

NO. 37897-3-II

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

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF GENERAL ADMINISTRATION

Appellant.

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COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

ROBERT M. MCKENNA
Attorney General

SPENCER W. DANIELS
Assistant Attorney General
WSBA No. 6831
PO Box 40108
Olympia, WA 98504-0108
(360) 753-6238

MITCHEL R. SACHS
Assistant Attorney General
WSBA No. 19051
PO Box 40145
Olympia, WA 98504-0145

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR AND ISSUES2

 A. Assignments of Error2

 B. Issues Pertaining to Assignments of Error.....2

III. STATEMENT OF THE CASE.....4

 A. The Civil Service Law Prior to 20024

 B. Personnel System Reform Act of 2002.....5

 C. Competitive Contracting Under RCW 41.06.142.....7

 D. Rule-Making Activities of General Administration Under
 RCW 41.06.14210

 E. Proceedings in Superior Court.....14

IV. ARGUMENT16

 A. The Federation Has a Heavy Burden to Prove That
 General Administration’s Rules Are Invalid16

 B. The Department of General Administration Acted Within
 Its Statutory Authority Under RCW 41.06.142 in
 Adopting the Three Rules Being Challenged18

 1. The Legislature Directed General Administration to
 Adopt Rules to Implement RCW 41.06.142 in
 Recognition of the Agency’s Expertise in Public
 Contracting Procedures18

 2. General Administration Acted Within Its Rule-
 Making Authority Under RCW 41.06.142 When It
 Adopted WAC 236-51-006 and WAC 236-51-
 010(11)20

3.	An Administrative Agency May Fill in the Gaps in Legislation Through Rule-Making.....	29
4.	General Administration Acted Within Its Rule- Making Authority in Adopting WAC 236-51-225	31
5.	That the Legislature Has Not Repudiated General Administration’s Rules Is an Additional Indication That the Rules Were Within the Agency’s Authority	32
C.	General Administration’s Rules Are Consistent With the Statute They Are Intended to Implement.....	33
1.	The Rules Defining “Displaced Employee” Are Consistent with RCW 41.06.142(1)(b) and (c)	33
2.	The Court Should Grant Deference to General Administration’s Interpretation of the Statute.....	36
3.	General Administration’s Rule Defining a Displaced Employee Provides a Fair and Objective Standard of Application, While the Federation’s Approach Would Lead to Uncertainty and Absurd Results.....	37
4.	The Federation Did Not Produce Any Legislative History That Clearly Supports Its Interpretation of the Statute	41
5.	WAC 236-51-225 Is Consistent With RCW 41.06.142.....	44
D.	General Administration’s Rules Are Not Arbitrary and Capricious	45
1.	WAC 236-51-006 and WAC 236-51-010(11) Are Not Arbitrary and Capricious	45
2.	WAC 236-51-225 Is Not Arbitrary and Capricious	46
V.	CONCLUSION	48

TABLE OF AUTHORITIES

Cases

<i>Anderson, Leach & Morse, Inc. v. Liquor Control Bd.</i> , 89 Wn.2d 688, 575 P.2d 221 (1978).....	16
<i>Armstrong v. State</i> , 91 Wn. App. 530, 958 P.2d 1010 (1998).....	passim
<i>Asarco, Inc. v. Puget Sound Air Pollution Control Agency</i> , 51 Wn. App. 49, 751 P.2d 1129 (1988).....	17
<i>Barrington v. Eastern WA Univ.</i> , 41 Wn. App. 259, 703 P.2d 1066, review denied, 104 Wn.2d 1019 (1985).....	5, 39
<i>Cunningham v. Cmty. Coll. Dist. 3</i> , 79 Wn.2d 793, 489 P.2d 891 (1971).....	5
<i>D.W. Close Co., Inc. v. WA State Dep't of Labor & Indus.</i> , 143 Wn. App. 118, 177 P.3d 143 (2008).....	18, 33
<i>Dot Foods, Inc. v. Dep't of Revenue</i> , 141 Wn. App. 874, 173 P.3d 309 (2007).....	37
<i>Federated Am. Ins. Co. v. Marquardt</i> , 108 Wn.2d 651, 741 P.2d 18 (1987).....	17
<i>Green River Cmty. Coll. Dist. 10 v. Higher Educ. Personnel Bd.</i> , 95 Wn.2d 108, 622 P.2d 826 (1980), adhered to and modified, 95 Wn.2d 962, 633 P.2d 1324 (1981).....	passim
<i>Hama Hama Co. v. Shorelines Hearings Bd.</i> , 85 Wn.2d 441, 536 P.2d 157 (1975).....	17, 29, 36, 37
<i>Hi-Starr, Inc. v. Liquor Control Bd.</i> , 106 Wn.2d 455, 722 P.2d 808 (1986).....	16

<i>Keeton v. Dep't of Soc. & Health Servs.</i> , 34 Wn. App. 353, 661 P.2d 982, review denied, 99 Wn.2d 1022 (1983).....	5
<i>Morin v. Johnson</i> , 49 Wn.2d 275, 300 P.2d 569 (1956).....	32
<i>Ortblad v. State</i> , 88 Wn.2d 380, 561 P.2d 201 (1977).....	4
<i>Qwest Corp. v. WA Util. & Transp. Comm'n</i> , 140 Wn. App. 255, 166 P.3d 732 (2007).....	37
<i>S.A.H. ex rel. S.J.H. v. Dep't of Social & Health Serv.</i> , 136 Wn. App. 342, 149 P.3d 410 (2006).....	17, 33
<i>Snow's Mobile Homes, Inc. v. Morgan</i> , 80 Wn.2d 283, 494 P.2d 216 (1972).....	43
<i>Spokane Cy. Health Dist. v. Brockett</i> , 120 Wn.2d 140, 839 P.2d 324 (1992).....	37
<i>Spry v. Miller</i> , 25 Wn. App. 741, 610 P.2d 931 (1980).....	21
<i>State ex. rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n</i> , 140 Wn.2d 615, 999 P.2d 602 (2000).....	29
<i>WA Fed'n of State Empl. v. Dep't of Soc. & Health Servs.</i> , 90 Wn. App. 501, 966 P.2d 322 (1998).....	5
<i>WA Fed'n of State Empl. v. Joint Cent. for Higher Educ.</i> , 86 Wn. App. 1, 933 P.2d 1080 (1997).....	5
<i>WA Fed'n of State Empl. v. Spokane Cmty. Coll.</i> , 90 Wn.2d 698, 585 P.2d 474 (1978).....	5
<i>WA Indep. Tel. Ass'n v. WA Utilities & Transp. Comm'n</i> , 148 Wn.2d 887, 64 P.3d 606 (2003).....	46

<i>Western WA Univ. v. WA Fed'n of State Empl.</i> , 58 Wn. App. 433, 793 P.2d 989 (1990).....	5
<i>Whatcom Cy. v. Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	37

Statutes

Laws of 1961, ch. 1	4
Laws of 1979, ex. sess., ch. 46, § 1.....	5
Laws of 1979, ex. sess., ch. 46, § 2.....	5
Laws of 2002, ch. 354.....	6
Laws of 2002, ch. 354, § 403(1).....	7
RCW 28B.16.240.....	5
RCW 34.05	11, 14
RCW 34.05.330(3).....	14
RCW 34.05.534(1).....	14
RCW 34.05.542(1).....	14
RCW 34.05.570(1).....	16
RCW 34.05.570(2)(b)(i)	14
RCW 34.05.570(2)(c)	16
RCW 35.68.076	19
RCW 41.06	4, 6
RCW 41.06.142	passim
RCW 41.06.142(1).....	8

RCW 41.06.142(1)(b)	passim
RCW 41.06.142(1)(b) and (c)	passim
RCW 41.06.142(1)(c)	passim
RCW 41.06.142(1)(d)	44
RCW 41.06.142(3).....	7
RCW 41.06.142(4).....	12, 23
RCW 41.06.142(4)(a)	24, 27
RCW 41.06.142(4)(d)	passim
RCW 41.06.142(4)(d)(iii)	26
RCW 41.06.142(4)(e)	26, 44
RCW 41.06.142(5)(a)	9
RCW 41.06.380	5, 7, 35, 42
RCW 41.80	6
RCW 41.80.001	7
RCW 43.19	19
RCW 43.19.011(2)(d).....	19
RCW 43.19.190	19
RCW 43.19.1906	19
RCW 43.19.450	19
RCW 46.08.150	19

