on the WSU campus under Chapter 39.34 RCW and providing for payment of an equitable share of the City's costs of providing those services. However, we are empowered to ensure that all actions involving classified employees comply with the state's civil service law and

the rules and authorities that implement the law. We must conclude, for the reasons discussed above, that the layoff of these Appellants was not justified due to a lack of work under WAC 251-10-030(1).

4.15 Summary Judgment should be granted in favor of Appellants and the appeals of David Grimes, Terry St. Mary, and Stuart Bennett should be granted

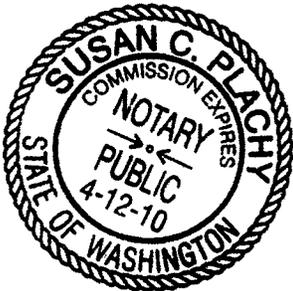


I also mailed one copy of same via Fed Ex Standard Overnight to:

Edward E. Younglove III  
Younglove Lyman & Coker  
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Olympia, WA 98502

Karin Skalstad  
Karin Skalstad

SIGNED and SWORN to before me, this 12<sup>th</sup> day of March,  
2007.



Susan C. Plachy  
SUSAN C. PLACHY (Print Name)  
NOTARY PUBLIC in and for the State  
of Washington, residing at SPOKANE  
My appointment expires: 4-12-10