

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
AT TACOMA

Alanna Gehr and Washington Federation of State Employees,
Appellants,

v.

South Puget Sound Community College, Respondent.

**BRIEF OF APPELLANTS ALANNA GEHR and WASHINGTON
FEDERATION OF STATE EMPLOYEES**

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STATE OF WASHINGTON
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FILED
COURT OF APPEALS
DIVISION II

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A. ASSIGNMENTS OF ERROR

Assignment of Error

The Thurston County Superior Court erred in dismissing the Petition for Common Law Writ of Certiorari brought by the Washington Federation of State Employees (WFSE) and Alanna Gehr (Gehr).

Issue Pertaining to Assignment of Error

Did Thurston County Superior Court Judge Richard Hicks commit reversible error when he ordered the dismissal of a Petition for a Common Law Writ of Certiorari filed by a labor union and an interested party/member on the basis that (1) the Personnel Resources Board's (PRB) failure to exercise a statutorily given duty did not amount to an illegal act, and (2) when he concluded the underlying issue at hand was a "bargaining" issue and should have been addressed through the Public Employees Relations Commission (PERC)?¹

II. STATEMENT OF THE CASE

A. *Statement of Proceedings*

On April 9, 2008, Petitioners filed a Petition for Common Law Writ of Certiorari and Review of Administrative Decision in Thurston County

¹ Transcript of Proceedings, p. 11, lines 18-23; and p. 11, line 25 through p. 12, line 7..

Superior Court.² The Petition for Common Law Writ of Certiorari was filed following the dismissal of an appeal filed by Petitioners before the Washington State Personnel Resources Board (PRB) of the exemption of a bargaining unit position at South Puget Sound Community College (SPSCC).³ Under the applicable RCWs and WACs there exists no direct statutory authority to appeal the denial of jurisdiction by the PRB.⁴

In response to the Petition for the Writ, Respondent filed a Motion to Dismiss the Writ of Certiorari.⁵ Petitioners challenged the Motion to Dismiss.⁶

On July 11, 2008, the matter was heard before Thurston County Superior Court Judge Richard Hicks. After reviewing pleadings filed by both sides and hearing arguments, Judge Hicks granted Respondent's Motion to Dismiss the Writ.⁷

Petitioners Washington Federation of State Employees (WFSE) and Alanna Gehr (Gehr) appeal the order dismissing the Petition for Common Law Writ of Certiorari and Review of Administrative Decision.

² Clerk's Papers (CP) 3-25.

³ CP pp. 14-17.

⁴ CP p. 5, lines 7-10.

⁵ CP pp. 56-65.

⁶ CP pp. 73-78.

⁷ CP pp. 79-81.

B. Statement of Facts

The WFSE is a labor organization and an exclusive bargaining representative representing approximately 40,000 civil service employees of the State of Washington.⁸ Gehr is a member of the WFSE and an employee of SPSCC. She has been an active union member for a significant period of time, is very familiar with the position at issue, and has a strong interest in the maintenance and integrity of existing bargaining units at SPSCC.⁹

On or about September 28, 2006, the WFSE received notice from SPSCC that it intended to reallocate and exempt an Office Assistant 3 position currently in the College Foundation Office, from its current position in a WFSE bargaining unit to a mandatory exempt position under the premise of RCW 41.06.070(2).¹⁰ Of particular note, at the time SPSCC chose to move the bargaining unit position the position was vacant, with no current incumbent.¹¹ The standards to determine whether or not a position is "exempt" and not subject to a bargaining unit are contained within RCW 41.06.070(2).

The criteria encompassed under RCW 41.06.070(2) create the facts, circumstances and duties that are considered when determining if a position

⁸ CP p. 4, lines 2-4.

⁹ CP p. 4, lines 13-16.

¹⁰ CP p. 6, lines 8-11; CP p. 19.