Other Authorities

1 K. Davis, *Administrative Law Treatise* § 5.05 (1958) 17

Rules

WAC 236 19

WAC 236-48..... 19, 20

WAC 236-51..... 10, 38

WAC 236-51-006..... passim

WAC 236-51-010(11)..... passim

WAC 236-51-010(20)..... 22

WAC 236-51-010(21)..... 26

WAC 236-51-110..... 23

WAC 236-51-110(4)..... 24

WAC 236-51-110(5)..... 24

WAC 236-51-115..... 24

WAC 236-51-120(1)..... 24

WAC 236-51-120(2)(a) and (b)..... 25

WAC 236-51-120(3)..... 27

WAC 236-51-200..... 25

WAC 236-51-200(1)(a) 25

WAC 236-51-215(1)(a) 26

WAC 236-51-225..... passim

WAC 236-51-250.....	45
WAC 236-51-302.....	22, 23
WAC 236-51-305(3).....	22
WAC 236-51-305(7)(f).....	28
WAC 236-51-500.....	26
WAC 236-51-500, -502, -505, -510, -515, -600.....	26
WAC 236-51-510(1).....	27
WAC 236-51-515.....	27
WAC 236-51-710(2).....	26
WAC 236-51-710(3)(a)	26, 27
WAC 236-745(2)(c)(i).....	27
WAC 357-43.....	15
WAC 357-43-020.....	47

I. INTRODUCTION

This case is a rule challenge under the administrative procedure act to three rules adopted by the Washington State Department of General Administration (General Administration). General Administration adopted the rules to implement RCW 41.06.142, which permits state agencies and educational institutions to contract for services customarily and historically performed by state employees. The Washington Federation of State Employees (Federation), which represents some of the employees covered by the statute and the rules, alleged that the three rules exceeded the authority the legislature had given to General Administration, that the rules were inconsistent with the statute they were intended to implement, and that they were arbitrary and capricious. The Thurston County Superior Court agreed with the Federation that the rules in question exceeded General Administration's authority to adopt. The court did not reach the claims that the rules were inconsistent with the statute or were arbitrary and capricious. General Administration asks this Court to reverse the superior court and to uphold the rules against all claims.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The superior court erred in entering Conclusion of Law No. 2, concluding that WAC 236-51-006, WAC 236-51-010(11), and WAC 236-51-225 exceeded the authority of the Department of General Administration (General Administration) to adopt.

2. The superior court erred in not concluding that WAC 236-51-006, WAC 236-51-010(11), and WAC 236-51-225 were consistent with RCW 41.06.142.

3. The superior court erred in not concluding that WAC 236-51-006, WAC 236-51-010(11), and WAC 236-51-225 were not arbitrary and capricious.

4. The superior court erred in entering a judgment declaring that WAC 236-51-006, WAC 236-51-010(11), and WAC 236-51-225 are invalid and of no force and effect.

B. Issues Pertaining to Assignments of Error

1. RCW 41.06.142 provides that a state agency or educational institution proposing to contract for services must comply with certain procedures with respect to “[e]mployees in the classified service whose positions or work would be displaced by the contract.” RCW 41.06.142 directed General Administration to adopt rules to “establish procedures to

ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service.” In order to establish fair, objective, and competitive bid procedures, General Administration adopted WAC 236-51-006 and WAC 236-51-010(11). These rules establish an objectively measureable standard that implements the statutory language “[e]mployees in the classified service whose positions or work would be displaced by the contract” as meaning that the proposed contract would “result[] in the employee being laid off or assigned to a different job classification.”

(a) Did General Administration exceed its statutory authority in adopting these rules? (Assignments of Error 1 and 4)

(b) Are these rules consistent with RCW 41.06.142? (Assignments of Error 2 and 4)

(c) Are these rules arbitrary and capricious? (Assignments of Error 3 and 4)

2. In establishing fair, objective, and competitive bid procedures, General Administration also adopted WAC 236-51-225, which provides: “An employee business unit awarded a contract by an agency shall not perform or bid on solicitations for services not contained in its contract unless their agency approves in writing.”

(a) Did General Administration exceed its statutory authority in adopting WAC 236-51-225? (Assignments of Error 1 and 4)

(b) Is this rule reasonably consistent with RCW 41.06.142? (Assignments of Error 2 and 4)

(c) Is this rule arbitrary and capricious? (Assignments of Error 3 and 4)

III. STATEMENT OF THE CASE

A. The Civil Service Law Prior to 2002

The State Civil Service Law, RCW 41.06, was originally enacted by initiative in 1960. Laws of 1961, ch. 1. Two primary features of the civil service law as it existed prior to 2002 are pertinent to this case.

First, RCW 41.06 did not provide for full-scale collective bargaining by state employees over their wages. Rather, employees, through their bargaining representatives, could only “present their views, data, and other matters which might bear upon the action ultimately taken by the Budget Director [now the Director of the Office of Financial Management (OFM)] with respect to the salary survey.” *Ortblad v. State*, 88 Wn.2d 380, 383, 561 P.2d 201 (1977). No obligation existed on the part of the Budget Director (later OFM Director) or the Governor to reach a binding agreement on salaries for inclusion in their budget proposals. *Id.*

Moreover, the ultimate authority for determining state employee salaries was the legislature, which was free to adopt its own budget proposals.

Second, state agencies and educational institutions were generally prohibited from contracting with a third party to perform services that had been customarily and historically performed by employees in the civil service. This principle was initially established by case law,¹ and was later incorporated into statute in former RCW 41.06.380.²

B. Personnel System Reform Act of 2002

In 2002, the legislature made significant changes to the state civil service system by adopting the Personnel System Reform Act of 2002

¹ See *Cunningham v. Cmty. Coll. Dist. 3*, 79 Wn.2d 793, 489 P.2d 891 (1971); *WA Fed'n of State Empl. v. Spokane Cmty. Coll.*, 90 Wn.2d 698, 585 P.2d 474 (1978); *Barrington v. Eastern WA Univ.*, 41 Wn. App. 259, 703 P.2d 1066, review denied, 104 Wn.2d 1019 (1985); *Western WA Univ. v. WA Fed'n of State Empl.*, 58 Wn. App. 433, 793 P.2d 989 (1990); *WA Fed'n of State Empl. v. Joint Cent. for Higher Educ.*, 86 Wn. App. 1, 933 P.2d 1080 (1997); *WA Fed'n of State Empl. v. Dep't of Soc. & Health Servs.*, 90 Wn. App. 501, 966 P.2d 322 (1998). But see *Keeton v. Dep't of Soc. & Health Servs.*, 34 Wn. App. 353, 661 P.2d 982, review denied, 99 Wn.2d 1022 (1983) (purchase of goods distinguished from purchase of services).

² Former RCW 41.06.380 read:

(1) Nothing contained in this chapter shall prohibit any department, as defined in RCW 41.06.020, from purchasing services by contract with individuals or business entities if such services were regularly purchased by valid contract by such department prior to April 23, 1979: PROVIDED, That no such contract may be executed or renewed if it would have the effect of terminating classified employees or classified employee positions existing at the time of the execution or renewal of the contract.

(2) Nothing contained in this chapter prohibits the department of transportation from purchasing construction services or construction engineering services, as those terms are defined in RCW 47.28.241, by contract from qualified private businesses as specified in RCW 47.28.251(2).

Laws of 1979, ex. sess., ch. 46, § 2. A comparable section existed in the former Higher Education Personnel Law. See former RCW 28B.16.240 (Laws of 1979, ex. sess., ch. 46, § 1).

(PSRA). Laws of 2002, ch. 354 (SHB 1268). The PSRA rested on three “legs,” as the Federation acknowledged at the superior court level. CP 15, 116. One leg was to grant full-scope collective bargaining over wages to state employees, which was a major expansion from prior law. This aspect of the PSRA is implemented in an extensive process set forth in RCW 41.80, a separate chapter from the civil service law (RCW 41.06).

The second leg of the PSRA was to allow state agencies to contract for services, including those that had been customarily and historically performed by civil service employees, under certain conditions. This aspect of the PSRA is reflected in RCW 41.06.142, and is discussed in detail below.

The final leg of the PSRA was to make various changes to the civil service system, such as reducing the number of civil service job classifications and giving the Director of the Department of Personnel greater authority.

These three legs represented political trade-offs of goals that had long been sought by organized labor (such as collective bargaining over wages) and by management (such as permitting contracting for services historically performed by state employees). The PSRA represented a significant change from prior law in both of these respects. Then Governor Locke stated: “Substitute House Bill No. 1268 is an historic

civil service reform act.” CP 65. Governor Gregoire termed the PSRA “landmark legislation.” Administrative Record (AR) 4467.³

C. Competitive Contracting Under RCW 41.06.142

The PSRA repealed the statute that had governed contracting out of civil service work, former RCW 41.06.380, and replaced it with RCW 41.06.142.⁴

RCW 41.06.142 provides in part:

(1) Any department, agency, or institution of higher education may purchase services, including services that have been customarily and historically provided by employees in the classified service under this chapter, by contracting with individuals, nonprofit organizations, businesses, employee business units, or other entities if the following criteria are met:

(a) The invitation for bid or request for proposal contains measurable standards for the performance of the contract;

(b) Employees in the classified service whose positions or work would be displaced by the contract are provided an opportunity to offer alternatives to purchasing services by contract and, if these alternatives are not accepted, compete for the contract under competitive contracting procedures in subsection (4) of this section;

³ In order to give agencies and institutions, and employees and unions, time to prepare for the changes put into place by the PSRA, various provisions of the act were phased in over time. The effective date for both collective bargaining agreements entered into pursuant to the expanded collective bargaining rights and the authority of agencies to enter into contracts pursuant to RCW 41.06.142 was July 1, 2005. RCW 41.80.001, RCW 41.06.142(3).

