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STATE OF WASHINGTON

NO. 35721-6-II

IN THE COURT OF APPEALS, DIVISION II  
OF THE 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 RESPONDENTS  
GRIMES, ST. MARY and BENNETT

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## I. Counterstatement of the Issues

Respondents (hereinafter referred to as fire officers or employees) agree with Washington State University's (WSU's) statement that the issue raised in this case is whether the trial court's denial of its petition for a constitutional writ of certiorari (review) constituted an abuse of discretion.

Employees disagree that this Court should itself decide whether the Washington State Personnel Appeals Board (PAB) decision was arbitrary and capricious or illegal.<sup>1</sup>

## II. Statement of the Case

### A. Statement of Proceedings

A state institution of higher education may lay off civil service employees only because of a lack of either work or funds. WAC 251-10-030.

WSU laid off three of its fire officer employees when it entered into an Interlocal

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<sup>1</sup> If this Court finds that the trial court abused its discretion, the case should be remanded with directions that a writ of review issue. See *Bridle Trails Community Club v. City of Bellevue*, infra.

Cooperation Agreement with the City of Pullman (City), under which the City assumed responsibility for fire protection services at the WSU campus and facilities. The WSU fire officers appealed their layoffs to the PAB, which has express authority to decide such appeals. RCW 41.06.170(2) and RCW 41.64.090.

The PAB entered summary judgment in favor of the employees. The PAB held that there was not a lack of fire protection work at the WSU campus to support a layoff of the employees, for the reason that a lack of work under WAC 251-10-030 cannot be justified where the work is being performed by employees not covered by RCW Ch. 41.06 (the state civil service law) pursuant to an agreement with the employer. In so holding, the PAB relied principally on the decisions in *Cunningham v. Community College Dist. No. 3*, 79 Wn.2d 793, 489 P.2d 891 (1971); and *Western Washington University v. Washington Federation of State Employees*, 58

Wn.App. 433, 793 P.2d 989 (1990).<sup>2</sup> The PAB granted the employees' appeals from the improper layoffs.

RCW 41.64.130 grants the right of appeal from PAB decisions only to the employee. Nevertheless, WSU petitioned the Thurston County Superior Court for constitutional certiorari. WSU alleged that the PAB's decision was arbitrary and capricious and illegal.

The trial court reviewed the complete record from the PAB. In denying the petition, the court properly stated the test for the court's exercise of its inherent power of review:

I am not convinced that their decision was arbitrary and capricious. That's an extremely high standard. The arbitrary and capricious standard basically that no reasonable person could ever have decided this in that way, that someone just went off on a tangent and is totally unreasonable. That standard has not been met. And then the issue of contrary to law requires more than simply an allegation that the law was incorrectly applied in this case.<sup>3</sup>

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<sup>2</sup> PAB Decision, ¶¶ 4.7, 4.8 and 4.9

<sup>3</sup> CP 125, Transcript of Oral Opinion, p. 22, lines 4-13.

WSU appeals. WSU alleges that the court abused its discretion in refusing to issue a constitutional writ of review.

**B. Statement of Facts**

Employees do not take issue with most of WSU's Statement of Facts. For the most part it is consistent with the findings of fact of the PAB.

The principal factual dispute revolves around WSU's description of the Interlocal Cooperation Agreement entered into between WSU and the City of Pullman. WSU describes the agreement as merely establishing the amount of WSU's payment to the City of Pullman for fire protection and emergency medical services, to take effect upon WSU's closure of its own fire department and the layoff of its fire officer employees.<sup>4</sup>

In truth, the agreement between the City and WSU did much more. The contract defined the services the City agreed to provide to the WSU

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<sup>4</sup> WSU ignores the fact that its first payment to the City under the contract was due April 1, 2005, approximately one and a half months prior to WSU's layoff of its firefighting staff.

campus and facilities. In addition to specifying the amount of WSU's current monthly payment, it also detailed what specific considerations would be taken into account in calculating WSU's future financial obligation.<sup>5</sup> In the agreement, the City obligated itself to budget sufficient funds for the cost of providing fire protection to the WSU campus and facilities.<sup>6</sup> The City also agreed that it would arbitrate any disputes regarding increases to WSU's contributions for 2007 or 2008.

The agreement provided that the City would direct and control the fire department "**except as provided in the agreement.**" (Emphasis supplied.)<sup>7</sup> In the contract, the parties agreed to establish an advisory board, which by the terms of the agreement was required to meet at least annually regarding the fire protection and emergency medical services provided to WSU. The advisory board was required to have both the WSU Vice President for Business

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<sup>5</sup> AR 58-59, Contract ¶ II.

<sup>6</sup> AR 59, Contract ¶ III.B.

<sup>7</sup> AR 59, Contract ¶ III.A.

