

Court of Appeals
Number 39334-4-II

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

Public School Employees of Washington, SEIU Local #1948,
Appellant

v.

Washington State Labor Relations Office, *Respondent*.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. Table of Authorities.....	vi
II. Introduction.....	1
III. Assignments of Error.....	2
IV. Issues Pertaining To Assignment of Error	3
V. Proceedings Below.....	5
VI. Statement of the Case.....	5
VII. Argument.....	17
A. The trial court erred in granting summary judgment in favor of the Defendant/Respondent LRO	17
1. The trial court erred by ruling that this matter was not a “justiciable controversy” and that it therefore did not meet the requirements of a declaratory judgment.....	19
a. The parties have existing and genuine rights and interests which are both direct and substantial.....	20
i. PSE’s duty of fair representation establishes direct and substantial rights sufficient to create a justiciable controversy.....	21
b. PSE has presented an actual, present and existing dispute.....	22

VII. Conclusion..... 44

VIII. Certificate of Mailing.....45

I. TABLE OF AUTHORITIES

Table of State Cases

<i>Allen v. Seattle Police Officer's Guild</i> , 100 Wn.2d 361, 371-372, 670 P.2d 246.....	21
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 199, 381 P.2d 966 (1963).....	18
<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 160, 829 P.2d 1087 (1992).....	25
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 262, 897 P.2d 1239 (1995).....	24
<i>City of Snohomish v. Joslin</i> , 9 Wn.App. 495, 498, 513 P.2d 293 (1973)	32
<i>Clearwater v. Skyline Constr. Co.</i> , 67 Wn. App. 305, 314, 835 P.2d 257 (1992), <i>review denied</i> , 121 Wn.2d 1005, 848 P.2d 1263 (1993)	24, 25
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)	33, 34
<i>Dep't of Transp. v. State Employees' Ins. Bd</i> , 97 Wn.2d 454, 458, 645 P.2d 1076 (1982)	32
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 458, 13 P.3d 1065 (2000) 81)	18
<i>Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.</i> , 189 Wash. 590, 66 P.2d 827, 109 A.L.R. 1472 (1937)	24
<i>Int'l Ass'n of Fire Fighters, Local Union 1052 v. Public Empl. Relations Comm'n</i> , 113 Wn.2d 197, 200-01, 778 P.2d 32 (1989)	40, 41
<i>International Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).	24

<i>Kelso Educ. Assn. v. Kelso Sch. Dist.</i> 453, 48 Wn.App.743, 749, 740 P.2d 889, <i>review denied</i> , 109 Wn.2d 1011 (1987).....	24
<i>King County v. Boeing Co.</i> , 18 Wn.App. 595, 602-03, 570 P.2d 713 (1977)	25
<i>Klauder v. San Juan Cy. Deputy Sheriffs' Guild</i> , 107 Wn.2d 338, 341, 728 P.2d 1044 (1986).....	40, 41
<i>Munsey v. Walla Walla College</i> , 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995).....	25
<i>Northwest Kennel Ass'n v. State</i> , 8 Wn. App. 314, 506 P.2d 878, <i>review denied</i> , 82 Wn.2d 1004 (1973).....	20
<i>Nostrand v. Little</i> , 58 Wn.2d 111, 361 P.2d 551 (1961), <i>appeal dismissed</i> , 368 U.S. 436, 82, S. Ct. 464, 7 L.Ed. 2d 426 (1962).....	19
<i>Perez v. Mid-Century Ins. Co.</i> , 85 Wn. App. 760, 765, 934 P.2d 731(1997)	24
<i>Schroeder v. Fageol Motors, Inc.</i> , 86 Wn. 2d 256, 260, 544 P.2d 20 (1975)	29
<i>Spokane Educ. Ass'n v. Barnes</i> , 83 Wn.2d 366, 375, 517 P.2d 1362 (1974).....	41
<i>State ex rel. O'Connell v. Dubuque</i> , 68 Wn.2d 553, 413 P.2d 972 (1966).	20
<i>Troxell v. Rainier Pub. Sch. Dist. No. 307</i> , 154 Wn.2d 345, 350, 111 P.3d 1173 (2005).....	17
<i>Washington State Patrol Lieutenants Ass'n v. Sandberg</i> , 88 Wn.App. 652, 657–58, 946 P.2d 404 (1997)	40, 41

<i>Womble v. Local Union No. 73 of the Int'l Bhd of Elec. Workers, AFL-CIO,</i> 64 Wn.App. 698, 701, 826 P.2d 224 (1992)	21
<i>Wright v. Jeckle,</i> 158 Wn.2d 375, 379, 144 P.3d 301 (2006).....	33
<i>Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima,</i> 122 Wn.2d 371, 393, 858 P.2d 245 (1993)	27

Table of Federal Cases

<i>First Nat'l Maintenance Corp. v. NLRB,</i> 452 U.S. 666, 69 L.Ed. 2d 318, 101 S.Ct. 2573 (1981).....	41
<i>Standard Oil Co. of Cal. v. Perkins,</i> 347 F.2d 379, 383 n.5 (9 th Cir. 1965).	27

Table of Administrative Decisions

<i>Federal Way Educ. Ass'n v. Board of Directors, Federal Way Sch. Dist. 210,</i> Pub. Empl. Relations Comm'n Dec. 232-A (EDUC 1977)	41
<i>Wenatchee v. Wenatchee Police Guild,</i> Pub. Empl. Relations Comm'n Dec. 780 (PECB, 1980)	41

Table of State Statutes

RCW 7.24	1,3, 4
RCW 7.24.010.....	19
RCW 7.24.020.....	19
RCW 41.06.170.....	34, 35, 36
RCW 41.56.....	10

RCW 41.80.....	1, 39
RCW 41.80.010.....	5,6,10, 11, 22
RCW 41.80.020.....	38,39
RCW 41.80.030.....	1, 2, 3, 9, 17, 18, 19, 22, 25, 30, 32, 34, 35
.....	36, 38, 42
RCW 41.80.040.....	37, 42
RCW 41.80.090.....	23
RCW 41.80.110.....	39
RCW 41.80.120.....	39

Table of Washington Administrative Codes

WAC 357-13	12, 13
------------------	--------

Table of Other Authorities

Elkouri and Elkouri, <i>How Arbitration Works</i> , Sixth Edition, page 16, (2003, American Bar Association)	25
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II. INTRODUCTION

The Plaintiff/Appellant Public School Employees of Washington, [hereinafter referred to as "PSE"], is a labor association which represents certain civil service employees of both Western Washington University [hereinafter referred to as "WWU"] and Central Washington University [hereinafter referred to as "CWU"]. PSE filed this matter in Thurston County Superior Court pursuant to RCW 7.24 et seq. in order to determine the rights of the civil service employees it represents under the Personnel Resources Reform Act of 2002 [hereinafter referred to as "PSRA"] codified at RCW 41.80. et seq.