⁴ Laws of 2002, ch. 354, § 403(1). The complete text of RCW 41.06.142 is attached as Appendix A to this brief.

(c) The contract with an entity other than an employee business unit includes a provision requiring the entity to consider employment of state employees who may be displaced by the contract;

(d) The department, agency, or institution of higher education has established a contract monitoring process to measure contract performance, costs, service delivery quality, and other contract standards, and to cancel contracts that do not meet those standards; and

(e) The department, agency, or institution of higher education has determined that the contract results in savings or efficiency improvements. The contracting agency must consider the consequences and potential mitigation of improper or failed performance by the contractor.

Under the PSRA, then, agencies may purchase services by contracting with “individuals, nonprofit organizations, businesses, employee business units, or other entities.” RCW 41.06.142(1). The services contracted for can include those “that have been customarily and historically provided by employees in the classified service.” *Id.*

The PSRA provides certain opportunities to “[e]mployees in the classified service whose positions or work would be displaced by the contract.” RCW 41.06.142(1)(b). Such employees may “offer alternatives to purchasing services by contract,” that is, they may attempt to dissuade the agency from contracting at all by offering alternatives that would fulfill the agency’s objectives instead of contracting. *Id.* Such

employees also may decide to form an employee business unit⁵ to “compete for the contract” if alternatives to contracting are not accepted. *Id.*⁶ Moreover, if the agency does decide to contract and an employee business unit does not win the contract, “employees who may be displaced by the contract” must be considered for employment by the entity with which the agency contracts. RCW 41.06.142(1)(c). These opportunities granted to employees impose corresponding obligations on agencies that are considering contracting, such as providing notices to employees so that they can offer alternatives and so that they can form employee business units to bid on the contract.

However, while the statute gives significant opportunities to and imposes duties on agencies with respect to “[e]mployees in the classified service whose positions or work would be displaced by the contract,” RCW 41.06.142(1)(b), the statute does not define this phrase in any greater detail.

⁵ An employee business unit is usually referred to by the acronym, EBU.

⁶ RCW 41.06.142(5)(a) defines an “employee business unit” as:

[A] group of employees who perform services to be contracted under this section and who submit a bid for the performance of those services under subsection (4) of this section.

D. Rule-Making Activities of General Administration Under RCW 41.06.142

RCW 41.06.142(4)(d) directed General Administration to adopt certain rules to carry out the provisions of the statute. That section provides:

The director of general administration, with the advice and assistance of the department of personnel, shall, by rule, establish procedures to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service. Such rules shall include, but not be limited to: (i) Prohibitions against participation in the bid evaluation process by employees who prepared the business unit's bid or who perform any of the services to be contracted; (ii) provisions to ensure no bidder receives an advantage over other bidders and that bid requirements are applied equitably to all parties; and (iii) procedures that require the contracting agency to receive complaints regarding the bidding process and to consider them before awarding the contract. . . .

Pursuant to this legislative direction, General Administration conducted an extensive public rule-making process from early 2003 through early 2004. General Administration held over 20 public forums and hearings statewide and received input from over 900 stakeholders, including the Federation and several other labor unions. AR 4442. This culminated in the Director of General Administration adopting rules to implement RCW 41.06.142 on March 17, 2004, with the rules becoming effective on July 1, 2005. AR 3055. The rules are codified in WAC 236-51.

Of the extensive set of rules adopted by General Administration, the Federation challenged three under the administrative procedure act (APA), RCW 34.05. The first two challenged rules relate to General Administration's definition of "displaced employee."

WAC 236-51-006 states:

If state employees will not be displaced. If state employees will not be displaced, agencies shall comply with RCW 41.06.142 (1)(a), (d) and (e), and applicable laws and rules governing the purchase of such services.

WAC 236-51-010(11) reads:

"Displaced employee" means a classified employee whose position or work would be eliminated, *resulting in the employee being laid off or assigned to a different job classification*, as a result of an award via the competitive contracting process.

(Emphasis added.)

Taken together, the effect of these two rules is to clarify that an agency's obligation under RCW 41.06.142(1)(b) to give employees the opportunity to offer alternatives and to form an employee business unit to compete for the contract is in those situations where the proposed contract would result either in the employee being laid off or assigned to a different job classification. If the employee remains employed in the same job class, the agency would not have to give notice, even though some portion of the employee's duties might be among those that would be performed under the proposed contract.

Consistent with the rule-making authority found in RCW 41.06.142(4), General Administration was required to establish a procedure to ensure that all bids are submitted in a fair and objective manner. The statute specifically states that the bid requirements must be applied equitably to all the parties. Under RCW 41.06.142, agencies have an obligation to affirmatively notify potentially displaced employees of the potential solicitation and to afford them certain opportunities. This affirmative obligation is in contrast to many typical bid processes, in which it is sufficient for the agency to make it possible for potential bidders to learn of a solicitation for bids from an agency's website, for example. The PSRA requires agencies that are considering contracting to first identify if there are any state employees to which RCW 41.06.142(1)(b) and (c) would apply. General Administration adopted WAC 236-51-006 and WAC 236-51-010(11) to answer this threshold question, specifically which state employees are able to participate in and be subject to the bidding procedures established under the statute. These rules also addressed concerns raised by stakeholders during the rule-making process that it was unclear to whom the phrase "[e]mployees in the classified service whose positions or work would be displaced by the contract," in RCW 41.06.142(1)(b) applied.⁷ The rules

⁷ For example, General Administration received the following feedback from a

establish a fair and measurably objective standard, as required in the statute's rule-making authority, to define what constitutes a displaced employee under RCW 41.06.142(1)(b) and (c).

The other rule that the Federation challenged is WAC 236-51-225, which reads:

Limits on performance of services not contained in a contract. An employee business unit awarded a contract by an agency shall not perform or bid on solicitations for services not contained in its contract unless their agency approves in writing.

Consistent with the rule-making authority found in RCW 41.06.142, this rule was necessary to clarify the status of employee business unit members in bid processes. The status of employee business unit members as “[e]mployees in the classified service whose positions or work would be displaced by the contract,” in RCW 41.06.142(1)(b), is fully resolved through the contracting process in which they are the successful bidder. In any subsequent bid process for other services or in other agencies, employee business unit members remain subject, as state employees, to the direction of their employer.

In early 2006, approximately two years after General Administration adopted the rules, the Federation challenged some of them

stakeholder: “A precise definition [of “displaced”] is necessary so employees may determine whether they are or are not covered.” AR 2868. General Administration received feedback from another stakeholder “that displaced is too vague a term.” AR 2960.

administratively. The Federation petitioned the Director of General Administration to amend or repeal certain of the rules, including the three that the Federation pursued to the court level in this case. The Director denied the request. AR 4439-4442. The Federation then sought review by the Governor, pursuant to RCW 34.05.330(3), who also rejected the challenge. AR 4467.⁸ None of the other unions that represent state civil service employees filed an administrative challenge to any of General Administration's rules.

E. Proceedings in Superior Court

On April 6, 2007, the Federation filed a petition for judicial review of administrative rule and for declaratory judgment in Thurston County Superior Court under the state APA, RCW 34.05.⁹ CP 4-8. The APA provides for the "validity of any rule [to] be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county" RCW 34.05.570(2)(b)(i).

The Federation did not challenge General Administration's rule-making process, only the substance of the rules. None of the other unions that represent state civil service employees filed any administrative or court challenge to any of General Administration's rules. The rules apply

⁸ The Federation was not required to appeal to the Governor prior to filing a court action. RCW 34.05.534(1).

⁹ A challenge to a rule, other than on procedural grounds, may be "filed at any time." RCW 34.05.542(1).

to all civil service employees, not just those represented by the Federation or other unions.¹⁰

The Federation argued that the rules under challenge, WAC 236-51-006, WAC 236-51-010(11), and WAC 236-51-225, should be declared invalid on three bases: (1) the rules exceeded the scope of rule-making authority granted to General Administration under RCW 41.06.142, (2) the rules were inconsistent with RCW 41.06.142, and (3) the rules were arbitrary and capricious.

