

Court of Appeals
Number 39334-4-II

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**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 REPLY BRIEF

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II. COUNTER STATEMENT OF FACTS.

The facts of the case set forth in PSE's Opening Brief are incorporated herein by reference. At the outset, it should be noted that PSE does not dispute that it ultimately agreed to language in its collective bargaining agreements with both Central Washington University [hereinafter referred to as "CWU"] and Western Washington University [hereinafter referred to as "WWU"] which exempts certain provisions from being subject to the contractual grievance and arbitration provisions. PSE does dispute, however, that its agreement to these terms precludes a court's determination of the parties' rights under the statute at issue: RCW 41.80.030. Because of the LRO's insistence on emphasizing irrelevant facts (and its obfuscation of others), the following represents a clarification of the pertinent facts.

During bargaining for the 2007-2009 collective bargaining agreements between WWU and PSE, WWU proposed that the parties agree to abandon the DOP classification system and that WWU would create and administer its own classification system. [CP 263]. Part of this proposal included the appointment of a long-term "Hearings Officer" to resolve disputes about classification and allocation. [CP 264]. Ultimately, both parties tentatively agreed to "opt out" of the DOP statewide classification

system and create their own “local” position classification system. [CP 454].

As a part of its administration of the state-wide classification system, the DOP conducts salary surveys in order to keep State employees within 25% of market. [CP 264]. Where a survey shows that certain classifications have dropped more than 25%, the State provides funding to bring those rates back within the 25% range. [CP 264].

After PSE and WWU reached a tentative agreement on this issue, the parties discovered that the DOP had conducted a salary survey, and that salary increases for certain “State” classifications were going to be implemented. [CP 265]. However, the DOP had taken the position that only those positions within the DOP classification system would receive these increases in their salaries. [CP 264]. The parties understood that if they did, in fact, opt out of the DOP classification system, both the University (and the bargaining unit employees) would lose around half a million dollars. [CP 268].¹

¹ The negotiator for WWU was the same negotiator for EWU, which had already agreed to abandon the DOP classification system and implement a local classification system. As a result, the DOP had refused to give salary increases to EWU’s new classifications, taking the position that only the State’s own classifications were eligible for the increases. The WWU negotiator therefore knew what the legal consequences would be if WWU decided to create and administer its own classification system.

Based on this information, WWU offered to rescind the tentative agreement and return to the DOP classification system. PSE ultimately accepted that offer. [CP 265].

While PSE did request that the “long-term Hearings Officer” provisions of the previous tentative agreement remain, this was not something that WWU was willing to agree to. [CP 265]. Ultimately, the agreed contract language provided (in pertinent part) as follows:

Section 24.1. Policy. Positions shall be allocated to the appropriate classification.

Section 24.2. Classification. Except as specifically modified by this Article, position classification, position review and reallocation shall be handled in accord with WAC 357. [CP 251]

What PSE ultimately agreed to was *not*, in the mind of the PSE negotiators, final and binding resolution of classification disputes by the DOP. [CP 230]. That is because the newly agreed provision in question did not specifically exclude the position allocation, review and reallocation provisions from the parties’ grievance and arbitration provisions. Instead, it merely stated that position allocation, review and reallocation “would be handled in accord with WAC 357.” [CP 251]. This was entirely reasonable given the parties’ mutual desire to safeguard the salary increases for the “trailing” classifications.

Because the contract language was silent as to whether an employee was *strictly* limited to the DOP and WPRB review process outlined in WAC 357, and because the language was bargained in the legal context of RCW 41.80.030, PSE believed the statute would require this section be deemed subject to the contractual grievance and arbitration provisions. [CP 269]. As PSE viewed what occurred during bargaining: “both parties to the contract believed that the disputed language supported their own point of view, and were content to allow the language to be incorporated into the contract without “calling attention” to their position at the bargaining table. [CP 271].