The PSRA sets forth parameters for collective bargaining between higher education civil service employees and institutions of higher education. The statute at issue in this case specifically requires that collective bargaining agreements negotiated under the act, "provide a grievance procedure that culminates with final and binding arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement". RCW 41.80.030 (2) (a). Despite this clear and specific statutory language, the Defendant/Respondent Labor Relations Office [hereinafter referred to as "LRO"] has insisted that certain

provisions of collective bargaining agreements it negotiates on behalf of institutions of higher education be exempt from the coverage of the parties' contractual grievance and arbitration provisions. PSE filed the instant matter asking the trial court to enter judgment declaring that the LRO violates RCW 41.80.030(2) by seeking to exempt any provisions of the parties' collective bargaining agreement from its grievance and arbitration provisions.

After both parties moved for summary judgment, the trial court granted the LRO's motion for summary judgment dismissal, and PSE timely appealed.

III. ASSIGNMENTS OF ERROR

- A. The trial court erred in granting the Defendant/Respondent LRO's motion for summary judgment and dismissing this case on the basis that it did not present a justiciable controversy.
- B. The trial court erred by ruling that, even if the matter had presented a justiciable controversy, summary judgment in favor of the Defendant/Respondent LRO was nevertheless appropriate by adopting their erroneous interpretation of the PSRA, specifically, RCW 41.80.030.

- C. The trial court erred by failing to grant summary judgment in favor of the Plaintiffs/Appellant PSE and failing to enter judgment declaring that the LRO violates RCW 41.80.030 by seeking to exempt certain provisions of the collective bargaining agreement from the grievance and arbitration provisions of the parties' collective bargaining agreement;
- D. The trial court erred by basing its ruling solely on whether "classification and reclassification" provisions in a collective bargaining agreement were properly exempted from its grievance and arbitration provisions;
- E. The trial court erred by failing to consider and rule on whether any other provision (besides classification and reclassification) could be properly excluded from the grievance and arbitration provisions contained in a collective bargaining agreement bargained under the PSRA.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. This case was brought pursuant to RCW 7.24 (the Uniform Declaratory Judgment Act) and was filed prior to the parties signing a collective bargaining agreement which excluded certain provisions from the labor agreement's grievance and arbitration provisions. Although the labor agreement was

ratified by the parties, it was subsequently repudiated by the State (due to the financial crisis). The parties were once more entering into negotiations for a collective bargaining agreement. Should the trial court, when considering a matter brought pursuant to RCW 7.24, involving statutory interpretation relating to a repudiated contract that would be re-negotiated, determine that the case presents a justiciable controversy?

2. Should a trial court grant summary judgment in favor of an institution of higher education (or its designee) based on an interpretation of PSRA which contradicts the plain language of that statute?
3. According to its Complaint, PSE had asked the trial court to declare that the LRO violates the PSRA when it seeks to exempt certain provisions of the parties' collective bargaining agreement from its grievance and arbitration process. [CP 7]. In spite of this, the trial court ruled on the legality of excluding only one provision from the labor agreement's grievance and arbitration process. Should a trial court grant summary judgment under the PSRA based on its determination that the parties are not required to bargain over only one of the provisions that is

excluded from the labor agreement's grievance and arbitration process?

V. PROCEEDINGS BELOW

The case was assigned to the Honorable Richard D. Hicks who ruled on both parties' Motions for Summary Judgment. The trial court granted the Defendant's Motion for Summary Judgment, and denied the Plaintiff's Motion for Summary Judgment. [CP 1352-1362]. A verbatim report of proceedings has not been filed in this Court.

VI. STATEMENT OF THE CASE

The PSRA was enacted in 2002 (with an effective date of July 1, 2004) and, as stated *supra*, sets forth parameters for collective bargaining between higher education civil service employees and institutions of higher education. Although the PSRA provides that the respective governing board of each of the institutions of higher education is the "employer" for purposes of negotiating agreements with labor associations, it also provides that a governing board may elect to have its negotiations conducted by the Governor or the governor's designee. RCW 41.80.010 (4). The LRO, which is a division of the Washington State Office of

Financial Management, [hereinafter referred to as "OFM"], is one such "governor's designee". Pursuant to the PSRA, it was therefore empowered to negotiate collective bargaining agreements on behalf of institutions of higher education at their request. RCW 41.80.010 (4).

PSE began representing certain higher education employees of WWU [hereinafter referred to as "PSE of WWU"] in 2000 and thereafter engaged in full-contract negotiations with WWU in 2001. [CP 1237]. From the outset, labor relations between PSE and WWU were contentious. [CP 1237]. PSE, by and through its chief negotiator Eric T. Nordlof, Esq., was compelled to file five unfair labor practice complaints with PERC based on collective bargaining violations committed by WWU. [CP 1237]. These charges included, but were not limited to: skimming bargaining unit work, failing to bargain in good faith over mandatory subjects of bargaining, making unilateral changes in working conditions without bargaining, and refusing to provide information to PSE necessary to bargaining. [CP 1237-1238].

Based in part on WWU's "historical pattern of rejecting the basic principles of collective bargaining", the Public Employment Relations Commission [hereinafter referred to as "PERC"], ordered

an extraordinary remedy related to the parties' bargaining for the 2009-2011 collective bargaining agreement. [CP 1241, CP 1315-1318]. The remedy ordered by PERC included the following remedial provisions: 1) the appointment of a mediator for negotiations for the 2009-11 collective bargaining agreement; and 2) certification of outstanding mandatory subjects of bargaining for binding interest arbitration. [CP 1242, CP 1316-1317].