Affairs and its Public Safety Director as members. The agreement required the City to consider any concerns raised by WSU in the City planning and delivery of services.<sup>8</sup> The agreement provided for WSU to transfer its fire equipment and vehicles to the City of Pullman.<sup>9</sup> The City promised it would negotiate with WSU "regarding future fire equipment and fire facility improvements."<sup>10</sup>

WSU agreed to "indemnify and hold the City harmless for any loss."<sup>11</sup> The City obligated that it would not assign any of its rights under the agreement, even to any other governmental entity.<sup>12</sup>

While WSU contends that it simply ceased operating a fire department, leaving that obligation to the City, and contracted only what it was obligated to do (pay) by statute, the terms of the contract were much broader. Under the contract, WSU not only reserved certain rights with regard to the calculation of its financial obligation to the

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<sup>8</sup> AR 60-61, Contract ¶ V.

<sup>9</sup> AR 61, Contract ¶ VI.

<sup>10</sup> AR 60, Contract ¶ IV.

<sup>11</sup> AR 61-62, Contract ¶ VII.

<sup>12</sup> AR 62, Contract ¶ X.

City, but it retained a say in the City's providing of fire protection and medical services. Furthermore, while the City is obligating itself to provide fire protection and medical services to the entire WSU campus and facilities, not all of WSU's campus and facilities are located within the City's jurisdiction.<sup>13</sup>

While WSU states that the contract was required by RCW 35.21.779, the agreement states it is entered into under RCW 35.21.775, which permits but does not require a city and a state institution to enter into a contract as to the amount of the institution's contribution.

### **III. Argument**

A. The trial court did not abuse its discretion in refusing to issue a writ of certiorari.

As WSU concedes, the granting of review under a constitutional writ of certiorari is discretionary with the trial court.<sup>14</sup> It also concedes, on review, that discretion will not be disturbed

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<sup>13</sup> See footnotes 25-29, *infra*.

<sup>14</sup> Brief of Petitioner, p. 12.

absent a clear showing of abuse of discretion, or that discretion which is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.<sup>15</sup>

The Washington State Constitution gives superior courts the inherent authority to review both judicial and non-judicial actions of administrative agencies. Const. art. IV, § 6; *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wash.2d 690, 693-94, 658 P.2d 648 (1983). The scope of the review is limited to whether the hearing officer's actions were arbitrary, capricious, or illegal, thus violating a claimant's fundamental right to be free from such action. *Bridle Trails Community Club v. City of Bellevue*, 45 Wash.App. 248, 251-52, 724 P.2d 1110 (1986). A court has the discretion to refuse to exercise its inherent power of review so long as it provides tenable reasons for its decision. *Birch Bay Trailer Sales, Inc. v. Whatcom County*, 65 Wash.App. 739, 746, 829 P.2d 1109, review denied, 119 Wash.2d 1023, 838 P.2d 690 (1992). The Supreme Court has gone so far as to state that the grant of a constitutional writ of review is "entirely discretionary and cannot be mandated by anyone, including an appellate court." *Raynes [v. City of Leavenworth]*, 118 Wash.2d [237] at 242 n. 1, 821 P.2d 1204. Because of the express legislative prohibition on interlocutory review of SEPA threshold

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<sup>15</sup> Brf. of Pet., p. 13.

determinations, only extraordinary facts or circumstances will provide the trial court a tenable reason to grant review. *Saldin [Securities, Inc. v. Snohomish County]*, 80 Wash.App. [522] at 530-31, 910 P.2d 513 (reversing the trial court's grant of constitutional review).

Here, the court denied the request for a constitutional writ on the grounds that the Fosters' allegations were not supported by facts showing that the hearing officer's decision was arbitrary and capricious. In deciding whether to grant review, a court determines whether the petitioner's allegations, if true, clearly demonstrate that the hearing officer's actions were arbitrary, capricious, or contrary to law. *Kerr-Belmark Constr. Co. v. City Council*, 36 Wash.App. 370, 373, 674 P.2d 684, review denied, 101 Wash.2d 1018 (1984). Arbitrary and capricious means "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Id.*

[W]e agree that the Fosters do not clearly demonstrate that they were willful and unreasoning actions taken without regard to the facts and circumstances of the case.

Although the Fosters' failure to clearly demonstrate arbitrary and capricious action is a tenable reason for failing to grant review, the trial court did not state on the record whether it also considered if the Fosters made a prima facie showing that

the actions were contrary to law. We next examine whether the Fosters' allegations clearly demonstrated that the actions were contrary to law and constituted extraordinary circumstances that would have given the court a tenable reason to grant a writ of review.

\* \* \*

[W]e do not find it an extraordinary circumstance requiring the trial court to grant a constitutional writ of review. . . .

(Emphasis supplied.) *Foster v. King County*, 83 Wn.App. 339, 346-48, 921 P.2d 552 (1996).

This too is a case where only extraordinary facts or circumstances would have provided the trial court tenable grounds to grant review. The civil service law clearly and expressly limits the right to seek review of a PAB decision to the employee. The employer (agency or institution) has no legislated right to obtain review. See RCW 41.64.130.