General Administration certified the administrative record of the rule-making process. CP 9-11.¹¹ The parties submitted briefs and other materials (CP 12-32, 33-45, 46-47, 51-65, 66-109, 110-119) and presented oral argument (RP 1-60). The superior court orally ruled that each of the three rules was invalid as exceeding the scope of General Administration's rule-making authority. The court expressly did not address the claims that the rules were inconsistent with RCW 41.06.142 or that they were arbitrary and capricious. RP 61-65. The court's oral ruling was reduced to a judgment. CP 120-122. General Administration filed a timely appeal to this Court. CP 123-128.

¹⁰ The Director of Personnel also adopted rules dealing with employees in employee business units and their relationship to the civil service laws and rules. *See* WAC 357-43. The Federation has not challenged any of those rules in court.

¹¹ The administrative record consisted of nine volumes and is 4,519 pages in length. *See* AR 1-4519.

IV. ARGUMENT

A. The Federation Has a Heavy Burden to Prove That General Administration's Rules Are Invalid

RCW 34.05.570(2)(c) provides:

In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; *the rule exceeds the statutory authority of the agency*; the rule was adopted without compliance with statutory rule-making procedures; *or the rule is arbitrary or capricious.*

(Emphasis added.)

A rule is presumed to be valid. *Anderson, Leach & Morse, Inc. v. Liquor Control Bd.*, 89 Wn.2d 688, 695, 575 P.2d 221 (1978). “The burden of demonstrating the invalidity of agency action is on the party asserting the invalidity.” RCW 34.05.570(1). A party attacking the validity of a rule must present compelling reasons why the rule is in conflict with the intent and purpose of the statute being implemented. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986); *Armstrong v. State*, 91 Wn. App. 530, 537, 958 P.2d 1010 (1998).

A rule will be upheld on judicial review if it is “reasonably consistent” with the statute being implemented. *Green River Cmty. Coll. Dist. 10 v. Higher Educ. Personnel Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980), *adhered to and modified*, 95 Wn.2d 962, 633 P.2d 1324 (1981); *Federated Am. Ins. Co. v. Marquardt*, 108 Wn.2d 651, 655, 741 P.2d 18

(1987); *S.A.H. ex rel. S.J.H. v. Dep't of Social & Health Serv.*, 136 Wn. App. 342, 348, 149 P.3d 410 (2006); *Armstrong v. State*, 91 Wn. App. at 537; *Asarco, Inc. v. Puget Sound Air Pollution Control Agency*, 51 Wn. App. 49, 53, 751 P.2d 1129 (1988). A party challenging a rule as not being “reasonably consistent” with the statute being implemented has a high standard to meet. “We perceive no *compelling considerations* indicating this construction is erroneous. . . . [W]e think it cannot be said *convincingly* that these agencies have arrogantly overstepped their proper functions by purporting to amend the [statute].” *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448-49, 536 P.2d 157 (1975) (emphasis added).

The court is not free to substitute its judgment as to the desirability or wisdom of a rule, for the legislative body has committed those questions to administrative judgment and not to judicial judgment. *Federated Am. Ins. Co. v. Marquardt*, 108 Wn.2d at 655, citing 1 K. Davis, *Administrative Law Treatise* § 5.05, at 315 (1958).

“[A]gency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts and circumstances.” *Id.* Where there is room for two opinions, action is not arbitrary and capricious, even though a reviewing court may believe it to

be erroneous. *Id.* See also *D.W. Close Co., Inc. v. WA State Dep't of Labor & Indus.*, 143 Wn. App. 118, 130, 177 P.3d 143 (2008).

In reviewing an administrative action, the appellate court sits in the same position as the superior court. The appellate court applies the proper standard of review directly to the record of the administrative proceedings and not to the findings and conclusions of the superior court. *D.W. Close Co.*, 143 Wn. App. at 125-26.

B. The Department of General Administration Acted Within Its Statutory Authority Under RCW 41.06.142 in Adopting the Three Rules Being Challenged

1. The Legislature Directed General Administration to Adopt Rules to Implement RCW 41.06.142 in Recognition of the Agency's Expertise in Public Contracting Procedures

The superior court erred in accepting the Federation's argument that General Administration exceeded its statutory authority under RCW 41.06.142 in adopting the three rules under challenge. In RCW 41.06.142, the legislature established a framework for agencies and institutions to contract for services and spelled out some of the requirements for that activity. However, the legislature recognized that it had not enacted a comprehensive scheme and directed General Administration to adopt rules to implement aspects of the contracting process to ensure that the process was "fair and objective." RCW 41.06.142(4)(d).

The legislature's selection of General Administration to adopt the rules reflects the extensive and comprehensive contracting expertise that General Administration has developed in more than 50 years as the state's purchasing agent and lead on contracting for goods, services, and public works. *See, e.g.,* RCW 43.19.190 and WAC 236-48 (purchasing procedures for material, supplies, services, and equipment for most state agencies and institutions); RCW 43.19.1906 (competitive bidding procedure); RCW 43.19.450 (contracting for architectural and engineering services and contract administration for construction). General Administration is well-versed in the process of adopting rules pursuant to the APA, having adopted numerous rules pursuant to the agency's general rule-making authority. *See* RCW 43.19.011(2)(d) (rule-making authority of Director of General Administration); WAC 236.¹²

In concluding that General Administration's rule-making authority under RCW 41.06.142 was quite limited, the superior court apparently viewed the establishment of fair and objective procedures under RCW 41.06.142 as a discrete, relatively simple activity. Such a view is misplaced. As other procedural rules General Administration has adopted

¹² In addition to the general grant of rule-making authority to General Administration in RCW 43.19.011(2)(d), the legislature has recognized General Administration's expertise in other areas by delegating it rule-making authority in statutes other than RCW 43.19. *See* RCW 35.68.076; RCW 46.08.150. The legislature's grant of rule-making authority to General Administration in RCW 41.06.142 is consistent with these prior acts.

for solicitation and evaluation of bids illustrate, the breadth of rules necessary to achieve a fair and objective bid process is quite expansive. Such rules must deal with the content and form of the bid solicitation documents; notice to potential bidders of the solicitation and amendments to the solicitation; the content and form of bids submitted by bidders; receipt and opening of bids by the agency; evaluation of bids by the agency; notification to bidders of the successful bidder; rights to protest or appeal the contract award; and entry into the contract. *See, e.g.*, WAC 236-48. In delegating many aspects of the implementation of RCW 41.06.142 to General Administration, the legislature recognized this. The superior court erred in accepting the Federation's position that this delegation of rule-making authority should be narrowly construed.

2. General Administration Acted Within Its Rule-Making Authority Under RCW 41.06.142 When It Adopted WAC 236-51-006 and WAC 236-51-010(11)

The superior court erred in accepting the Federation's argument that WAC 236-51-006 and WAC 236-51-010(11) are invalid as being beyond General Administration's authority to adopt. The court and the Federation are reading the grant of rule-making authority to General Administration too narrowly. RCW 41.06.142(4)(d) directed General Administration to "by rule, establish *procedures* to ensure that bids are submitted and evaluated in a *fair* and *objective* manner and that there

exists a *competitive* market for the service.” (Emphasis added.) While RCW 41.06.142(4)(d) does set forth certain subjects that General Administration’s rules must include, by its terms the statute is not a narrow grant of authority. “Such rules shall include, *but not be limited to*” (Emphasis added.) “Once the legislature has properly delegated rule-making authority to a state agency, that power is liberally construed. *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972).” *Spry v. Miller*, 25 Wn. App. 741, 745, 610 P.2d 931 (1980).

Setting forth when the employees’ opportunities and the agencies’ corresponding obligations under RCW 41.06.142(1)(b) and (c) are triggered is an integral part of the bid submittal and evaluation procedures for which General Administration was directed by the legislature to adopt rules. Indeed, consistent with this rule-making authority, the rules establish a fair and objective manner for submitting and evaluating bids. This is accomplished by identifying who is a displaced employee for purposes of submitting a bid. This is the threshold determination that agencies must make and continues to be a critical determination throughout the contracting process.

None of the many other rules General Administration adopted outlining the detailed procedures for bid submittal and evaluation comes

into play unless the proposed contract would result in “[e]mployees whose positions or work would be displaced by the contract.” RCW 41.06.142(1)(b). The concepts of fairness and objective measurable standards in the bidding process mean that employees and agencies and institutions have to know what this statutory language means in order to fulfill their responsibilities under RCW 41.06.142. A review of the steps in the overall competitive contracting process, as set forth in RCW 41.06.142 and in the rules adopted by General Administration that the Federation has not challenged, makes this clear.