In 2008, the governing board of WWU elected to have the LRO act as its exclusive bargaining representative for this 2009-11 labor agreement with PSE of WWU. [CP 230]. Throughout these negotiations, the LRO negotiators insisted they were not merely negotiating on behalf of WWU, but that the agency had become the *de facto* employer for the purposes of collective bargaining. [CP 230]. Indeed, at one point during the negotiations, a tentative agreement on the final contract settlement was disrupted because the LRO's negotiator's supervisors in Olympia disagreed with its terms. [CP 230].

During the negotiations for the 2009-11 labor agreement, PSE attempted to reach agreement on a contract in which all provisions were subject to the grievance procedure, including final and binding arbitration, consistent with the PSRA. [CP 231]. The

LRO negotiator, for his part, made it clear that the parties would never achieve an agreement unless PSE was willing to exempt certain provisions from the contract's grievance and arbitration process. [CP 232]. As a result, several important provisions contained in the final agreement were exempted from all or part of the grievance procedure. These include: Article 8, Nondiscrimination and Affirmative Action, (employees who believe their rights have been violated are limited to the employer's discrimination policy or applicable law and cannot submit the issue to the grievance process) [CP 290]; Article 30.1, Probationary Period (probationary employees may be disciplined or terminated for any reason with no recourse to the grievance process) [CP 324-325]; Article 30.2, Trial Service (employees who are appointed to a different classification and are involuntarily reverted to their previous classification may only file a grievance up to step 2 of the grievance process and cannot proceed to arbitration) [CP 325-326]; Article 34, Performance Evaluations (the content of performance evaluations is not subject to the grievance procedure) [CP 332]; Article 46, Health and Safety (an employee cannot challenge safety issues through the grievance process if he or she has filed a complaint with the Department of Labor and Industries) [CP 345];

Article 29.4, Classification and Reclassification (employer's decisions regarding an employee's position allocation is not subject to the grievance procedure) [CP 324].

Once again, these provisions were insisted upon by the LRO despite the clear statutory language contained in RCW 41.80.030 (2) (a) which requires that all collective bargaining agreements provide "a grievance procedure that culminates with final and binding arbitration of *all disputes arising over the interpretation or application of the collective bargaining agreement*". [CP 232] [emphasis added].

Prior to reaching agreement on the 2009-2011 collective bargaining agreement, PSE filed the instant lawsuit. [CP 4-11]. After filing and serving the lawsuit, the parties reached agreement on a 2009-2011 collective bargaining agreement without submitting the matter to interest arbitration. [CP 1242]. Dismissal of this action was not a condition of ratifying the parties' collective bargaining agreement. [CP 1242].

Despite the fact that the collective bargaining agreement contained what PSE construes as illegal exclusions, it agreed to the collective bargaining agreement for two reasons: 1) the collective bargaining agreement contained a provision which permits illegal

provisions to be separable from the contract; 2) the implacable intransigence previously demonstrated by WWU (which required the filing of so many unfair labor practices) and by its designee led PSE's lead negotiator to believe that reaching an agreement, however imperfect or contrary to statute, was the most prudent approach. [CP 1242]. PSE had an additional, critical incentive to agree to this collective bargaining agreement (as well as others) despite the inclusion of illegal provisions/exclusions: the bargaining deadline contained in the PSRA. RCW 41.80.010 (3).

One of the ways in which the PSRA is unique from other bargaining acts (such as RCW 41.56) is that it sets a deadline of October 1 of the year prior to every odd-numbered legislative biennium for approval of a collective bargaining agreement. RCW 41.80.010 (3)(a). A collective bargaining agreement which would take effect on July 1, 2009 must be ratified prior to the October 1, 2008 deadline in order to be included in the OFM's appropriation request to the 2009 legislature. RCW 41.80.010(3)(a). If the labor agreement was not completed prior to that date (October 1, 2008), it would not be presented to the legislature by OFM, and would not be funded, if at all, until July 1 of the second year after it was executed. RCW 41.80.010. Pursuant to the statute, once a

collective bargaining agreement is ratified by the parties, the OFM must certify that the compensation and fringe benefits are financially feasible for the State for it to be funded. RCW 41.80.010 (3).

On December 18th, 2008, PSE's lead negotiator, Eric T. Nordlof, received a memo from Diane Leigh, the Director of the Labor Relations Office. [CP 1243, CP 1320-1323]. The memo advised PSE that the Director of the OFM had refused to certify that the compensation and fringe benefit provisions contained in the 2009-2011 collective bargaining agreement between PSE and PSE of WWU were financially feasible for the State. [CP 1243; CP 1320]. Given this, the Governor would not be requesting funds from the Legislature to fund those provisions. [CP 1243; CP 1320].

Because of the repudiation of the contract by the Governor, the parties were now obliged to return to the bargaining table after the Washington Legislature concluded its business for the 2009 legislative session. [CP1244]. Since financial provisions were not going to be funded, PSE would be withdrawing non-economic concessions made during the initial bargaining which included agreement to the exclusion of certain provisions of the labor agreement from its grievance procedure. [CP 1244].

While all of the provisions excluded from the grievance procedure are both problematic and illegal, the provisions dictating the classification and reclassification provisions of the labor agreement have special significance for PSE's higher education members. [CP 232]. This is so for two reasons: 1) for a higher education employee, the only way to receive a promotion and raise (not associated with a COLA), is to successfully have your position "reallocated"; and 2) the current process is compromised, and members have lost faith in its neutrality. [CP 232].

All employees have the ability to request that their current position be reviewed if they believe that their current classification does not accurately reflect the duties they actually perform. WAC 357-13. If an employee is successful during the review process, his current position is "reclassified" to a higher level position which also means a higher salary. WAC 357-13.

According to the parties' collective bargaining agreement, (and WAC 357-13), an employee may initiate such a review of his or her classification by submitting a request to the Human Resources Department of WWU. [CP 324]. If the employee's request is denied, however, an employee is limited to requesting "reconsideration" pursuant to WAC 357 and before Washington

State Personnel Resources Board [hereinafter referred to as the WPRB]. [CP 324]. There are a number of inherent injustices in being limited to this process alone, a process that is severely compromised and far from neutral. [CP 232].