In accordance with its interpretation of the collective bargaining agreement, again within the context of RCW 41.80.030, PSE demanded arbitration of a position allocation grievance brought by Tom McNeely. [CP 262-271]. Although the arbitrator declined to rule that Mr. McNeely’s allocation grievance was arbitrable, he stated the following:

. . . it is entirely possible that Washington Personnel System Reform Act (RCW 41.80), with its requirement of “final and binding arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement,” voided the exclusive remedy provision of WAC 357 by implication. If so, that would seem to turn any proposal to incorporate that portion of WAC 357 into a prohibited matter for bargaining. The record before me is far from adequate to address that broad issue, particularly when it seems within PERC’s jurisdiction. [CP 270].

PSE filed its Complaint For Declaratory and Injunctive Relief precisely to obtain clarification of its rights under RCW 41.80.030, clarification which the arbitrator was unable to provide. [CP 4-11].

The LRO takes great pains to highlight the various proposals PSE made and/or agreed to in order to achieve a collective bargaining agreement with WWU and CWU. It is the nature of bargaining that the parties will propose certain provision that it knows the other side would want in exchange for others that it desires, and compromise to achieve a contract. Unfortunately, as explained in PSE's opening brief, PSE was obligated to capitulate regarding certain provisions because of the LRO's "all or nothing" and "take it or leave it" approach to bargaining. [CP 232; CP 45]. Because these various proposals are not dispositive of the issue before the Court, PSE will not address with specificity what occurred or did not occur during bargaining.

Regardless of the provisions currently contained in its collective bargaining agreements with CWU and WWU, PSE has been clear regarding its interpretation of RCW 41.80.030: it demanded arbitration of Mr. McNeely's grievance premised on its interpretation that RCW 41.80.030 required arbitration of all provision in the collective bargaining agreement [CP 262-271]; it clearly expressed its concern to CWU during bargaining (and indicated that it may need to file a ULP) based on its

interpretation of RCW 41.80.030 [CP 742-743]; and, when an arbitrator declined to rule on its interpretation of the requirements of RCW 41.80.030, PSE promptly asked the trial court for an interpretation of its rights under the Uniform Declaratory Judgments Act, RCW 7.24 [hereinafter referred to as the “UDJA”]. [CP 4-11]. Furthermore, PSE did not dismiss its Complaint for Declaratory and Injunctive Relief after ratification of the collective bargaining agreement with WWU, nor was this made a condition of ratification by the LRO. [CP 1242].

The LRO essentially argues that in order to preserve its right to receive relief (in the shape of a declaratory ruling), PSE was required to refuse to ratify collective bargaining agreements if they contained provisions which were exempt from grievance processing and arbitration. This is a purposefully obtuse argument as collective bargaining agreements obviously also include important economic provisions. There is nothing in the UDJA that requires PSE to sacrifice the financial well-being of its members simply to preserve its right to receive an interpretation of RCW 41.80.030.

As explained in more detail in PSE’s Opening Brief, PSE had overwhelming incentives to agree to exclude certain provisions from the grievance and arbitration provisions in order to ratify the collective bargaining agreements. [See PSE’s Opening Brief, page 9-10]. And, while

the LRO decries PSE's positions during bargaining, the Court is not being asked to referee the bargaining between the parties, nor is it being asked to determine which side was the best or most consistent "bargainer". The issue before the trial court and this Court is instead very straight-forward: does RCW 41.80.030 mean what it says - - a collective bargaining agreement shall contain provisions that 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.

III. ARGUMENT

As stated *supra*, the LRO has apparently taken the position that PSE should be deemed disqualified from asking the court to clarify its rights under RCW 41.80.030 (pursuant to RCW 7.24), simply because it had agreed during bargaining to provisions that may ultimately be deemed contrary to the statute. Essentially, the LRO is arguing "waiver by conduct" on the part of PSE. There are two fairly glaring problems with the LRO's position.

A. The Court Cannot Find That PSE's Waived Its Rights To Move For Declaratory And Injunctive Relief

First, as set forth in PSE's Opening Brief, 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). With regard to arbitration of labor disputes, there can be no question that encouraging arbitration serves an important public policy purpose.² If the Court were to determine RCW 41.80.030 means what it says and that arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement must be subject to final and binding arbitration, PSE could not “waive” its members’ right to have *all* disputes submitted to arbitration.