Appellate courts rarely reverse a trial court's refusal to issue a constitutional writ of

review.<sup>16</sup> On the other hand, appellate courts have not infrequently reversed trial courts for conducting review under constitutional certiorari. See, e.g., *Williams v. Seattle School Dist.*, 97 Wn.2d 215, 643 P.2d 426 (1982); and *Saldin Securities, Inc. v. Snohomish County*, 80 Wn.App. 522, 910 P.2d 513 (1996).

State civil service boards, such as the PAB, have been given great deference by the courts in their interpretation and application of the unique provisions of the civil service laws which they are charged with administering. See, e.g., *Green River Community College v. Higher Education Personnel Board*, 95 Wn.2d 108, 117-18, 622 P.2d 826 (1981), adhered to and modified, 95 Wn.2d 962 (1981); *Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 561 P.2d 195 (1977);

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<sup>16</sup> In fact, the only case respondent has been able to find is *Bridle Trails Community Club v. City of Bellevue*, 45 Wn.App. 248, 724 P.2d 1110 (1986), where the Court of Appeals remanded the case because the trial court had not specifically considered the issue. On remand, the Court of Appeals directed that the trial court consider if, in its discretion, it would grant review. In this case, the trial court squarely faced whether to exercise its inherent power of review.

*International Federation of Professional and Technical Engineers v. State Personnel Bd.*, 47 Wn.App. 465, 474, 736 P.2d 280 (1987); *Washington Federation of State Employees v. State Personnel Bd.*, 29 Wn.App. 818, 630 P.2d 951 (1981); and *Gogerty v. Dept. of Institutions*, 71 Wn.2d 1, 426 P.2d 476 (1967) (cautioning the courts not to thrust themselves into the role of super personnel boards).

The parties agree regarding the exceedingly limited basis for court review by way of constitutional certiorari. To obtain review, WSU must show that the PAB acted arbitrarily and capriciously or contrary to law. Employees do not disagree with WSU's statement that "an administrative agency acts in an arbitrary or capricious manner if it takes 'willful and unreasonable action, without consideration of facts or circumstances.'" <sup>17</sup>

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<sup>17</sup> Brf. of Pet., p. 13.

Similarly, employees agree with WSU's statements regarding what constitutes "illegal" conduct by an administrative agency warranting a court's exercise of its inherent power of review. As WSU correctly states, "an alleged error of law is insufficient to invoke the court's constitutional power of review. [Citation omitted.]" And that, "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. [Citations omitted.]"<sup>18</sup>

In this case, the PAB was hearing employee appeals pursuant to its express authority set forth in RCW 41.64.090 and 41.06.170. An administrative agency acts contrary to law only if it exceeds its authority (jurisdiction). This is an important distinction, and even though WSU acknowledges the proper standard, nowhere does it argue that the PAB was exceeding its jurisdiction. Instead, WSU

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<sup>18</sup> Brf. of Pet., p. 14.

argues that the PAB erroneously applied the provisions of WAC 251-10-030, and this Court's decision in *Western Washington University v. Washington Federation of State Employees*, supra, to the facts in this case.

While WSU suggests the PAB purported to determine rights between WSU and the City, it did not. The PAB granted the employees' appeals and ordered the WSU only to correct the layoffs. This is precisely the authority it is expressly granted by statute.

B. The trial court did provide tenable reasons for its decision refusing to issue a writ of certiorari.

As WSU points out, after reciting that the court had fully considered the entire record and the arguments of counsel, the order entered by the trial court simply denied the petition. As WSU also concedes, however, the trial court entered an oral decision setting forth reasons for the denial which this Court is to consider in determining

whether or not the trial court had tenable reasons for denying the writ.<sup>19</sup>

WSU argues that the court's oral decision does not provide tenable reasons for its decision to deny the writ. WSU is incorrect.

The trial court correctly and squarely identified the two grounds upon which a writ of review could have been issued. The court characterized what it was being asked to do as, "I should find that the board in their decision was arbitrary and capricious or that their decision was contrary to law."<sup>20</sup> After discussing he would construe the facts most favorably to WSU, the court went on to state:

I think there must, however, be some threshold showing that convinces me that there is an error obvious that was committed by the PAB in making their decision and I don't believe that standard has been met to my satisfaction today. I am not convinced that their decision was arbitrary or capricious. That's an extremely high standard. The arbitrary and capricious standard basically that no reasonable person could ever have

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<sup>19</sup> Brf. of Pet., p. 15.

<sup>20</sup> CP 124, p. 21, lines 13-16.

decided this in that way, that someone just went off on a tangent and is totally unreasonable. That standard has not been met. And then the issue of contrary to law requires more than simply an allegation that the law was incorrectly applied in this case.