Once the reallocation request is denied by the Human Resources Department of WWU, the employee may appeal to the “director” of the Department of Personnel [hereinafter referred to as “DOP”]. [CP 232]. This typically involves an oral, unrecorded interview. [CP 350]. If the employee’s reclassification request is denied by the “director”, he or she may appeal that decision to the WPRB. [CP 232]. However, because the “director’s review” process/interview is not recorded, the parties are therefore without a true “record” to appeal from. [WAC 357-13, CP 350].

Another glaring issue, as referenced *supra*, is what appears to be blatant collusion between the DOP and institutions of higher education. [CP 233]. For example, it is clear that the “DOP” and WWU regularly have ex parte communications without notifying opposing counsel, as demonstrated by communications discovered by PSE in a recent case. [CP 233, CP 352-353].

In that case, PSE was attempting to arbitrate a dispute involving a reclassification for one of its members (the contract in

existence at this time did not contain a specific exemption from the grievance process). [CP 230; CP 251]. The DOP colluded with WWU in moving the DOP appeal forward, ahead of many other pending matters, in order to complete the DOP process before the arbitration would be held. [CP 232-233; CP 352-353].

Another communication between DOP and WWU demonstrate that both entities share a common goal of discouraging employees from pursuing reclassification at all:

From WWU Human Resources: CJ, the only two appeals that you conducted were both withdrawn before you had to submit a report. You did such a good job with the interview that the employees knew they couldn't convince you otherwise. Good luck.

From DOP: WOW! I am good! (ha!) [CP 354].

Given the control WWU maintains over this entire process, it is unsurprising that the LRO insisted that WWU maintain its control by exempting that provision from the contract's grievance and arbitration process. [CP 231].

The LRO has not limited this tactic of compelling agreement to exclude certain provisions from the grievance and arbitration provisions to its bargaining with PSE of WWU alone. [CP 45]. Indeed, the LRO has expressed an intent to "standardize" collective bargaining agreements for represented civil service employees of

institutions of higher education. [CP 44]. Consistent with that expressed intent, it used the exact same tactic in bargaining with PSE represented employees of CWU. [CP 44-45].

PSE began representing certain higher education employees of CWU in 2007. [CP 43]. CWU was represented at the bargaining table by the LRO for the first collective bargaining agreement between the parties which was negotiated between February and May, 2008. [CP 43]. Just as it did when it bargained with PSE of WWU, the LRO took the position that it was the *de facto* employer during bargaining with PSE of CWU. [CP 44; CP 136-137]. Neither the CWU Board of Trustees, nor the President of CWU, approved or ratified the final agreement, and it was actually executed by both a representative of LRO and a vice president of the university. [CP 44-45].

During negotiations, the LRO negotiators stated many times that its contract proposals had been originated by LRO, with the goal of standardizing the language of civil service labor agreements. [CP 44]. Disturbingly, this “standardized language” included exempting certain portions of the labor agreement from enforcement through the agreement’s grievance and arbitration procedure in contravention of the PSRA. [CP 44-45].

The LRO insisted that the following provisions be exempt, in whole or in part, from the grievance and arbitration process: Article 3-Classification (employees are limited to the classification review process and the process is not subject to the grievance/arbitration procedure) [CP 54]; Article 8- Discipline (no probationary employee may access the grievance/arbitration process if disciplined or terminated for any cause) [CP 64]; Article 8.1, regular employees may not access the grievance/arbitration process for oral reprimands, and may only access the grievance/arbitration process for written reprimands under certain prescribed scenarios) [CP 64]; Article 34- Performance Evaluations (the specific content of performance evaluations are not subject to the grievance/arbitration procedure). [CP 98].

These proposals were offered on a “take it or leave it” basis, despite the fact that PSE pointed out the proposals were in derogation of the PSRA. [CP 45]. In response, the LRO made it clear that agreement would be impossible unless PSE agreed to the LRO’s proposals, whether they were in derogation of the PSRA or not. [CP 45]. Eventually, PSE of CWU was compelled to capitulate to LRO’s demand that the provisions referenced *supra* be exempted from the agreement’s grievance and arbitration process.

[CP 45]. This was in large part because, as were the negotiations with PSE of WWU, the negotiations at CWU were conducted under a legislatively imposed deadline. [CP 45]. Had no agreement been reached, there was a potential loss of compensation and fringe benefit improvements. [CP 45].

PSE brought this action to obtain a court's ruling that indeed, RCW 41.80.030 means what it says and that the LRO violates the statute by seeking to exempt any provisions from the grievance and arbitration process set forth in a collective bargaining agreement. [CP 7-8].

VI. ARGUMENT

A. The trial court erred in granting summary judgment in favor of the Defendant/Respondent LRO.

Because this presents an appeal of summary judgment dismissal, the standard of review before the Court is *de novo*. *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). Here, pursuant to its *de novo* review, the Court should vacate the summary judgment dismissal in favor of the LRO and instead order the declaratory judgment sought by PSE.

A summary judgment under CR 56(c) should only be granted if the pleadings, affidavits, depositions, and admissions on file

demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The court must consider *all* facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

Here, the trial court properly determined that summary judgment was appropriate as there were no material issues of fact. There was no question that the LRO routinely proposes the exclusion of certain provisions from the grievance and arbitration provisions of collective bargaining agreements it negotiated with PSE of WWU and PSE of CWU. And, there was no question that those provisions are then included in collective bargaining agreements that the LRO negotiates as the *de facto* employer. The primary question is therefore clearly one of law. Specifically, the trial court properly determined that the primary issue was whether excluding any provision of a collective bargaining agreement from its grievance and arbitration provisions was permissible under RCW 41.80.030.

The trial court erred, however, in failing to enter summary judgment in favor of PSE and reach the one conclusion which reasonable minds could reach: that the LRO has violated, and continues to violate, the PSRA. The trial court erred by not only adopting the LRO's interpretation of RCW 41.80.030, but also by first determining that this matter did not present a justiciable controversy.

1. The trial court erred by ruling that this matter was not a “justiciable controversy” and that it therefore did not meet the requirements of a declaratory judgment.