¹¹ CP p. 19.

is in fact "exempt" or "confidential" under the law.¹² If an appeal of the criteria utilized for an exemption is brought, it may only be brought under the language of RCW 41.06.170. RCW 41.06.170(3) states:

(3) Any employee whose position has been exempted after July 1, 1993, shall have the right to appeal, either individually or through his or her authorized representative, not later than thirty days after the effective date of such action to the personnel appeals board through June 30, 2005, and to the Washington personnel resources board after June 30, 2005.¹³

WAC 357-52-010(1)(d) then states:

(1) Within WGS, the following actions may be appealed:

(d) An employee whose position has been exempted from Chapter 41.06 RCW may appeal the exemption to the board.¹⁴

A full hearing on both the merits of the proposed exemption under the criteria established by RCW 41.06.070(2) and SPSCC's motion to dismiss the appeal were heard by the PRB on September 20, 2007.¹⁵ In its decision the PRB did not rule on the merits of the exemption. Instead, the PRB summarily dismissed the appeal filed by the WFSE and Gehr due to the fact that, in its opinion, the case at hand was actually a dispute concerning whether or not the disputed position is removed from a bargaining unit.¹⁶ Thereby, the PRB concluded that disputes regarding bargaining units are

¹² RCW 41.06.070(2).

¹³ RCW 41.06.170(3).

¹⁴ WAC 357-52-010(1)(d); CP p. 15.

¹⁵ CP p. 14.

¹⁶ CP p. 16, lines 21-23.

outside of the PRB's jurisdiction.¹⁷ The PRB denied it had jurisdiction to hear the matter.

Under RCW 41.06.170(2), decisions of the PRB on appeals filed after June 30, 2005, shall be final and not subject to further appeal.¹⁸ Therefore, no statutory avenue existed for an appeal of the PRB's summary dismissal of the WFSE's appeal of the proposed exemption.

On April 9, 2008, the WFSE and Gehr filed a Petition for Common Law Writ of Certiorari and Review of Administrative Decision.¹⁹ In their petition the WFSE and Gehr alleged both arbitrary and capricious action and illegal actions on the part of the PRB. On or about August 15, 2008, Thurston County Superior Court Judge Richard Hicks denied the Petition for Common Law Writ of Certiorari and Review of Administrative Decision.²⁰ In his decision, Judge Hicks opined that the matter was in fact a bargaining unit issue and that the PRB's action in denying jurisdiction did not constitute an illegal act for purposes of issuing a Common Law Writ.²¹

III. ARGUMENT

A. Standard of review of trial court's dismissal of a Petition for Common Law Writ of Certiorari.

¹⁷ *Id.*

¹⁸ RCW 41.06.170(3).

¹⁹ CP pp. 3-25.

²⁰ CP pp. 79-81.

²¹ Transcript (Tr.) p. 11, line 4 through p. 12, line 1.

Washington recognizes the right to seek discretionary review of an administrative agency decision under the court's inherent constitutional power (also known as constitutional or common law certiorari). *Foster v. King County*, 83 Wn. App. 339, 343, 921 P.2d 552 (1996). The Court of Appeals reviews the denial of a petition for a constitutional writ of certiorari for an abuse of discretion. *Klickitat County v. Beck*, 104 Wn. App. 453, 458, 16 P.3d 692 (2001). A court abuses its discretion when it bases its decision on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Put another way, if a trial court refuses to exercise its power to grant discretionary review, it must do so for tenable reasons. *Wash. Pub. Employees Ass'n v. Wash. Personnel Res. Bd.*, 91 Wn. App. 640, 658, 959 P.2d 143 (1998); *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986). If the trial court abused its discretion, the remedy is to remand for issuance of the writ. *Bridle Trails*, 45 Wn. App. at 251-52.

B. Standard for issuance of a Common Law Writ of Certiorari.

The Superior Court has inherent power provided in Article IV, Section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P.2d 438 (1989); *Pierce County Sheriff v. Civil*

Serv. Comm'n, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983); *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 221, 643 P.2d 426 (1982).