Secondly, “waiver by conduct” requires “unequivocal acts of conduct evidencing an intent to waive”. *Absher Constr. Co. v. Kent Sch. Dist. No 415*, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995). As highlighted *supra*, PSE has certainly not engaged in unequivocal acts of conduct evidencing an intent to waive its right to challenge the legality of excluding any provision of the collective bargaining agreement from grievance and arbitration provisions. The Court should reject the LRO’s narrow and constrained interpretation of what is required of a party to retain their ability to ask for relief under the UDJA.

² See PSE’s Opening Brief, page 24-25, and cases cited therein.

1. The Trial Court Erroneously Dismissed This Matter Based On A Lack of A Justiciable Controversy

PSE properly invoked the UDJA to determine the rights of the parties under RCW 41.80.030. Specifically, the UDJA provides, in pertinent part that “a person interested . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder. RCW 7.24.020. The declaratory judgment act is to be liberally interpreted in order to facilitate its socially desirable objective of providing remedies not previously countenanced by law. *Reeder v. King County*, 57 Wn.2d 563, 358 P.2d 810 (1961).

PSE certainly does not dispute the elements required to establish a justiciable controversy as set forth in both its Opening Brief and the LRO’s Brief.³ Because the LRO only disputes whether there is an “actual, present and existing dispute or the mature seeds of one”, the Court can presume that the LRO concedes that all other elements of a justiciable controversy have been met. As will be explained *infra*, the Court must also conclude that this matter does set forth an “actual, present and

³ i.e. parties must have genuine and opposing interests; the interests must be direct and substantial; and a judicial determination will be final and conclusive. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

existing dispute or the mature seeds of one” for purposes of finding a justiciable controversy under the UDJA.

a. There Is An Actual, Present And Existing Dispute Or The Mature Seeds Of One For Purposes Of Finding A Justiciable Controversy.

The LRO is apparently arguing that the only way PSE could have preserved the interpretation of RCW 41.80.030 as an “actual, present and existing dispute” for purposes of a declaratory judgment action, was to refuse to agree to any contractual provisions which were excluded from the grievance and arbitration provisions. But this position ignores the law which provides the alternative that a justiciable controversy is created if there is “the mature seeds of a dispute”. It also ignores the reality of the effects of failure to ratify a contract.

Since the LRO made it clear that it would not agree to a contract which required arbitration of certain provisions, had PSE insisted, the parties would not have been able to ratify a collective bargaining agreement within the statutory deadline, if at all. [CP 231-232] Obviously, refusing to ratify a collective bargaining agreement would not have been feasible; it would have meant that PSE’s members would have to forego salary increases and other economic benefits. There is nothing in the UDJA, nor should the Court read into the UDJA, a requirement that a party must

endure serious economic hardship in order to have a court rule on one's rights under a statute.

b. The Cases Cited By The LRO In Support Of Its Position Are Not Dispositive.

In support of its position (that there was no “actual, present and existing dispute or the mature seeds of one”), the LRO cites two cases, neither of which is analogous to the case at bar: *DiNino v. State*, 102 Wn.2d 327, 684 P.2d 1297 (1984) and *Bercier v. Kiga*, 127 Wn. App 809, 822, 103 P.3d 232 (2004). That is because both cases presented essentially “hypothetical” situations.

DiNino v. State involved a plaintiff who wanted a medical directive placed in her file providing that life sustaining procedures would be withheld and her pregnancy terminated if she was pregnant, terminal, and unable to communicate her desires. *Id.* at 329. The Court refused to grant the declaratory judgment because the issue was not “ripe” for review: Ms. DiNino was not pregnant or in a terminal condition, and because there was not a present controversy between parties with opposing views. The State had not prevented her from placing the directive in her file, it was her own physician. *Id.* at 331-332. Similarly, in *Bercier v. Kiga*, the Court was being asked to determine the rights of parties under a hypothetical “compact” and refused to do so. Here, PSE is not asking the Court to

entertain a “hypothetical” statute, nor a hypothetical situation. PSE and the LRO are indeed parties to a collective bargaining agreement, which at the time of hearing had been repudiated, and is asking the Court to interpret an existing, and fairly new statute. PSE has presented the Court with a genuine and existing issue, making the cases by the LRO inapplicable.