I think that petitioners for this writ of certiorari have some burden of convincing me that there was a decision that's contrary to law. In my opinion, that threshold has not been met, so I am going to grant the motion to dismiss this petition.<sup>21</sup>

In *Washington Public Employees Association v. Washington Personnel Resources Board*, 91 Wn.App. 640, 959 P.2d 143 (1998), this Court upheld the trial court's denial of a petition for constitutional review. The Court cited the tenable reasons stated by the trial court for denying the writ as follows:

The trial court denied the petition, stating:

In determining whether other requirements of either a statutory writ or a constitutional writ of certiorari are met, the court must find allegations of more than an error of law. Here, the fundamental issue is one of whether the Personnel Resources Board erred, as a

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<sup>21</sup> CP 124-25, p. 21, line 25 through p. 22, line 18.

matter of law, in determining that no bargaining was needed. Allegations of error in interpreting the law are very different than allegations that an agency acts illegally. The present allegations are not sufficient to invoke the court's review by writ of certiorari even though Petitioners will be without further remedies.

*Washington Public Employees Ass'n, supra*, at 645.

The trial court, in this case, was at least as thorough in explaining the lack of tenable grounds for issuing the writ as the Court in *Washington Public Employees Association, supra*.

C. This Court should refuse WSU's invitation to conduct a review of the PAB decision.

Since the trial court properly refused to issue a writ of review because it found that there was no showing that the PAB had acted illegally (outside its jurisdiction and authority) or arbitrarily and capriciously in granting the employees' appeals from their layoff, there is no basis for this Court to conduct its own review of the PAB decision. What WSU is attempting to do is to obtain review of the PAB decision without the

issuance of a writ. In effect, this would be a second review. In petitioning the Superior Court, WSU gave the trial court the entire PAB record of proceedings. Thus, while the issue before the trial court was whether it should review the PAB decision, in passing on the petition, the court was actually reviewing the entire record. Now WSU seeks to have this Court do the same. This Court should hold that the trial court did not abuse its discretion in denying issuance of a writ of constitutional certiorari and refuse WSU's invitation to conduct another "review" of the PAB decision.

D. The PAB decision was not arbitrary and capricious or illegal.

Without conceding that this Court should conduct its own review of the PAB proceedings, if the Court were to do so, it should conclude that the PAB acted neither arbitrarily and capriciously nor illegally.

1. The PAB was not arbitrary and capricious in not finding a lack of (firefighting) work.

WSU argues that the PAB acted arbitrarily and capriciously because it concluded that there was no lack of work justifying the layoff of the WSU employees.

Of course, this is an issue peculiarly within the province of the PAB in hearing layoff appeals. At its core, the PAB decision is based on the premise that an employer cannot claim a lack of work when the work is being performed by a third party, and particularly where the employer has a contract with the third party. This is true whether the third party is a private contractor or another governmental entity. This premise is well-founded in Washington law. In *Cunningham v. Community College District No. 3*, supra, the Court upheld the administrative board's decision that the layoff of Community College food service employees was illegal where the work they had been performing was

being performed by a third party contractor. In

*Cunningham*, the Supreme Court held that:

This alternative condition precedent to layoff, of curtailment of work, cannot be established by merely showing that the employer has determined, for whatever reason, to have the work accomplished by others. Such interpretation of the board's rule would render any limitation upon an employer's right to remove an employee (whether by discharge, layoff, or by any other means) meaningless, completely thwarting the purposes for a civil service system. . . .

*Cunningham* at 801-02.

Since *Cunningham*, numerous cases have solidified that principle as a basic tenet in Washington state civil service law.<sup>22</sup>

The decision in *Spokane Community College, supra*, led to the adoption of former

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<sup>22</sup> See, e.g., *Washington Federation of State Employees v. Spokane Community College*, 90 Wn.2d 698, 585 P.2d 474 (1978); *Barrington v. Eastern Washington University*, 41 Wn.App. 259, 703 P.2d 1066 (1985); *Western Washington University v. Washington Federation of State Employees, supra*; and *Washington Federation of State Employees v. Joint Center for Higher Education*, 86 Wn.App. 1, 933 P.2d 1080 (1997).

RCW 41.06.382.<sup>23</sup> This statute grandfathered contracts for services that were regularly purchased by contract prior to enactment of the statute (April 23, 1979), but only if renewing such contracts would not have the effect of terminating classified employees or positions.

An issue identical to the one in this case was presented in *Western Washington University v. Washington Federation of State Employees*, supra. Western Washington University (WWU) ceased providing police protection services on its campus and laid off its police officer employees contemporaneous with the effect of an interlocal agreement it entered into with the City of Bellingham. Under the agreement, WWU agreed to compensate the City for providing police services to the WWU campus. This Court upheld the PAB decision reinstating the WWU police officers on the basis there was no lack

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<sup>23</sup> Formerly RCW 28B.16.040 enacted by Laws 1979 Ex. Sess. Ch. 46 § 1, modified as RCW 41.06.382 by Laws 1993 Ch. 281 § 70. This section was upheld as part of the Personnel System Reform Act, Ch. 354 Laws 2002, which made significant changes to the civil service law, but which took effect after the layoffs of these employees.

of work; the work was simply being performed by City personnel under the interlocal agreement.<sup>24</sup> That is this case.