The jurisdictional basis for issuance of a writ of review by certiorari is found in RCW 7.16.040, which provides:

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority. *Bridle Trails*, 45 Wn. App. at 252-53. Thus, a court will accept review only if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious. *Pierce County Sheriff*, 98 Wn.2d at 693-94; *Williams*, 97 Wn.2d at 221.

Additionally, although exercise of this inherent power is discretionary, it will not ordinarily occur if either a statutory writ or a direct appeal is available, unless the appellant can show good cause for not using those methods. *Bridle Trails*, 45 Wn. App. at 253; *Birch Bay Trailer Sales, Inc. v. Whatcom County*, 65 Wn. App. 739, 746, 829 P.2d 1109, review denied, 119 Wn.2d 1023 (1992).

Arbitrary and capricious means "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Foster*, 83 Wn. App at 347 (quoting *Kerr-Belmark Const. Co. v. City Council*, 36 Wn. App. 370, 373, 674 P.2d 684, review denied, 101 Wn.2d 1018 (1984)). "Illegality" is a more nebulous term.

In determining what constitutes an "illegal" act courts have generally required that it be determined that the board or agency decision under review be made outside of the respective board or agencies statutory authority. In *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d 271, 525 P.2d 774 (1974), the court stated at page 279: "An illegal act, in the context of administrative agency action, is an act which is contrary to statutory authority." In *Leschi* the court found that a petitioner's allegation that an agency had proceeded without a statutorily required environmental impact statement constituted a sufficient allegation of an illegal act to invoke the court's constitutional review power. The court in *Port Townsend School Dist. 50 v. Brouillet*, 21 Wn. App. 646, 587 P.2d 555 (1978), equated the illegal act requirement with a requirement that the agency has acted outside the scope of its statutory authority.

A Superior Court, in deciding whether to grant review, looks initially to the petitioner's allegations to determine whether, if true, they clearly demonstrate such a violation. *State ex rel. Dupont-Fort Lewis*

School Dist. 7 v. Bruno, 62 Wn.2d 790, 794, 384 P.2d 608 (1963). If they do, review should be granted and the court may proceed to dispose of the case on its merits. *State ex rel. Hood v. State Personnel Bd.*, 6 Wn. App. 872 (Div. II, 1972).

C. The Washington Personnel Resources Board's failure to act and exercise its statutory authority in reviewing the actions of South Puget Sound Community College constituted an illegal act therefore warranting the Superior Court's exercise of its authority to review such an act under a Common Law Writ of Certiorari.

The PRB decision to summarily refuse to consider the appeal of the WFSE and Gehr of the exemption of a bargaining unit position under the authority of RCW 41.06.070 constituted an "illegal" act on the part of the PRB, due to the PRB's failure to exercise its given jurisdictional authority. An illegal act, in the context of administrative agency action, is an act which is contrary to statutory authority. *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d at 279.

The authority and requirement of the PRB to hear appeals of exemptions under RCW 41.06.070 is clearly defined under RCW 41.06.170. As stated previously, RCW 41.06.170(3) states in pertinent part:

Any employee whose position has been exempted after July 1, 1993, shall have the right to appeal, either individually or through his or her authorized representative . . . to the Washington personnel resources board. . . .

Here, SPSCC chose to "exempt" a position once it had become vacant.²² SPSCC chose to justify the exemption under the criteria presented within RCW 41.06.070(2).²³ When SPSCC chose to utilize the criteria of RCW 41.06.070(2), the WFSE and Gehr objected. In its own letter to the WFSE, SPSCC admits that the "mandatory exemption in the statute (sp) RCW 41.06.070(2) suggests that we meet the criteria for the exemption."²⁴ Once SPSCC invoked the authority of RCW 41.06.070 to exempt a position, it necessarily invoked the jurisdiction and the authority of the PRB to hear any appeal of the proposed exemption. The legislature unequivocally vested the power to appeal the merits of an exemption brought under RCW 41.06.070 in the Washington Personnel Resources Board. In its decision of March 14, 2008, the PRB refused to exercise this statutory authority, leaving the WFSE and Gehr no avenue to challenge the criteria alleged by SPSCC to justify an exemption. If the PRB was given the statutory authority to hear appeals of exemption, then fails to exercise such authority leaving an appellant with no avenue of appeal, this failure to act constitutes an illegal act, and not just a mere error of law for any writ of certiorari analysis.