While emphasizing irrelevant cases, the LRO ignores a genuinely analogous case, *Department of Game v. Puyallup Tribe Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967), *aff'd* 391 U.S. 392, 88 S. Ct. 1725, 20 L.Ed 2d 689 (1968). There, an action for a declaratory judgment was deemed a proper method for state agencies to determine whether certain Native Americans were immune from state fishing regulations by virtue of treaties between the United States and various Indian tribes. The action for declaratory and injunctive relief was brought before any members of the Tribe were arrested or faced other penalties. The Puyallup Tribe made an argument similar to that which the LRO is making here: that the state agencies were not entitled to seek relief under the UDJA because no members of the Tribe had yet been arrested or fined. It argued that the issues should instead be raised only once individual criminal actions brought against its members. *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn. 2d. at 248.

This position was specifically rejected by the Court. Instead, the Court determined that a declaratory judgment action was appropriate because the alternative method of relief would be a multiplicity of arrests for violation of the fishing regulations, and the jailing and detention of individuals with consequent hardship to them and their families. *Id.* at 249. In short, the Court determined that parties are not required to suffer personal hardship to create an “actual, present and existing dispute” for purposes of a declaratory judgment.⁴

Like the Native Americans in *Department of Game*, the personal hardship for PSE members of failing to ratify a contract containing important economic incentives simply to create an “actual, present and existing” dispute would simply be too great. Because of the bargaining deadline contained in RCW 41.80.010, and the time that is typically required to litigate, PSE members and their families would necessarily suffer serious economic hardship if they refused to ratify a contract based on provisions PSE believed to be illegal exclusions from the grievance and arbitration process. The Court should not require PSE and its members to

⁴ *The Department of Game v. Puyallup Tribe v. Puyallup Tribe*, *supra* was later reversed by *The Department of Game et al v. The Puyallup Tribe*, 80 Wn.2d 561, 497 P.2d 171 (1972) on the merits of the issues before the Court and not based on whether the matter was properly before the Court under the UDJA.

suffer personal economic hardship simply to obtain a clarification of its rights under RCW 41.80.030.

c. The Repudiation Of The Collective Bargaining Agreement Between PSE And WWU At The Time of Hearing Was Not Given Appropriate Attention By The Trial Court.

As set forth in PSE's Opening Brief, the status of the parties' bargaining agreement should have been of critical importance in determining whether a justiciable controversy exists. At the time of hearing, the collective bargaining agreement between PSE of WWU had been repudiated by the State. [CP 1243; CP 1320-1323]. This meant that 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 in bargaining this new collective bargaining agreement. Given this, the trial court should have ruled that there was an actual, present and existing dispute or at the very least, the mature seeds of one.

Consistent with the mandate that the UDJA be liberally construed, the Court should determine that this matter did indeed present a justiciable controversy. Once the Court determines that this matter presents a

justiciable controversy, the Court should further adopt PSE's interpretation of RCW 41.80.030 as that interpretation is wholly consistent with the rules of statutory construction.

B. The Court Should Rule That RCW 41.80.030 Indeed Means What It Says: That All Provisions In a Collective Bargaining Agreement Must Be Subject To The Contractual Grievance Procedure Which Culminates In Final And Binding Arbitration.

As fully set forth in PSE's opening brief, 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)). It is precisely this rule of statutory interpretation that the LRO is asking this Court to ignore.