Development of proposal for bids. Under General Administration’s rules, both “employees whose work or positions would be displaced” and other potential bidders may provide technical assistance to an agency in the preparation of the bid solicitation document and performance work statement.¹³ WAC 236-51-302. However, potentially displaced employees are not to determine the award methodology and scoring to be used in the evaluation of bids. *Id.* This rule is clearly within the legislature’s direction in RCW 41.06.142(4)(d) to General Administration to adopt rules “to ensure that bids are submitted and

¹³ A performance work statement must be included as part of the solicitation documents. WAC 236-51-305(3). A performance work statement is “a statement of the technical, functional and performance characteristics or requirements of the work to be performed. The statement identifies essential functions to be performed, determines performance factors, including the location of the work, the units of work, the quantity of work units, and the quality and timeliness of the work units.” WAC 236-51-010(20).

evaluated in a fair and objective manner.” It is also within that same authority to ensure that the bid requirements are applied equitably to all the parties. In order for employees or an agency to follow WAC 236-51-302, the employees and the agency have to be able to determine which employees are covered by the statutory language “[e]mployees whose positions or work would be displaced by the contract.” Accordingly, rules defining who is a displaced employee are consistent with the rule-making authority found in RCW 41.06.142 requiring General Administration to implement rules to ensure fairness, objectivity, and equitable application of the bidding process.

Notice of intent to solicit bids. Under WAC 236-51-110, which implements RCW 41.06.142(1)(b), an agency must provide written notice to potentially displaced employees of the agency’s intent to solicit bids. Such notification is a key step in conducting a fair and objective bid submittal and evaluation process. As mentioned earlier, unlike many typical bid processes in which it is sufficient for the agency to make it possible for a vendor to learn of the potential solicitation, under RCW 41.06.142(4) the agency has a clear obligation to ensure that potentially displaced employees know of the potential solicitation. To identify the employees to whom it must give this notice, an agency has to know what the statutory language “[e]mployees whose positions or work

would be displaced by the contract” means. Likewise, employees have to know whether or not they are entitled to notice.

Opportunity for employees to offer alternatives and agency response. WAC 236-51-110(4), implementing RCW 41.06.142(4)(a), provides that the notice of intent to solicit bids must include a statement that employees have 60 calendar days from the date of notification to offer alternatives to competitive contracting. WAC 236-51-110(5) provides that the agency must notify such employees of the amount and type of state resources allocated by the agency to assist them in developing alternatives. The consideration of alternatives is a key step in conducting a bid process. General Administration’s purchasing rules encourage consulting and conducting pre-bid conferences with vendors to illuminate ways for the agency to refine and perfect its solicitation for bids. Likewise, the alternatives generated by potentially displaced employees may enable the agency to refine and perfect their solicitation. Both the agency and the employees have to know who is entitled to receive notice of the opportunity to offer alternatives and notice of the assistance available to develop alternatives.¹⁴

WAC 236-51-120(1), implementing RCW 41.06.142(4)(a), provides that an agency must respond in writing to all alternatives offered

¹⁴ See also WAC 236-51-115 regarding employees who want to use state resources other than those offered by the agency to develop alternatives.

by potentially displaced employees. Again, RCW 41.06.142(4)(d) requires General Administration to ensure the bid process is fair, objective, and equitably applied to all the parties. Consistent with its statutory authority, General Administration adopted WAC 236-51-006 and WAC 236-51-010(11) because agencies and employees have to know who is entitled to submit alternatives, receive assistance in developing alternatives, and receive an agency response to any alternatives.

Forming an employee business unit. If the agency does not accept any of the alternatives offered by employees, WAC 236-51-120(2)(a) and (b) provide that the agency shall notify the employees in writing of its intent to proceed with soliciting bids and the amount and type of state resources allocated by the agency to assist potentially displaced employees in developing a notice of intent to form an employee business unit. Again, the agency and employees have to know which employees are entitled to this notice and to this assistance.

WAC 236-51-200, implementing RCW 41.06.142(1)(b), provides that potentially displaced employees that decide to compete by forming an employee business unit shall notify the agency before the agency's intended day to solicit bids. The notice by the employee business unit must include a "list of those potentially displaced employees forming the employee business unit." WAC 236-51-200(1)(a). If the employee

business unit decides to submit a bid, that bid must include as direct costs the “[s]alaries, wages, overtime, and benefits of employees directly performing the service.” WAC 236-51-215(1)(a). See RCW 41.06.142(4)(e). In order for these rules to be complied with, the employees and agency must have an objectively measureable definition of what constitutes a displaced employee to know which employees are entitled to form or be in an employee business unit.

Complaint and appeal procedures. An essential element of a “fair and objective” bidding process is the ability to seek review of whether other elements in the process have been complied with. Accordingly, RCW 41.06.142(4)(d)(iii) expressly directed General Administration to adopt rules for procedures for complaints regarding the bidding process. General Administration adopted such rules. WAC 236-51-500, -502, -505, -510, -515, -600. A complaint may be filed by a bidder or potential bidder. WAC 236-51-500. A potential bidder can include an employee business unit. WAC 236-51-010(21). Thus, it is important for an agency and employees to know which employees can form an employee business unit. WAC 236-51-710(2) provides that complainants can file an appeal to an administrative law judge with regard to an agency’s response to their complaint. WAC 236-51-710(3)(a) provides that displaced or potentially displaced employees may file an appeal with respect to the agency’s

adherence to the statutory notice requirements of RCW 41.06.142(4)(a). Again, for an agency and employees (and the administrative law judge) to know who can avail themselves of these administrative review procedures, they have to know the meaning of the statutory phrase “[e]mployees whose positions or work would be displaced by the contract” in RCW 41.06.142(1)(b).

WAC 236-51-120(3) provides that an agency’s failure to give timely notice to all potentially displaced employees of the agency’s intent to proceed with soliciting bids is a ground for a complaint under WAC 236-51-510(1), which could, at a minimum, delay the solicitation. *See* WAC 236-51-515. Furthermore, under RCW 41.06.142(4)(d) and General Administration’s rules failure to give such notice is a basis of appeal to an administrative law judge, who can require the agency to start the bidding process all over. *See* WAC 236-51-710(3)(a), WAC 236-745(2)(c)(i). Once again, the requirement in the statute that General Administration shall by rule, establish a bidding process that is fair, objective, and equitably applied makes it critical for an agency and employees to know to whom the statutory language “[e]mployees whose positions or work would be displaced by the contract” applies. General Administration met this requirement by adopting WAC 236-51-006 and WAC 236-51-010(11).

Opportunity to be considered for hiring by a non-employee business unit contractor. WAC 236-51-305(7)(f), implementing RCW 41.06.142(1)(c), provides that the contract accompanying the bid solicitation must include: “Provisions requiring an entity other than an employee business unit to consider employment of state employees who may be displaced by the contract.” An agency and employees, as well as the contractor, have to know who these employees are in order to comply with this requirement.

The above recitation of the steps in the competitive contracting process demonstrates that knowing which employees the statutory language in RCW 41.06.142(1)(b) “[e]mployees whose positions or work would be displaced by the contract” applies to is critical at each stage of the process and is an integral part of the rules that the legislature directed General Administration to adopt. It is evident that General Administration adopted WAC 236-51-006 and WAC 236-51-010(11) pursuant to the legislature’s direction in RCW 41.06.142, requiring General Administration to adopt procedures to ensure that bids are submitted and evaluated in a fair and objective manner and are applied equitably to all the parties. This Court should reject the Federation’s and the superior court’s limited view of the rule-making authority given to General Administration in RCW 41.06.142(4)(d).

3. An Administrative Agency May Fill in the Gaps in Legislation Through Rule-Making

The powers of an administrative agency are derived from statutory authority expressly granted or necessarily implied. *State ex. rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 140 Wn.2d 615, 634, 999 P.2d 602 (2000). “[I]t is an appropriate function for administrative agencies to ‘fill in the gaps’ where necessary to the effectuation of a general statutory scheme. *See Barry & Barry v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972).” *Hama Hama Co.*, 85 Wn.2d at 448. *See also Green River*, 95 Wn.2d at 112.¹⁵ This is particularly true when the statutory language is unclear or ambiguous. *Green River*, 95 Wn.2d at 113.