Although this case and the *Western Washington University* case, supra, are remarkably indistinguishable, WSU nevertheless argues a distinction that it has no "true contract" with the City of Pullman. WSU argues that since the City would be obligated to provide fire protection services and WSU would be obligated to pay for those services even without an agreement, there was no "true" agreement.

This is not a distinction from the *Western Washington University* case. In that case, WWU similarly argued that when it laid off its campus police force the City of Bellingham was obligated to provide police services to the WWU campus, and that (even without an agreement) WWU was obligated

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<sup>24</sup> WWU was able to obtain review in that case because it did not come before the Higher Education Personnel Board as an appeal, but rather as a declaratory ruling pursuant to the Administrative Procedures Act, reviewable under the provisions of RCW 34.05.080, and on the employees' complaint for declaratory judgment and injunctive relief, the proceedings having been consolidated.

(by RCW Ch. 43.135) to contribute toward the cost of those services. Nevertheless, WWU and the City of Bellingham did enter into an interlocal agreement per RCW Ch. 39.34, fixing the institution's financial obligation and containing other provisions much the same as WSU and the City of Pullman did in this case. Both cases concern the PAB's interpretation of an application of WAC 251-10-030, the civil service layoff rule, to these similar situations. The PAB was not arbitrary and capricious in applying this precedent.

There is no basis for distinguishing the holding in *Western Washington University, supra*. The PAB was not arbitrary and capricious in holding that the fire officers' layoff was not justified by a lack of work. As the PAB found, the work undisputedly continued to be performed, only by the City of Pullman fire officers.<sup>25</sup>

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<sup>25</sup> PAB Decision ¶ 4.9.

2. WSU did not simply walk away from fire protection services on its campus.

In an extension of its argument that it did not actually enter into a "contract" with the City of Pullman, WSU argues that it simply walked away from ("got out of the business of") fire protection work, leaving that work to the City, which was legally obligated to perform the work if WSU did not. This is not a fair characterization of WSU's agreement with the City of Pullman for several reasons. First, the City was undertaking to provide fire protection services to portions of the WSU campus and facilities not located in the City of Pullman.<sup>26</sup> Thus, only its contract with WSU obligated the City to provide fire protection and emergency medical services to the portion of the WSU campus and facilities not within the City. WSU's properties and facilities outside the Pullman city limits were historically provided fire

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<sup>26</sup> PAB Decision ¶ 3.2, lines 19-20.

protection services by the WSU fire department and its civil service fire officers.<sup>27</sup> WSU has been circumspect on this issue. In her oral argument, WSU's counsel admitted that WSU was only "primarily within the jurisdiction" of the City of Pullman.<sup>28</sup> In actuality, more acreage of the WSU campus lies outside the City limits.<sup>29</sup>

Without the interlocal agreement obligating it to provide fire protection services to "the campus areas and facilities of the University,"<sup>30</sup> as the City itself acknowledged, the City would only have had "the responsibility for providing services for anything inside the City limits."<sup>31</sup> The Fire Chief for the City of Pullman, Patrick Wlkins, admitted that WSU's campus extended outside the city, and that WSU campus property "including dairy farms and buildings, and research farms and facilities," were otherwise outside the fire

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<sup>27</sup> AR Index II.E, Affidavit of Stuart R. Bennett, ¶ 5 on p. 2.

<sup>28</sup> CP 114, Tr. p. 11, lines 23-24.

<sup>29</sup> AR Index II.E, Bennett Affidavit, ¶ 5 on p. 2.

<sup>30</sup> AR 58-59, Interlocal Agreement ¶¶ II and III.C.

<sup>31</sup> AR Index II.E, Bennett Affidavit, Exhibit 1 (City of Pullman Memorandum).

department's area of responsibility, and that because of the agreement the City was "in the process of revising their existing mutual assistance agreements with the three Whitman County Rural Fire Protection Districts to include more specific language about outlying WSU properties."<sup>32</sup>

Beyond the question of whether the compensation WSU agreed to pay in its contract was for the services the City would have been obligated to provide, the contract also contained other promises between the two parties. Perhaps most significantly, WSU attempted through the contract to retain some control over the fire protection and emergency medical services to be provided on campus. The City was required to establish an advisory board with two principals from WSU on the board. The City was further obligated by the contract to consider WSU's concerns in any City planning and delivery of services, and the City

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<sup>32</sup> AR Index II.D, Affidavit of Patrick Wilkins, ¶ 4 on p. 2.

agreed it would negotiate with WSU regarding future fire equipment and fire facility improvements.

WSU extracted promises from the City in the contract that the City would arbitrate any disputes over the scheduled cost increases, and that the City would budget sufficient funds for the cost of providing services to WSU. WSU clearly was not walking away and leaving the issue of what it would pay unsettled.

The City further agreed that it would not assign its responsibilities to any third party, including another governmental entity. The contract also provided that WSU would transfer its fire equipment and vehicles to the City, and that WSU would indemnify and hold the City harmless from any loss.