Pursuant to RCW 7.24.020, a party may have a court of record determine “any question of construction or validity” under a statute, and obtain a declaration of rights, status or other legal relations. RCW 7.24.020. Indeed, pursuant to RCW 7.24.010, a court has the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. RCW 7.24.010. The court has, however, long held that in a declaratory judgment action, there must be a justiciable controversy. *Nostrand v. Little*, 58 Wn.2d 111, 361 P.2d 551 (1961), *appeal dismissed*, 368 U.S. 436, 82, S. Ct. 464, 7 L.Ed. 2d 426 (1962).

Under the UDJA, a dispute is considered a justiciable controversy if the following elements are met: 1) the parties must have existing and genuine rights or interests; 2) these rights must be direct and substantial; 3) the determination will be a final judgment that extinguishes the dispute; and 4) the proceeding must be genuinely adversarial in character. *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 413 P.2d 972 (1966). In the alternative, a declaratory judgment is also appropriate if the parties present an issue of such great public moment as to be the legal equivalent of these elements. *Northwest Kennel Ass'n v. State*, 8 Wn. App. 314, 506 P.2d 878, *review denied*, 82 Wn.2d 1004 (1973). Here, the trial court erred in ruling that this matter did not present a justiciable controversy, and that it was being asked to make an advisory ruling.

a. The parties have existing and genuine rights and interests which are both direct and substantial.

Instead of determining that it was being asked to make an advisory ruling, the trial court should have found that the case presented a justiciable controversy. First, it is very clear that the parties have existing and genuine rights and interests. PSE

certainly acknowledges that the LRO has the right to bargain on behalf of those institutions of higher education that so choose its representation. And, for its part, PSE has both a substantial right, and indeed duty, to represent and protect the interests of its members in accordance with the duty of fair representation.

i. PSE's duty of fair representation establishes direct and substantial rights sufficient to create a justiciable controversy.

Washington imposes a duty of fair representation on unions because of their status as the exclusive bargaining agent for their members. *Womble v. Local Union No. 73 of the Int'l Bhd. of Elec. Workers, AFL-CIO*, 64 Wn. App. 698, 701, 826 P.2d 224 (1992); *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 371-72, 670 P.2d 246 (1983). The duty of fair representation requires a union to conform its behavior to each of three separate standards:

First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 at 374-375.

In order to comply with the duty of fair representation, PSE is under a legal and ethical obligation to determine the rights of its members under RCW 41.80.030 to ensure that it is not improperly agreeing to illegal provisions to the detriment of its members. The union must assert the rights of its members in complete good faith and honesty, and to accomplish that, it must have a judicial determination of the rights of its members under the statute. For PSE to overlook what appears to be the plain requirements of RCW 41.80.030 (even if it previously had overwhelming incentives to do so) would be to risk violating the duty of fair representation.

b. PSE has presented an actual, present and existing dispute.

The current status of the collective bargaining agreement should have been of critical importance in determining whether a justiciable controversy exists. As stated *supra*, at the time of hearing, the collective bargaining agreement between PSE of WWU and WWU had been repudiated by the State, and the parties were once more entering into negotiations. That is because RCW 41.80.010(3)(b) provides that if the Legislature does not fund a civil service labor agreement, either party may “reopen all or part of the agreement”, or the parties may resort to the mediation and fact

finding provisions contained in RCW 41.80.090. Because LRO and WWU had repudiated their tentative agreement to the 2009-2011 collective bargaining agreement with PSE, the parties were going to be returning to bargaining after the Legislature concluded its business for the 2009 legislative session. [CP 1244]. At that point, non-economic concessions made by PSE during the original bargaining would be withdrawn. [CP 1244]. The legality of excluding provisions from the grievance and arbitration provisions of the collective bargaining agreement would be a critical dispute between the parties. Given this, there could be no question that there was an actual, present and existing dispute.

- i. **The Court cannot infer a waiver based on PSE's previous agreement to exclude contract provisions from the grievance and arbitration process in previous collective bargaining agreements.**

The LRO will doubtless argue that PSE voluntarily (and permanently) waived the statutory requirement of a grievance procedure which culminates in final and binding arbitration with regard to any provisions contained in the labor agreement. This

argument is simply not supported by the actual plain language of the statute, nor is it supported by the law.

1. Parties Cannot Waive A Statutory Right Which Serves A Public Policy Purpose.

Where a statutorily created right serves a public policy purpose, the persons protected by the statute cannot waive that right either individually or through the collective bargaining process. *Kelso Educ. Assn. v. Kelso Sch. Dist.* 453, 48 Wn.App.743, 749, 740 P.2d 889, *review denied*, 109 Wn.2d 1011 (1987). Indeed, the court has held that the requirements of a statute enacted for the public good may not be nullified or varied by contract. *Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wash. 590, 66 P.2d 827, 109 A.L.R. 1472 (1937).

With regard to the instant case, there is a clear public policy in favor of arbitration of disputes. *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002). The Court has noted that encouraging parties to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society. *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995) See, e.g., *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997) (recognizing a strong

public policy in Washington state favoring arbitration of disputes); *Clearwater v. Skyline Constr. Co.*, 67 Wn. App. 305, 314, 835 P.2d 257 (1992), review denied, 121 Wn.2d 1005, 848 P.2d 1263 (1993). See also *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988, (1995) (recognizing the strong public policy favoring arbitration of disputes and noting arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation); accord *King County v. Boeing Co.*, 18 Wn. App. 595, 602-03, 570 P.2d 713 (1977) (and cases cited therein). See also *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992) (noting the object of arbitration is to avoid the formalities, delay, expense and vexation of ordinary litigation). In the context of labor arbitration, it has long been recognized that arbitration of labor disputes is much more than a substitute for work stoppages and litigation. It is also an integral part of the system of self-government, designed to aid management in its quest for efficiency, and union leadership in its participation in the enterprise. Elkouri and Elkouri, *How Arbitration Work*, Sixth Edition, page 16, (2003, American Bar Association).

Because of the strong policy in favor of arbitration, it is indeed contrary to public policy to interpret RCW 41.80.030 to

permit the parties to waive the grievance and arbitration provisions with regard to any section of the parties' collective bargaining agreement, including the allocation and reallocation process. The fact that PSE was not able to insist that these unlawful provisions be excluded from the collective bargaining agreement was clearly not a waiver of its rights, but rather a product of disparate bargaining power between the parties. Indeed, PSE was dealing with a bargaining partner who was specifically found to have "a historical pattern of rejecting the basic principles of collective bargaining" by a PERC hearing officer. [CP 1241; CP 1315]. This was after PSE was compelled to file no less than five unfair labor practice charges based on WWU's continuing violations of the rules of collective bargaining. [CP 1237].