Here, the statutory language in RCW 41.06.142(1)(b), “[e]mployees in the classified service whose positions or work would be displaced by the contract,” is ambiguous. This is evidenced by stakeholder comments during the rule-making process (*see, e.g.*, AR 2868 and AR 2960) and by the differing interpretations given to the language by General Administration and the Federation. General Administration’s rules implement the statutory language by specifying that the procedures

¹⁵ In *Green River*, the Higher Education Personnel Board had been granted authority to adopt rules for procedures for collective bargaining agreements. The court held that this authority was broad enough to support the board’s rule requiring mandatory interest arbitration by board, even though the statute did not mention such arbitration.

under RCW 41.06.142(1)(b) are triggered when the proposed contract would “result[] in the employee being laid off or assigned to a different job classification.” This gap filling is wholly consistent with the rule-making authority found in RCW 41.06.142(4)(d). These rules provide an objective and measurable standard for ensuring that bid requirements are applied equitably by first identifying which state employees will be allowed to participate in the bidding process. Further, the rules clarify who the “employees who may be displaced” and who must be considered for employment by the entity that was awarded the contract, pursuant to RCW 41.06.142(1)(c).

It is evident, then, that agencies needed guidance as to what the language in RCW 41.06.142(1)(b) and (c) meant. It was appropriate, and within the authority given to it by the legislature, for General Administration to have provided this guidance through its rules. Without General Administration’s rules, agencies and employees would be left to determine what the statutory language means without any further guidance. This would lead to confusion through inconsistent or conflicting applications, particularly in situations where only a portion of an employee’s duties would be covered by the proposed contract. This is precisely the type of situation in which a rule-making agency can “fill in the gaps” in the statutory scheme. General Administration’s rules were

“necessary to the effectuation of a general statutory scheme,” *Green River*, 95 Wn.2d at 112, and were within the agency’s authority to adopt.

4. General Administration Acted Within Its Rule-Making Authority in Adopting WAC 236-51-225

The superior court also erred in agreeing with the Federation’s position that the third rule under challenge, WAC 236-51-225, exceeded General Administration’s rule-making authority. Restated for convenience, that rule reads:

Limits on performance of services not contained in a contract. An employee business unit awarded a contract by an agency shall not perform or bid on solicitations for services not contained in its contract unless their agency approves in writing.

RCW 41.06.142(4)(d) expressly directs General Administration to establish rules relating to the submission of bids. WAC 236-51-225 expressly relates to submission of bids and is essential in determining who is eligible to submit bids. As noted previously, the status of employee business unit members as “[e]mployees in the classification service whose positions or work would be displaced by the contract,” in RCW 41.06.142(1)(b), is fully resolved through the contracting process in which they are the successful bidder. In any subsequent bid process for other services or in other agencies, employee business unit members remain subject, as state employees, to the direction of their employer. The

superior court erred in concluding that this rule exceeded General Administration's authority to adopt.

5. That the Legislature Has Not Repudiated General Administration's Rules Is an Additional Indication That the Rules Were Within the Agency's Authority

An additional indication that General Administration acted within its statutory authority in adopting the three rules in question is that the legislature has not repudiated the rules or General Administration's implementation of RCW 41.06.142. As the Supreme Court has noted: "[A]n administrative construction nearly contemporaneous with the passage of the statute, especially when the legislature fails to repudiate the contemporaneous construction, is entitled to great weight." *Green River*, 95 Wn.2d at 118. *See also Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

Here, General Administration began its rule-making process immediately upon the legislature's enactment of the Personnel System Reform Act of 2000. General Administration completed its process and adopted the rules on March 17, 2004, with an effective date of July 1, 2005. Four full legislative sessions have passed without the legislature amending RCW 41.06.142 to change General Administration's implementation of the statute, or in any other way repudiating the agency's rules.

For these reasons, this Court should conclude that the Federation has failed to meet its burden to present compelling reasons showing that General Administration exceeded its statutory authority in adopting WAC 236-51-006, WAC 236-51-010(11), and WAC 236-51-225.

C. General Administration's Rules Are Consistent With the Statute They Are Intended to Implement

1. The Rules Defining "Displaced Employee" Are Consistent with RCW 41.06.142(1)(b) and (c)

The Federation's second claim was that General Administration's rules are inconsistent with RCW 41.06.142. The superior court did not reach that claim. Contrary to the Federation's position, the rules are consistent with the statute.

"A rule exceeds the agency's authority if it conflicts with a statute. *Devine v. Dep't of Licensing*, 126 Wn. App. 941, 956, 110 P.3d 237 (2005)." *D.W. Close Co., Inc. v. WA State Dep't of Labor & Indus.*, 143 Wn. App. at 130. The test for judging whether the rule conflicts with the statute is whether the rule is "reasonably consistent" with the statute. *Green River*, 95 Wn.2d at 112; *S.A.H. ex rel. S.J.H.*, 136 Wn. App. at 348.

General Administration's rule providing that its rules apply only where employees are displaced, WAC 236-51-006, and its rule defining "displaced employee," WAC 236-51-010(11), are consistent with RCW 41.06.142. RCW 41.06.142(1)(b) provides that agencies may

purchase services by contract if “[e]mployees in the classified service whose positions or work would be displaced by the contract” are provided the opportunity to offer alternatives and to form an employee business unit to compete for the contract. (Emphasis added.) General Administration’s rules interpreting this statutory language as meaning a situation in which an employee is either laid off or is assigned to a different job classification as a result of the contract, are consistent with the statutory language. General Administration’s rules give meaning to the portion of the passage about “positions being displaced,” as being a situation in which an employee would be laid off. The rules also give meaning to the passage about “work being displaced.” The rules interpret “work being displaced” as meaning that the employee’s duties have so changed as a result of the contract that the employee is no longer assigned to the proper civil service classification.

The interpretation of the statute advanced by the Federation before the superior court is that the statute is invoked whenever any portion of an employee’s duties is changed by the contract (except perhaps for a de minimis amount). The Federation’s interpretation is contrary to the intent of the PRSA, in that it would return the State to the same situation that existed prior to the PRSA, *i.e.*, that state agencies were essentially prohibited from contracting out for services customarily and historically

performed by civil service employees. It is not reasonable to accept the Federation's view that when the legislature repealed the former statute prohibiting contracting out (RCW 41.06.380) and replaced it with RCW 41.06.142, the legislature was intending no practical change in the law. In determining whether a rule is "reasonably consistent" with the statute it is intended to implement, the court looks at the purpose of the statute. *Armstrong*, 91 Wn. App. at 537. The court will consider "the subject matter within which the word is used and the statutory context in which it appears." *Id.* at 539. The overriding purpose of RCW 41.06.142 was to remove the prohibition against state agencies contracting for services customarily and historically done by civil service employees. General Administration's rules advance this purpose; the Federation's approach does not.

The Federation's interpretation finds no specific support in the language of RCW 41.06.142(1)(b). However, there is language in the statute that supports General Administration's rule. For instance, the next subsection, RCW 41.06.142(1)(c), requires that a contract with an entity other than an employee business unit must include a provision requiring the entity to "consider employment of *state employees who may be displaced by the contract.*" (Emphasis added.) This phrasing indicates that the legislature was concerned with employees who would experience

a significant change in employment status as a result of the contract. Indeed, the statutory language suggests that the legislature was concerned that such employees might need an alternative to imminent unemployment. The Federation's suggestion that the statute applies to employees who will remain stably employed in the same job classification at the same pay, even though some portion of their duties are let by contract, is inconsistent with the language of RCW 41.06.142(1)(c). Thus, the language of the statute supports General Administration's rule.

2. The Court Should Grant Deference to General Administration's Interpretation of the Statute

The Court should grant deference to General Administration's interpretation of RCW 41.06.142(1)(b) and (c). The court's purpose in construing a statute is to ascertain and give effect to the legislature's intent. *Armstrong v. State*, 91 Wn. App. at 537. When a statute is ambiguous, the construction placed on the statute by the agency charged with its administration and enforcement should be given great weight in determining legislative intent. *Hama Hama Co.*, 85 Wn.2d at 448. The basis for this deference is the special expertise of administrative agencies, which "is often a valuable aid in interpreting and applying an ambiguous statute" *Id.*

The courts have accorded deference to the interpretation of statutes by agencies with recognized expertise in the subject matter of the statute. *See, e.g., Hama Hama Co.*, 85 Wn.2d at 448 (deference given to interpretation by Shorelines Hearings Board and Department of Ecology of Shorelines Management Act); *Spokane Cy. Health Dist. v. Brockett*, 120 Wn.2d 140, 155, 839 P.2d 324 (1992) (deference given to interpretation of statutes by State Board of Health and Department of Health regarding needle exchange programs). As discussed above, General Administration has extensive expertise in establishing bid solicitation procedures. This Court should give great weight to General Administration's interpretation of RCW 41.06.142.