D. The Public Employment Relations Commission is not the proper avenue to challenge the merits of a proposed exemption claimed under RCW 41.06.070.

²² CP p. 19.

²³ *Id.*

²⁴ *Id.*

As part of the trial court's analysis in its denial of the Writ of Certiorari, it was stated that the WFSE and/or Gehr could have utilized the appeal process under the Public Employment Relations Commission (PERC) to challenge the exemption of a vacant bargaining unit position.²⁵ This conclusion and justification for denial of the Writ of Certiorari is in error.

Contrary to the conclusion reached by the trial court, PERC would have jurisdiction to decide issues related to collective bargaining requirements only under RCW Ch. 41.80. Specifically, under RCW 41.80.005 "collective bargaining" means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith, in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020. As argued to the trial court, the obligation to bargain was never an issue in the original challenge to the exemption. The exemption was bargained. The issue challenged has always been whether or not the SPSCC's basis for exemption was justified under RCW 41.06.070(2). PERC would not have had the authority to question the merits of the exemption, only whether or not the matter was bargained prior to the exemption being made. Jurisdiction for an appeal of the basis for an exemption brought under

²⁵ Tr. at p. 12, lines 20-22; Tr. p. 11, line 25 through p. 12, line 2.

the premise of RCW 41.06.070, per statute, lies exclusively with the PRB. The PRB refused to exercise its jurisdictional authority, thus illegally preventing the WFSE and Gehr from challenging the merits of the exemption at issue.

IV. CONCLUSION

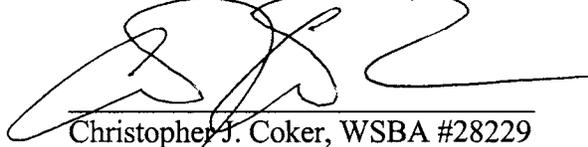
The trial court's decision to deny Petitioners' Petition for Common Law Writ of Certiorari and Review of Administrative Decision was done so in error. The trial court's tenable reasons for denial of the Petition for the Writ were that the actions of the PRB, for argument's sake, may have constituted an error of law, but that the error of law standard did not equate to an illegal act. In addition, the trial court surmised that Petitioners could have challenged the exemption at issue under the premise of PERC jurisdiction. While these are in fact tenable reasons, they are in error. As argued above, the PRB's failure to exercise its jurisdictional authority clearly equates to a circumstance where an agency or board acted outside of its jurisdictional authority. Refusal to afford jurisdiction to an injured party, where no other avenue for review exists, is in and of itself an illegal act on the part of the PRB, not just merely an error of law. The trial court erred in simply categorizing the PRB's actions as a mere error of law in its denial of the Petition for Common Law Writ.

Finally, the issue at hand has never been an issue of bargaining or the exercise of collective bargaining rights. It has always been an issue regarding the reasons behind the SPSCC's exemption of a position, and the validity and merits of those reasons. This challenge to the merits has not been fully adjudicated due to the PRB's and the trial court's refusal to exercise their respective authority. Petitioners respectfully request an Order remanding this matter back to the trial court so that the actual issues of this case can eventually be addressed.

DATED this 8th day of January, 2009.

Respectfully submitted,

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SUBSCRIBED AND SWORN to before me this 8th day of
January, 2009, by Angelique Dowell.



S. Rossire
Notary Public in and for the State of
Washington, residing at Olympia
My commission expires June 7, 2009