There is no question that PSE was essentially forced to exclude certain provisions from the grievance and arbitration provisions in order to obtain needed financial benefits for its members. A union should not be compelled to choose between pay raises and insurance benefits for its members and a contract whose provisions comply with the requirements of the PSRA.

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2. The collective bargaining agreement containing provisions excluded from the grievance and arbitration process should be construed as a contract of adhesion and procedurally unconscionable.

The determination of whether a contract is an adhesion contract is properly considered in ascertaining procedural unconscionability which would in turn render the contract or provisions within in, void. The Court has established the following factors to determine whether an adhesion contract exists: (1) whether the contract is a standard form printed contract, (2) whether it was “prepared by one party and submitted to the other on a “take it or leave it” basis”, and 3) whether there was “no true equality of bargaining power between the parties.” *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 393, 858 P.2d 245 (1993) (quoting *Standard Oil Co. of Cal. v. Perkins*, 347 F.2d 379, 383 n.5 (9th Cir. 1965)).

Here, there are two elements that establish that the labor agreement bargaining by the LRO on behalf of WWU was indeed a contract of adhesion. First, consistent with the LRO's *modus operandi* in bargaining, its bargaining proposals were presented on a “take it or leave it” basis. The LRO was well aware that PSE had

much to lose if it did not agree to the terms the LRO presented, even if those terms included agreeing to its illegal provisions. Had PSE refused to agree to exclude certain provisions from the applicability of the grievance and arbitration procedures, there was a grave risk that the contract would not have been funded, if at all, until the next year. This was obviously a risk that PSE could not take, a fact well known by the LRO who used this deadline to violate the statute.

By the same token, because of the October 1 bargaining deadline, there could be no true equality of bargaining power between the parties. The October 1 deadline worked to force PSE into a position where it was required to accept certain provisions and sacrifice some meaningful and important rights to ensure funding of the contract. In short, the LRO should not be permitted to use PSE's capitulation as evidence of a waiver of its members rights. Instead, the court should find that the forced exclusion of certain provisions from the grievance and arbitration process was procedurally unconscionable and those provisions should be deemed unenforceable and void as procedurally unconscionable.

Procedural unconscionability has been defined as the lack of meaningful choice, considering all the circumstances surrounding

the transaction, including “the manner in which the contract was entered”, “whether each party had a reasonable opportunity to understand the terms of the contract,” and whether “the important terms were hidden in a maze of fine print.” *Schroeder v. Fageol Motors Inc*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975). These three factors are not to be applied mechanically, and each case must be considered based on its own unique facts. *Id.* The trial court has the inherent authority to find that any provisions of a contract which are procedurally unconscionable are void and unenforceable.

Here, the October 1 bargaining deadline, coupled with the LRO’s insistence that an agreement would be impossible without PSE’s capitulation on excluding certain provisions from the grievance and arbitration provisions, indeed make those provisions procedurally unconscionable. PSE lacked a meaningful choice when one considers all of the circumstances surrounding the transaction, particularly LRO’s express communication that no agreement would be possible unless PSE agreed to its illegal proposals. This applies *a fortiori* as the LRO knew it was insisting on exclusions which were in derogation of the PSRA. The Court should not permit the LRO to compel PSE to agree to illegal provisions, and then claim that PSE has forever waived its right to a

collective bargaining agreement that complies with RCW 41.80.030.

c. The Court's ruling would be a final judgment that extinguishes the dispute.

Despite the fact that PSE had ratified the collective bargaining agreements containing provisions excluded from the contractual grievance and arbitration provisions, a determination of exactly what the PSRA requires will be a final judgment that extinguishes the dispute. PSE continues to represent higher education employees and has a continuing relationship with institutions of higher education, as well as its designees such as the LRO. The legality of excluding any provision, including the classification and reallocation provisions, from the contractual grievance and arbitration provisions is a continuing issue between these parties as well as all unions representing higher education civil service employees and their employers. A ruling from the trial court would provide the clarity the parties need to craft their bargaining strategy, and would obviously apply to all parties bargaining under the PSRA. There can be no question that the Court's ruling would be a final judgment that would extinguish the dispute regarding what provisions are required to be included in the

grievance and arbitration provisions of a collective bargaining agreement under the PSRA.

d. This matter is genuinely adversarial.

Finally, there is no question that this matter is genuinely adversarial as the parties hold directly opposing interpretations of the PSRA. PSE's position that no provision is legally excluded from the grievance and arbitration provision has been demonstrated not only by its prosecution of the instant lawsuit, but also by its processing of a classification reallocation grievance.¹ PSE has also expressed its position when the LRO proposed excluding certain provisions from the contractual grievance and arbitration provisions of a collective bargaining agreement. [CP 635]. As explained *supra*, the fact that PSE may have been compelled to previously agree to exclude certain terms from the grievance and arbitration provisions of a collective bargaining agreement cannot and should not preclude a finding that this matter is genuinely adversarial.

¹ In the previous (2007-2009) collective bargaining agreement between PSE of WWU and WWU, the classification/reallocation provision did not specifically exempt it from the grievance and arbitration process. [CP 265-66]. PSE attempted to litigate the dispute through arbitration based on its interpretation that 41.80.030 required "final and binding arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement". [CP 270]

Thus, it is very clear that all of the elements of a justiciable controversy had been met, and that the trial court should not have dismissed PSE's complaint on this basis. By the same token, the Court should have adopted PSE's interpretation of the PSRA, and granted summary judgment in its favor.