3. General Administration's Rule Defining a Displaced Employee Provides a Fair and Objective Standard of Application, While the Federation's Approach Would Lead to Uncertainty and Absurd Results

The courts will construe a statute to avoid "unlikely, absurd, or strained consequences." *Dot Foods, Inc. v. Dep't of Revenue*, 141 Wn. App. 874, 886, 173 P.3d 309 (2007), quoting *Whatcom Cy. v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). *Accord, Qwest Corp. v. WA Util. & Transp. Comm'n*, 140 Wn. App. 255, 261, 166 P.3d 732 (2007). General Administration's rule defining a displaced employee provides an objective and quantifiable certainty as to when and which components of

the bidding process in the statute applies. By contrast, the Federation's approach would lead to uncertainty and absurd results and would be inconsistent with the legislature's intent in the PSRA to authorize contracting for services, including those customarily and historically done by state employees.

General Administration's rules are clear and simple to apply and provide certainty to agencies and employees. Under WAC 236-51-010(11) and WAC 236-51-006, the provisions of RCW 41.06.142(1)(b) and (c) are triggered when the proposed contract would result in an employee either "[1] being laid off or [2] assigned to a different job classification." Both of these are events certain. Either the employee is laid off or the employee is not. Either the employee's position is assigned to a different job classification or it is not.

The Federation's position would lead to numerous problems in application. Under the Federation's approach, RCW 41.06.142(1)(b) and (c) (as well as the rules adopted by General Administration in WAC 236-51) would be triggered whenever the duties that a contract might take away from one or more civil service employees are, in the Federation's words, "sufficiently diminished." CP 24. This standard is much too subjective and will lead to uncertainty on the part of agencies and employees and subsequent legal disputes. The Federation contended

below that there was a de minimis exception to the pre-2002 prohibition against contracting out and that RCW 41.06.142(1)(b) and (c) are not triggered when the impact of a contract on an employee's duties is de minimis. CP 24. Even assuming there was a de minimis exception in prior case law, which is not at all clear,¹⁶ the Federation does not articulate any standards for determining when the removal of duties would be de minimis versus when the removal of duties would be "sufficiently diminished." The Federation's approach leaves employees and agencies to guess at their options and responsibilities in every instance of the bidding process.

Under General Administration's rules, a fair bidding process is established allowing an agency to determine with relative ease and certainty which civil service employees would be entitled to the opportunities offered under RCW 41.06.142. In contrast, the Federation's approach would result in practical problems in agencies being able to identify which employees may access the opportunities set out in RCW 41.06.142(1)(b) and (c), *i.e.*, to receive notice that the agency is

¹⁶ The Federation contended that under the prior case law there was a de minimis exception to the prohibition against contracting out. CP 15, 26. This purported exception is dubious. The only appellate case referring to such an exception is *Barrington v. Eastern WA Univ.*, 41 Wn. App. 259, 703 P.2d 1066 (1985), in which the former Higher Education Personnel Board had recognized such an exception. However, the court in *Barrington* did not reach the question of whether it would recognize such an exception.

considering contracting, to offer alternatives, to form an employee business unit, to bid on the contract, and to be considered for employment if the contract is awarded to a non-employee business unit. As discussed earlier, these are not theoretical problems. If an agency fails to properly identify employees and fulfill the requirements under RCW 41.06.142 and General Administration's rules, the agency might well have to begin the entire contract solicitation process over, resulting in a loss of money, time, and efficiency.

The Federation's approach would also lead to absurd results if an employee business unit did win the contract. Under the Federation's approach, an agency could propose a contract that would cover some of the duties of one or more civil service employees but not result in the employees being laid off or reclassified. The employees would continue to be fully employed by the agency, at the same salary, in the same job classifications. However, the employees would be entitled to form an employee business unit and bid on the contract. Assuming the employee business unit won the contract, when would the employee business unit members, who remain employed full time by the agency doing their normal duties, perform the contract? On weekends? At night? Neither of these times may meet the agency's need to be in communication with or have oversight over those performing the contract. Or would such

employees seek to cut back on their normal duties for the agency? However, civil service employees have no right to unilaterally cut back on their hours.

Nor would it necessarily help the agency for the employees to be doing the contract work as an employee business unit, while their normal civil service duties were not being performed (or were being performed by other employees). Furthermore, if the employees were working full-time for the agency in their civil service positions and putting in additional time as members of an employee business unit performing the contract, this could trigger an obligation on the part of the agency to pay the employees at the overtime rate for some of their time. The numerous operational problems and legal issues raised by the Federation's approach illustrates its absurdity. For these reasons, the court should reject it. *Qwest*, 140 Wn. App. at 261.

4. The Federation Did Not Produce Any Legislative History That Clearly Supports Its Interpretation of the Statute

The legislative history of the Personnel System Reform Act of 2002 does not show that General Administration's rules defining displaced employee are inconsistent with RCW 41.06.142. In its challenge below, the Federation argued that RCW 41.06.142 was intended to continue in place the statutory and judicial restrictions against contracting out that

were in place prior to the 2002 act. The Federation is incorrect in this assertion.

As discussed above, the 2002 reform act rested on three “legs”: Granting greater collective bargaining rights to state employees; removing the general restriction against state agencies to contracting for services customarily and historically performed by civil service employees; and making various changes to the civil service system. The Federation’s view that the 2002 reform act essentially retained the severe limitations on contracting out that were in existence prior to 2002 fails to acknowledge the political trade-offs that made passage of the 2002 act possible. In exchange for full-scope collective bargaining, which some unions had been seeking for decades, state agencies got most of the restrictions lifted on contracting out civil service work. The legislature did not retain the general prohibition against agencies contracting for services customarily and historically performed by civil service employees. On the contrary, it repealed the statute (former RCW 41.06.380) that had embodied that general prohibition.

In the superior court, the Federation did not produce any legislative history that conclusively supports its position that the legislature did not intend to make any change in the law when it enacted RCW 41.06.142 as

part of the PSRA.¹⁷ The Federation’s view flies in the face of the clear language of RCW 41.06.142 that contracting for services is customarily and historically done by state employees is permitted. General Administration’s interpretation of the statute, as reflected in its rules, is the “interpretation that best advances the legislative purpose.” *Armstrong*, 91 Wn. App. at 537.

For the reasons set forth above, General Administration’s rule defining “displaced employee,” WAC 236-51-010(11), and its rule stating that the rules on competitive contracting do not apply if state employees will not be displaced, WAC 236-51-006, are reasonably consistent with RCW 41.06.142, and the Federation has not met its burden of showing that the rules are in conflict with the statute.

¹⁷ The Federation cited statements by individual members of the legislature in floor debate over various amendments to the 2002 bill. CP 30-31; Ex. A. However, the Federation did not point to any specific floor debate that is conclusive. For example, the floor comments by Representative Talcott that the Federation cited do not contain any discussion about when the duty to notify employees of their right to form an employee business unit arises. In any event, “statements and opinions of individual legislators generally are not considered by the courts in construing legislation” *Snow’s Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972).

The Federation also relied on what it considers a discrepancy between the bill report for the 2002 House Bill that eventually was enacted as the Personnel System Reform Act of 2002 and the bill report for the companion 2002 Senate Bill that was not enacted. CP 28-30, 35-39, 40-45. On closer examination, however, no purported inconsistency exists. The 2002 Senate Bill (SB 5577) was the *companion* bill to the House Bill (HB 1268), not a competing version of the legislation. The language of both bills, as introduced, was identical, including what became RCW 41.06.142(1)(b) and (c). CP 53-56, 57-60. The language of the Senate Bill is identical to the enacted language of RCW 41.06.142(1)(b) and (c). Thus, any minor inconsistency in language between the House and Senate bill reports on the 2002 bills merely reflects a difference in writing styles between the legislative staffers who wrote the respective bill reports, not on any actual difference in language between the two bills.

5. WAC 236-51-225 Is Consistent With RCW 41.06.142

The third rule challenged by the Federation, WAC 236-51-225, is also reasonably consistent with RCW 41.06.142. Under that rule, an employee business unit that has been awarded a contract by an agency “is not to perform or bid on solicitations for services not contained in its contract unless their agency approves in writing.” The purpose of this rule is to ensure that a group of state employees that forms an employee business unit and does win a contract to perform work for their agency will devote their time, resources, and attention to performing the contract they have been awarded. The rule accomplishes this by requiring agency approval before the employee business unit bids on or performs work on other contracts.

WAC 236-51-225 is reasonably consistent with RCW 41.06.142. The successful contractor, whether an employee business unit or a private firm, must provide the services for which the agency has contracted. RCW 41.06.142 contemplates that an employee business unit that wins a contract will be devoting its employees’ time and energies toward fulfilling the contract.¹⁸ If the employee business unit believes it has the

¹⁸ See RCW 41.06.142(1)(d), requiring an agency to have in place a contract monitoring process to make sure that the contract is performed and the services delivered are of satisfactory quality; RCW 41.06.142(4)(e), requiring a bid by an employee business unit to include the costs of the employees’ salaries and benefits and other costs the employee business unit will incur.

capacity to submit a bid on or perform another contract besides the one it is already performing, it is only reasonable that the agency be able to assure itself that the employee business unit can perform its current contract and also another contract. WAC 236-51-250, requiring agency approval in such situations, is reasonably consistent with the purposes of RCW 41.06.142.