None of these obligations exist separate from the City's "contract" with WSU. It is disingenuous of WSU to argue that it simply walked away from the fire protection and medical services. Not only did WSU obtain these services for its entire campus,

including those portions outside the City, it contracted for a say in how those services were performed.

It was not arbitrary and capricious for the PAB to hold, consistent with the holdings in *Cunningham* and *Western Washington University, supra*, that these layoffs were illegal, and that any lack of work was occasioned by the contract for fire protection services between WSU and the City of Pullman.

Even if the Court were to conclude WSU's agreement with the City of Pullman is not a "contract," there was still no lack of fire protection and emergency medical services work on the WSU campus justifying the employees' layoff. Fire and emergency work had historically been done on the WSU campus by WSU civil service employees. It was work the laid-off fire officers continued to be capable of performing.<sup>33</sup> The intent of the

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<sup>33</sup> There is no contention the employees were incapable of performing the fire protection work historically performed by WSU's civil service employees.

provisions of the civil service law in effect at the time (RCW Ch. 41.06) was that unless regularly purchased by contract prior to April 23, 1979, work which civil servants had performed and were still capable of performing is civil service work to be performed by civil servants subject to the state's merit system (RCW Ch. 41.06 and WAC Titles 356 and 251), unless specifically exempted by the legislature. See *Cunningham v. Community College*, supra; and RCW 41.06.380 and .382. WSU does not contend that it purchased fire protection or emergency medical services by contract prior to April 23, 1979. WSU's actions were a clear attempt to thwart this basic tenet of the state's civil service system. No lack of work existed justifying the WSU employees' layoff, as evidenced by City employees performing that work. The PAB decision was not arbitrary and capricious even if WSU's agreement were not a contract.

3. The provisions of RCW Ch. 35.21 do not make the PAB decision arbitrary and capricious.

RCW 35.21.775 permits, but does not require, a state institution to contract with a city for an equitable share of fire protection services, and in fact specifically provides:

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 35.21.775.

WSU argues that if it had not entered into a contract pursuant to RCW 35.21.775, it would have been required to have entered into a contract under RCW 35.21.779, in conjunction with the Department of Community, Trade and Economic Development.

This is a circuitous argument. WSU was not required to enter into any such contract since it had fire protection services performed by state employees (the respondents). Further, because it

did have a contract with the City pursuant to RCW 35.21.775, the requirements of RCW 35.21.779 were expressly inapplicable.<sup>34</sup>

WSU argues that **if** there were no contract, the City would still be obligated to provide fire protection services and WSU would still be required to pay for those services. This argument ignores the fact that there is a contract, and that the contract's terms are broader than the parties' statutory obligations.

While WSU argues that it is getting completely out of the fire protection business, as has been previously shown, this is not the case. The agreement between the City and WSU went well beyond any statutory requirements for payment. The contract assured that WSU would have a say in the fire protection services being rendered by the City.<sup>35</sup> This control may reflect a different level of

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<sup>34</sup> See RCW 35.21.779(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."

<sup>35</sup> These provisions are also similar to control provisions WWU had in its contract with the City of Bellingham in *Western Washington University*, supra.

participation by WSU, but belies WSU's argument that it was abandoning fire protection services to the sole discretion of the City.

*Ellensburg v. State*, 18 Wn.2d 709, 826 P.2d 1081 (1992), relied on by WSU in arguing that the City must provide fire services even without a contract, is unhelpful. The case was decided under the provisions of former RCW 35.21.775, which required that "the state shall contract," as opposed to the amended version currently in effect permitting that agencies "may" contract for such services. Of course, none of these current or former provisions would have required WSU to contract for fire services as it had its own fire department.

Since there is a contract, it is not necessary for the Court to decide this case as if there were no contract; however, the result would be the same. First, the statutes relied upon by WSU are themselves contractual in nature.

'Generally, a statute is treated as a contract when the language and circumstances demonstrate a legislative intent to create rights of a contractual nature enforceable against the state.' *Washington Federation of State Employees, AFL-CIO, Council 28, AFSCME v. State*, 101 Wash.2d 536, 539, 682 P.2d 869 (1984) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)). . . .

*Eugster v. City of Spokane*, 118 Wn.App. 383, 417, 76 P.3d 741 (2003), review denied 151 Wn.2d 1027 (2004). The language in RCW 35.21.775 and .779 obviously reflect a legislative intent which creates rights of a contractual nature enforceable against the state.

Second, as previously shown, even without a contract, there was no lack of fire protection work on the WSU campus, it was simply no longer being performed by state civil servants, but rather by City employees.

4. The previous "contracting out cases" cited by WSU are inapposite.

In support of its argument, WSU cites *Keeton v. Social and Health Services*, 34 Wn.App. 353, 661

P.2d 982 (1983). In upholding the layoff of the institution's civil service bakers, the Court held that the state's contract with a private bakery to provide bakery "goods" to the institution was not a contract for "services." It is clear from the decision that had the Court characterized the bakery products as services and not goods, the decision would have been otherwise, that the bakers' layoffs would have been illegal since the lack of work would have been based on a contract for services.