2. The trial court erred in determining that the interpretation of the PSRA offered by the LRO was correct.

The initial principle of statutory interpretation is that the Court does not construe unambiguous statutes: "In judicial interpretation of statutes, the first rule is 'the Court should assume that the legislature means exactly what it says. Plain words do not require construction.'" *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting *City of Snohomish v. Joslin*, 9 Wn. App. 495, 498, 513 P.2d 293 (1973)) A statute's meaning must be primarily derived from the language itself. *Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982). A statute is only ambiguous if its meaning is susceptible to more than one interpretation. Here, the statute at issue, RCW 41.80.030 (2), is not susceptible to more than one interpretation as it provides:

A collective bargaining agreement shall contain provisions that:

- a) Provide for a grievance procedure that culminates with final and binding arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement and that is valid and enforceable under its terms when entered into in accordance with this chapter; and
- b) Require processing of disciplinary actions or terminations of employment of employees covered by the collective bargaining agreement entirely under the procedures of the collective bargaining agreement. . . .

The statute clearly means that each and every contract provision in a collective bargaining agreement must be subject to a grievance process culminating in arbitration. With regard to disciplinary actions or terminations, an employee is strictly limited to the grievance and arbitration provisions contained in the parties' collective bargaining agreement. For all other disputes regarding the application or interpretation of the parties' collective bargaining agreement, the parties are apparently empowered to agree to a grievance procedure which includes outside agencies or entities, so long as the grievance procedure ultimately culminates in "final and binding arbitration".

The Court's primary goal when interpreting statutes is to effectuate the Legislature's intent. *Wright v. Jeckle*, 158 Wn.2d 375, 379, 144 P.3d 301 (2006) (citing *Dep't of Ecology v. Campbell*

& *Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The Court gleans legislative intent by considering the legislation as a whole and interpreting words in context. PSE's interpretation of RCW 41.80.030 is entirely consistent with, and in fact gives meaning to, the Legislature's amendment to RCW 41.06.170 within the PSRA. Prior to the enactment of the PSRA, (and the consequent amendment of RCW 41.06.170), an employee who was "reduced, dismissed, suspended or demoted" could appeal that decision to the personnel appeals board. There was no statutory exclusion of this right to appeal if the employee was also subject to the provisions of a collective bargaining agreement. [See CP 477].

The PSRA amended RCW 41.06.170 to eliminate the right of an employee who was "reduced, dismissed, suspended or demoted" to appeal to the Washington personnel appeals board² [hereinafter "WPRB"] if that employee was subject to a collective bargaining agreement. At the same time, pursuant to RCW 41.80.030 (2) (b), the Legislature mandated that discipline and discharge decisions be processed *entirely* under the grievance and arbitration procedures of a collective bargaining agreement. In eliminating the right of represented employees to appeal these

decisions to the WPRB, while simultaneously requiring that discipline and discharge issues be processed *entirely* under the grievance and arbitration provisions of a collective bargaining agreement, the Legislature was clearly expressing its intent that the WPRB no longer be involved in adjudicating cases involving contested discipline and discharge cases. [See RCW 41.80.030 and RCW 41.06.170]. Since one could easily posit that discipline and discharge cases constitute a large percentage of grievances prosecuted by unions, it is reasonable to infer that the Legislature contemplated that the WPRB should have little involvement in governing employment relations between union members and their employers.

The Legislature was also expressing its intent, by enacting RCW 41.80.030 and modifying RCW 41.06.170 within the PSRA, that the WPRB should have only limited involvement in determining allocation and reallocation decisions for employees covered by a collective bargaining agreement. RCW 41.80.030(2)(a) makes it clear that the WPRB process cannot be the sole process for allocation and reallocation appeals when that process is contained in a collective bargaining agreement. To determine otherwise is to

² The WPRB replaced the personnel appeals board.

essentially ignore the plain language of RCW 41.80.030(2)(a). There can be no question that the statute *specifically* requires (by the use of the mandatory term “shall”) that a collective bargaining agreement provide for a grievance procedure that culminates with final and binding arbitration of *all disputes* arising over the interpretation or application of the collective bargaining agreement.

RCW 41.06.170 is easily harmonized with RCW 41.80.030 (2) as it provides that an employee *may appeal* an allocation or reallocation decision to the WPRB, but does not indicate that the WPRB is the sole entity empowered to make classification and reallocation decisions. If the Legislature intended that classification and reallocation decisions would not be subject to the grievance and arbitration provisions it could have: 1) indicated this limitation in RCW 41.80.030 (2)(a); 2) specified this limitation in RCW 41.06.170; or 3) included the classification and reclassification process in those subjects which could not be bargained pursuant to RCW 41.80.040. The fact that the Legislature chose not to do should be deemed dispositive by this Court.

While RCW 41.80.030 does not permit any provisions of a collective bargaining agreement be deemed exempt from its grievance and arbitration provisions, it does set forth limits on what

can be bargained between the parties, and therefore included in a collective bargaining agreement. As set forth *supra*, pursuant to RCW 41.80.040, the Legislature contemplated that certain subjects would simply not be eligible for “bargaining” by the union and the employer under the statute. Specifically, RCW 41.80.040 provides as follows:

The employer shall not bargain over rights of management which, in addition to all powers and duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:

- (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
- (2) The employer’s budget and the size of the agency work force, including determining the financial basis for layoffs;
- (3) The right to direct and supervise employees;
- (4) The right to take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies; and
- (5) Retirement plans and retirement benefits.

Just as the Legislature required certain provisions be exempt from bargaining, it also could have permitted that certain provisions could be exempt from the grievance and arbitration provisions contained in a labor agreement. It is indeed dispositive that the Legislature chose to do neither with regard to the classification and reallocation provisions.

In spite of the lack of statutory support for its position, the LRO argued that it was under no obligation to even bargain the classification and reallocation provisions as they were “permissive” subjects of bargaining. Based on this premise the LRO then erroneously persuaded the trial court that because it was not obligated to bargain classification and reallocation provisions, those provisions should be exempt from the requirement that all provisions be subject to the grievance and arbitration provisions per RCW 41.80.030.

The trial court erred by not only basing its interpretation of the PSRA on the propriety of excluding only the classification and reallocation provisions from the contractual grievance provisions, but also by characterizing these provisions as “permissive” instead of “mandatory” subjects of bargaining.

a. The classification and reallocation process is a mandatory subject of bargaining.