D. General Administration's Rules Are Not Arbitrary and Capricious

1. WAC 236-51-006 and WAC 236-51-010(11) Are Not Arbitrary and Capricious

For all the reasons discussed above, General Administration's rules on who is a displaced employee are not arbitrary and capricious. General Administration adopted the rules following a lengthy rule-making process in which hundreds of stakeholders were given the opportunity to participate. During the course of its rule-making process, General Administration received comments indicating that stakeholders needed guidance regarding when the provisions of RCW 41.06.142(1)(b) and (c) were triggered. The rules General Administration adopted provide certainty of application and are consistent with the language and intent of the statute. Under these circumstances, the Court cannot say that General Administration's actions were "willful and unreasoning and taken without regard to the attending facts and circumstances." *WA Indep. Tel. Ass'n v.*

WA Utilities & Transp. Comm'n, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). The Federation's dissatisfaction with the result of the rule-making process does not establish that the rules are arbitrary and capricious.

2. WAC 236-51-225 Is Not Arbitrary and Capricious

Likewise, WAC 236-51-225, adopted as part of the same lengthy rule-making process, is not arbitrary and capricious. General Administration had good and sufficient reasons for adopting this rule. If an employee business unit has been successful in obtaining a contract from the agency, the agency has a direct interest in ensuring that the employee business unit is devoting the time, resources, and attention necessary to carry out the contract the agency has awarded it. If an employee business unit is contemplating bidding on or performing an additional contract, the agency should have a say in whether or not diverting a portion of the employee business unit's time, resources, and attention to that other contract is compatible with the employee business unit's obligations under the existing contract.

The Federation appears to consider civil service employees who form an employee business unit and win a contract from their agency as independent contractors, no longer connected to their agency. Such a characterization is incorrect. Under the rules adopted by the Department of Personnel, employees in an employee business unit remain state

employees. "Employee business unit members continue to be classified employees." WAC 357-43-020. Thus, there is nothing unusual about the agency retaining some control over the activities of the members of the employee business unit, especially when those activities could directly impact the employee business unit's performance of its contract with the agency.

The Federation contended below that WAC 236-51-225 could have the effect of putting employees out of work for periods between contracts. However, the Federation has presented no evidence that this has, or will, occur. The Federation raised a facial challenge to the rule as written, not an "as applied" challenge. The rule is not arbitrary and capricious.

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V. CONCLUSION

For the reasons set forth above, the Court should reverse the superior court and uphold the validity of WAC 236-51-006, WAC 236-51-010(11), and WAC 236-51-225.

RESPECTFULLY SUBMITTED this 6th day of October, 2008.

ROBERT M. MCKENNA
Attorney General



SPENCER W. DANIELS
WSBA No. 6831
Assistant Attorney General



MITCHEL R. SACHS
WSBA No. 19051
Assistant Attorney General

Attorneys for Appellant
Department of
General Administration

APPENDIX A

WAC 236-51-006:

If state employees will not be displaced. If state employees will not be displaced, agencies shall comply with RCW 41.06.142(1)(a), (d) and (e), and applicable laws and rules governing the purchase of such services.

WAC 236-51-010(11):

“Displaced employee” means a classified employee whose position or work would be eliminated, resulting in the employee being laid off or assigned to a different job classification, as a result of an award via the competitive contracting process.

WAC 236-51-225:

Limits on performance of services not contained in a contract. An employee business unit awarded a contract by an agency shall not perform or bid on solicitations for services not contained in its contract unless their agency approves in writing.

APPENDIX B

RCW 41.06.142

Purchasing services by contract — Effect on employees in the classified service — Criteria to be met — Bidding — Definitions.

(1) Any department, agency, or institution of higher education may purchase services, including services that have been customarily and historically provided by employees in the classified service under this chapter, by contracting with individuals, nonprofit organizations, businesses, employee business units, or other entities if the following criteria are met:

(a) The invitation for bid or request for proposal contains measurable standards for the performance of the contract;

(b) Employees in the classified service whose positions or work would be displaced by the contract are provided an opportunity to offer alternatives to purchasing services by contract and, if these alternatives are not accepted, compete for the contract under competitive contracting procedures in subsection (4) of this section;

(c) The contract with an entity other than an employee business unit includes a provision requiring the entity to consider employment of state employees who may be displaced by the contract;

(d) The department, agency, or institution of higher education has established a contract monitoring process to measure contract performance, costs, service delivery quality, and other contract standards, and to cancel contracts that do not meet those standards; and

(e) The department, agency, or institution of higher education has determined that the contract results in savings or efficiency improvements. The contracting agency must consider the consequences and potential mitigation of improper or failed performance by the contractor.

(2) Any provision contrary to or in conflict with this section in any collective bargaining agreement in effect on July 1, 2005, is not effective beyond the expiration date of the agreement.

(3) Contracting for services that is expressly mandated by the legislature or was authorized by law prior to July 1, 2005, including contracts and agreements between public entities, shall not be subject to the processes set forth in subsections (1), (4), and (5) of this section.

(4) Competitive contracting shall be implemented as follows:

(a) At least ninety days prior to the date the contracting agency requests bids from private entities for a contract for services provided by classified employees, the contracting agency shall notify the classified employees whose positions or work would be displaced by the contract. The employees shall have sixty days from the date of notification to offer alternatives to purchasing services by contract, and the agency shall consider the alternatives before requesting bids.

(b) If the employees decide to compete for the contract, they shall notify the contracting agency of their decision. Employees must form one or more employee business units for the purpose of submitting a bid or bids to perform the services.

(c) The director of personnel, with the advice and assistance of the department of general administration, shall develop and make available to employee business units training in the bidding process and general bid preparation.

(d) The director of general administration, with the advice and assistance of the department of personnel, shall, by rule, establish procedures to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service. Such rules shall include, but not be limited to: (i) Prohibitions against participation in the bid evaluation process by employees who prepared the business unit's bid or who perform any of the services to be contracted; (ii) provisions to ensure no bidder receives an advantage over other bidders and that bid requirements are applied equitably to all parties; and (iii) procedures that require the contracting agency to receive complaints regarding the bidding process and to consider them before awarding the contract. Appeal of an agency's actions under this subsection is an adjudicative proceeding and subject to the applicable provisions of chapter 34.05 RCW, the administrative procedure act, with the final decision to be rendered by an administrative law judge assigned under chapter 34.12 RCW.

(e) An employee business unit's bid must include the fully allocated costs of the service, including the cost of the employees' salaries and benefits, space, equipment, materials, and other costs necessary to perform the function. An employee business unit's cost shall not include the state's indirect overhead costs unless those costs can be attributed directly to the function in question and would not exist if that function were not performed in state service.

(f) A department, agency, or institution of higher education may contract with the department of general administration to conduct the bidding process.

(5) As used in this section:

(a) "Employee business unit" means a group of employees who perform services to be contracted under this section and who submit a bid for the performance of those services under subsection (4) of this section.

(b) "Indirect overhead costs" means the pro rata share of existing agency administrative salaries and benefits, and rent, equipment costs, utilities, and materials associated with those administrative functions.

(c) "Competitive contracting" means the process by which classified employees of a department, agency, or institution of higher education compete with businesses, individuals, nonprofit organizations, or other entities for contracts authorized by subsection (1) of this section.

(6) The requirements of this section do not apply to RCW 74.13.031(5).

[2008 c 267 § 9; 2002 c 354 § 208.]

Notes:

Short title -- Headings, captions not law -- Severability -- Effective dates -- 2002 c 354: See RCW 41.80.907 through 41.80.910.

NO. 37897-3-II

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

WASHINGTON FEDERATION OF
STATE EMPLOYEES,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF GENERAL
ADMINISTRATION,

Appellant.

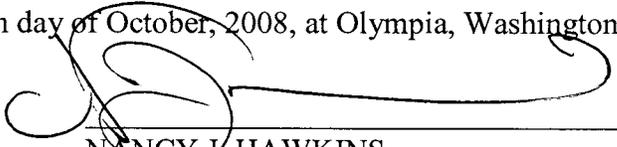
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STATE OF WASHINGTON
BY NANCY J. HAWKINS

I hereby certify that on October 6, 2008, I served a copy of the Brief of Appellant on all parties or their counsel of record via first class mail, postage prepaid, as follows:

Mr. Edward E. Younglove III
Younglove Lyman & Coker, PLLC
1800 Cooper Point Road SW, Bldg. 16
Olympia WA 98507-7846

DATED this 6th day of October, 2008, at Olympia, Washington.



NANCY J. HAWKINS
Legal Assistant