Since fire protection and emergency medical services are clearly services and not goods, Keeton has no application to this case.

WSU's reliance on the two City of Kelso Public Employment Relations Commission decisions (*City of Kelso*, Decision 2120-A (PECB, 1985) (Kelso I); and *City of Kelso*, Decision 2633-A (PECB, 1988) (Kelso II)) is equally misplaced. These cases involved the question of whether the employer had a duty to bargain. The issue in this case is not

whether WSU's decision to enter into a contract with the City regarding the transfer of fire department operations was a mandatory subject of bargaining or not, but whether it offended the basic tenet recognized in *Cunningham*, supra, and its progeny, that work historically and traditionally performed by state civil service employees is civil service work and cannot be performed under a contract with a third party, whether the third party is a private contractor or public entity.

Portions of the *Kelso Decisions*, supra, do support the employees' position, however. As WSU notes in its brief, those cases held that an employer truly "goes out of business" "when management seeks to relieve itself from **any legal involvement whatsoever** in a product or service it formerly produced." (Emphasis supplied.)<sup>36</sup> Here, the contract between WSU and the City of Pullman obligated the City to put WSU representatives on the advisory board and consider WSU's concerns in

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<sup>36</sup> Brf. of Pet., p. 34.

City planning and delivery of services, and to negotiate with the City regarding future fire equipment and fire facility improvements, amongst other things. Thus, it cannot fairly be said that WSU relieved itself of any legal involvement whatsoever in fire protection services. Further, WSU agreed to indemnify and hold harmless the City. These are all "legal involvements."

5. The PAB was not arbitrary and capricious in its application of former RCW 41.06.382.

WSU next argues that the PAB arbitrarily and capriciously applied former RCW 41.06.382. This argument is once again based on WSU's position that its agreement with the City of Pullman was not truly a contract. It argues that WWU conceded it was contracting for police services, whereas WSU does not.

The employees do not repeat the arguments made heretofore regarding the nature of the agreement entered into between the City and WSU.

However, WSU also argues that the principle announced in *Cunningham*, supra, is not applicable because in that case, the contractor had agreed to employ only employees acceptable to the College, and therefore the institution retained certain rights and responsibilities regarding the work. The same is true in this case, as WSU retained certain rights and responsibilities by WSU's participation on the advisory board and the agreement that the City negotiate with WSU regarding future fire equipment and facility improvements, and consider any concerns raised by WSU in City planning and delivery of services. In this respect, WSU's contract is remarkably similar to the contract entered into by both WWU and Community College District 3 in the two cases relied on by the PAB.

WSU mistakenly argues that WWU did not argue, as it does, that it was getting out of the police service business. That was exactly WWU's position. It argued that there was a lack of work because the College no longer had a police force, and that

police services for the College were now being rendered by the Bellingham City police.

WSU argues that the transfer of fire protection services was contemplated, and thus in WSU's view authorized, by the collective bargaining agreement pertaining to WSU fire officers. Article 34 of the contract provided:

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 transfers of service shall be in accordance with RCW 41.06 as it now exists or hereafter may be amended and applicable case law.**

(Emphasis supplied.)

Of course, *Cunningham* and its progeny extracted from the Civil Service Act, RCW Ch. 41.06, the basic tenet that civil service work be performed by civil service employees and could not be performed under contract. Furthermore, RCW 41.06.380, adopted in response to these cases, specifically prohibited contracting out, even where services had been contracted prior to 1979, if the

effect were to eliminate civil service employees or positions, as in this case.

WSU may have complied with its contractual obligation to offer to bargain regarding its decision to transfer fire protection services; however, it did not abide by its contractual and legal obligation not to contract out civil service work, something prohibited by both the civil service law and the bargaining agreement, by its reference to that law.

6. The PAB has broad discretion and authority in administering the civil service rules regarding layoffs.

With regard to WSU's argument that the PAB decision was arbitrary and capricious, the courts are cautioned that even with regard to matters properly on appeal to the courts, review is limited to:

a judicial examination of the record as a whole for the purpose of ascertaining whether there exists therein any competent, relevant and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or

circumstantially support the challenged finding or findings. In essence, we are persuaded that the legislature envisioned the application of a rule somewhat akin to the 'substantial evidence rule', and a judicial review somewhat analogous to this court's review of the factual findings of a superior court. Any broader or more inclusive judicial review, embracing or approaching the concept of a De novo review of factual disputes, would have the tendency to minimize the administrative function and expertise of the personnel board, render futile the statutory requirement that the board make findings of fact, and thrust the superior court into the role of a super personnel board.

*Gogerty*, 71 Wn.2d at 8-9.

WSU is inviting the Court to do just that which it ought not do.

7. The PAB's decision was not illegal.

Both the parties and the trial court recognized that an administrative agency's acting illegally for purposes of the court's exercising its inherent power of review means that the agency was acting beyond its jurisdiction and authority, not merely that it may have misconstrued the law.