As stated *supra*, the trial court based its ruling in favor of the LRO in large part on its determination that the classification and reallocation process was a permissive, instead of a mandatory, subject of bargaining. This was in error. Significantly, RCW 41.80.020 (1) specifies that the matters subject to bargaining

include wages, hours, and other terms and conditions of employment. Clearly, the process by which an employee can request that his or her position be reallocated to receive a raise is related both to wages and conditions of employment. While the actual rules of the DOP and the WPRB are not subject to bargaining between the parties pursuant to RCW 41.80.020(2)(c), this does not mean that the classification and reallocation process to be utilized by the universities and PSE is not subject to bargaining. Again, it only means that the parties are not required to bargain regarding the rules of a third party - - the WPRB and or the Director of Personnel. It does not transform the classification and reallocation provisions into a permissive subject of bargaining.

The trial court's determination that the classification and reallocation process is a permissive subject of bargaining also ignores the Legislature's intent that the bargaining requirements of RCW 41.80 be interpreted and enforced by the Public Employment Relations Commission [hereinafter referred to as "PERC"]. RCW 41.80.120 specifically empowers PERC to prevent any unfair labor practice and to issue remedial orders. RCW 41.80.110(1) (e) further provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its

employees. By empowering PERC to prevent and correct any unfair labor practices, and by defining unfair labor practices using the same terminology employed by PERC, the Legislature is implicitly authorizing PERC to make these determinations based on the body of law it has created in determining mandatory, permissive and illegal subjects of bargaining.

Pursuant to PERC precedent, collective bargaining subjects are either mandatory, permissive, or illegal subjects of bargaining. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Public Empl. Relations Comm'n*, 113 Wn.2d 197, 200-01, 778 P.2d 32 (1989); *Washington State Patrol Lieutenants Ass'n v. Sandberg*, 88 Wn. App. 652, 657-58, 946 P.2d 404 (1997). Matters that directly affect employees, such as wages, hours, workload, safety, and other terms and conditions of employment, are mandatory bargaining subjects. The parties must bargain in good faith regarding these issues. *Fire Fighters Local 1052*, 113 Wn.2d at 200-01; *Lieutenants Ass'n*, 88 Wn. App. at 657.

On the other hand, managerial decisions that only remotely affect "personnel matters", and decisions that are predominantly "managerial prerogatives", are classified as nonmandatory or "permissive" subjects of bargaining. See *Klauder v. San Juan Cy.*

Deputy Sheriffs' Guild, 107 Wn.2d 338, 341, 728 P.2d 1044 (1986); *Federal Way Educ. Ass'n v. Board of Directors, Federal Way Sch. Dist. 210*, Pub. Empl. Relations Comm'n Dec. 232-A EDUC (1977); see also *Spokane Educ. Ass'n v. Barnes*, 83 Wn.2d 366, 375, 517 P.2d 1362 (1974); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 69 L. Ed. 2d 318, 101 S. Ct. 2573 (1981). The parties may bargain over these "permissive" issues but are not obligated to do so. *Fire Fighters Local 1052*, 113 Wn.2d at 201; *Lieutenants Ass'n*, 88 Wn. App. at 657. Illegal subjects are those that the parties are forbidden by law from negotiating. *Lieutenants Assn*, 88 Wn. App. at 657-58.

In determining whether an item is a mandatory or permissive subject of bargaining, the Court has directed PERC to conduct a balancing test, weighing the relationship the subject bears to "wages, hours, and working conditions" against the extent to which the subject lies "at the core of entrepreneurial control" or is a "management prerogative." *Fire Fighters Local 1052*, 113 Wn. 2d at 203. The balancing test is to be applied on a case by case basis, "after being fully appraised of the facts of each case." *Id* at 202 (citing *Wenatchee v. Wenatchee Police Guild*, Pub. Empl. Relations Comm'n Dec.Dec. 780 at 1 (PECB, 1980).

Based on this balancing test, it is clear that the classification and reallocation process is a subject that is very closely related both to wages and working conditions and must therefore be characterized as a mandatory subject of bargaining. The only way an employee can request, and indeed receive additional salary in consideration of performing work of a higher classification, is through this process. In practical terms, it is the only way an employee can receive increased salary (besides a COLA) without changing positions.

On the other hand, the subject cannot be said to lie “at the core of managerial control”. Certainly, the Legislature did not consider it to be a “core” management right and declined to include it in the prohibited matters for bargaining under RCW 41.80.040. The trial court erred in both in characterizing the classification and reallocation provisions as “permissive” and determining that RCW 41.80.030 permitted them to be excluded from contractual grievance and arbitration provisions.

Even if the Court were to determine that the classification and reallocation provisions were properly excluded, this does not end the controversy between the parties. The trial court should have also ruled on whether other provisions were properly excluded from

the contractual grievance and arbitration provisions. The trial court's failure to so rule was in error.

b. The trial court erred by failing to consider the legality of excluding any provision from the grievance and arbitration provisions in a collective bargaining agreement.

In its Complaint, PSE clearly identified that the relief it sought was a declaration that the LRO violates the PSRA when it seeks to exempt any provisions of a labor agreement from its grievance and arbitration provisions. And, while the LRO and PSE both discussed in detail the legality of excluding classification and reallocation provisions from the grievance and arbitration process, there is no question that other provisions were also illegally excluded as described *supra*. Instead of limiting its ruling to a decision regarding the legality of only the classification and reallocation provisions, the trial court should have ruled on an interpretation of the PSRA regarding *all* provisions as set forth in PSE's complaint. This is an omission that this Court should, and must, correct.

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VII. CONCLUSION

The summary judgment in favor of the LRO should be vacated, and summary judgment in favor of PSE should instead be entered. Specifically, this Court should enter a declaratory judgment that the LRO violates the PSRA, specifically RCW 41.80.030, by seeking to exclude any provision from the grievance and arbitration provisions in a collective bargaining agreement.

In the alternative, if the Court determines that trial court properly ruled that classification and reallocation provisions are properly excluded from the labor agreement's grievance and arbitration process, it should grant PSE a partial summary judgment declaratory judgment that the LRO violates the PSRA when it excludes any other provision from the grievance and arbitration provisions contained in a collective bargaining agreement.

Respectfully submitted this 16th day of September, 2009.



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VIII. CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Opening Brief to:

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on this 16th day of September, 2009, by ordinary first class mail,
with postage prepaid thereon, and also sent the Appellant's
Opening Brief via e-mail.


ELYSE B. MAFFEO

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