Illegality in the constitutional certiorari context, as opposed to the statutory certiorari context, refers to an

agency's jurisdiction and authority to perform an act. [Citations of authority omitted.]

*Washington Public Employees Association v. Washington Personnel Resources Bd.*, 91 Wn.App. at 657-58.

WSU's brief gives short shrift to the argument that the PAB acted illegally. WSU argues that the PAB illegally used its authority to attempt to prohibit WSU from laying off employees for which no work is available.

The civil service rules permit an employing institution to lay off employees if there is either a lack of work or a lack of funds. WAC 251-10-030. Employees who are laid off are given the statutory right to appeal their layoffs to the Personnel Appeals Board. RCW 41.64.090 and 41.06.170. WSU had the burden of proving by a preponderance of the evidence that it laid off its fire officers for a lack of work, the reason stated in the reduction-in-force letter to the employees.<sup>37</sup> The issue in

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<sup>37</sup> PAB Decision ¶ 4.4.

this case was thus squarely before the PAB, i.e., whether a lack of work existed justifying WSU's layoff of its fire officers. The PAB was clearly acting within its authority and jurisdiction when it decided that issue as a part of the employees' appeals from their layoffs.

WSU is simply arguing that the PAB was wrong in concluding that there was no lack of work justifying the employees' layoff. Even if the PAB had erred in applying the layoff rule, which is certainly not conceded, that is not a basis for issuance of a constitutional writ of review.

E. The trial court was acting within its broad discretion in denying WSU's petition for a writ of certiorari.

In closing, WSU argues that it was simply acting in good faith in attempting to transfer responsibility for fire protection services to its campus and facilities to the City of Pullman, and in dealing with the employees it had laid off.

Although employees do not concede WSU's description of events, WSU's good faith is not an issue in this case. The PAB, acting within its jurisdiction to hear layoff appeals of the employees, determined that the layoffs were not justified by a lack of work because the fire protection services at WSU's campus and facilities were continuing. Instead of being provided by WSU's civil service employees, they are now being provided by City of Pullman employees. The work continues to be performed. In addition, through its contract with the City for fire protection services, WSU retained some control over the services that were to be provided.

The PAB did not purport to declare the rights of either WSU or the City of Pullman with regard to their agreement, or to in any way affect that agreement. The PAB simply ordered WSU to appropriately remedy the improper layoffs consistent with its decision.

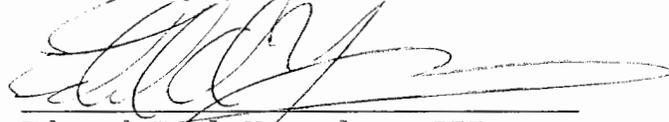
**IV. Conclusion.**

The trial court did not abuse its discretion in denying WSU's petition for a constitutional writ of certiorari. The PAB was acting neither arbitrarily and capriciously nor illegally when it directed WSU to remedy the improper layoff of the respondents. The decisions of both the trial court and the PAB should be affirmed and WSU's appeal denied.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of  
April, 2007.

Respectfully submitted,

YOUNGLOVE LYMAN & COKER, P.L.L.C.



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Grimes, St. Mary and Bennett

NO. 35721-6-II

IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

WASHINGTON STATE UNIVERSITY, )  
)  
Petitioner, )  
)  
v. )  
)  
WASHINGTON STATE PERSONNEL )  
APPEALS BOARD, and DAVID )  
GRIMES, TERRY ST. MARY, )  
STUART BENNETT, )  
)  
Respondents. )  
\_\_\_\_\_ )

AFFIDAVIT OF  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
COURT OF APPEALS

I, Lindy DeGidio, being first duly sworn upon oath, deposes and says: That I am the assistant to the attorney for Respondents David Grimes, Terry St. Mary and Stuart Bennett herein, and that on the 9th day of April, 2007, I did mail the original and one copy of the Brief of Respondents and Affidavit of Mailing to:

David Ponzoha, Clerk/Administrator  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

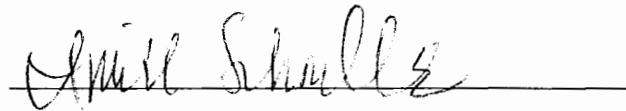
I also mailed one copy of the same to:

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Lindy DeGidio

SUBSCRIBED AND SWORN to before me this 3<sup>rd</sup> day of April,  
2007.





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residing at Olympia  
Commission expires: May 8 2010

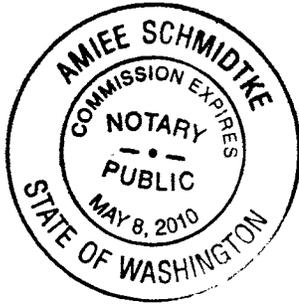


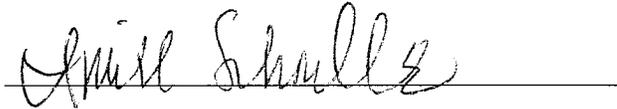
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Lindy DeGidip

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