Significantly, the LRO argues that "there is nothing in RCW 41.80.030 . . . which states the parties cannot agree that the merits of some types of disputes will not be arbitrated." [LRO's Brief at page 27]. PSE submits that this is wholly incorrect - - the plain language of RCW 41.80.030 states that *all* collective bargaining agreements *shall* 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.” The LRO nonetheless attempts to avoid the clear meaning of the statute by arguing that it cannot be harmonized with RCW 41.06. Like the previous argument, this argument is specious.

1. PSE’s Interpretation Of The PSRA Is Easily Harmonized With RCW 41.06,

Again, as set forth in PSE’s opening brief, 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 specifically 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 set forth in RCW 41.80.030, it could have: 1) specifically 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 Legislature obviously did none of these things, negating the LRO’s argument that RCW 41.80.030 cannot be harmonized with RCW 41.06 et. seq.

The LRO’s argument also mistakenly presupposes that the DOP must administer the classification and allocation of all positions at

institutions of higher education. Based on this erroneous presumption, the LRO argues that the classification and reallocation process cannot be subject to final and binding arbitration because it would negate the administrative rules of the DOP contained in WAC 357. Specifically, the LRO argues that the language of WAC 357-52-210, making appeals to the PRB “final and binding”, acts to prohibit the parties from agreeing to arbitrate classification disputes.

What this argument ignores is that institutions of higher education are not even necessarily required to use the state-wide DOP classification system and can instead implement their own, local position classification system, just as Eastern Washington University did and WWU tentatively agreed to do during bargaining for its 2007-2009 collective bargaining agreement with PSE. Because it is tied directly to wages, “classification” is considered an item in the scope of bargaining, and, as explained in PSE’s opening brief, is in fact properly characterized as a mandatory subject of bargaining between the parties. [See PSE’s Opening Brief, page 38-43]. Had the parties agreed to ignore the DOP classifications and establish their own local classifications, including their own system of allocation and reallocation within a collective bargaining agreement, the DOP would be statutorily precluded from objecting or insisting on its “jurisdiction” to administer classifications. That is because, in accordance

with RCW 41.80.020 (6), it is the provisions of a collective bargaining agreement that prevail over a conflicting administrative rule or agency policy relating to wages and terms and conditions of employment. In short, WAC 357 and all policies of the DOP could be deemed inapplicable by operation of RCW 41.80.020(6) if the parties agreed on a different system for administering a system of classifications within their collective bargaining agreement.

Given that an institution of higher education can, consistent with RCW 41.80.020(6), lawfully create its own entire classification system within a collective bargaining agreement, there is nothing to preclude it also from defining that certain administrative rules of the DOP would be applicable, and others would not, i.e. WAC 357-52-210. If the Legislature intended the DOP to have the kind of exclusivity over the classification system that the LRO argues it has, (such that it is exempt from the application of RCW 41.80.030), the Legislature would not have indicated that collective bargaining agreements essentially “trump” administrative rules. Reading RCW 41.80.030 with RCW 41.80.020(6) and applying labor law (as it pertains to mandatory subjects of bargaining) leads inexorably to the following conclusions: the parties to a collective bargaining agreement are required to bargain classification/wages because they are properly characterized as mandatory subjects of bargaining; all provisions,

including classifications and their reallocation must be subject to the grievance procedure culminating in final and binding arbitration pursuant to RCW 41.80.030; and to the extent that arbitrating classification/reallocation disputes violates DOP agency rule or policy, the collective bargaining agreement should prevail pursuant to RCW 41.80.020(6).

2. The *Steelworkers Trilogy* and “Related Case Law” Cited By The LRO Is Wholly Irrelevant To The Issue at Bar And Is Of No Use In Interpreting RCW 41.80.030.

The LRO next simplistically argues that the Court should consider the *Steelworkers Trilogy* (and other cases involving the interpretation of arbitration clauses contained in collective bargaining agreements) in its interpretation of RCW 41.80.030. This is presumably because they all address the broad issue of “arbitration”. Such an argument should be deemed wholly unpersuasive by this Court for one basic reason: the cases cited by the LRO have nothing to do with the issue at bar, much less the proper interpretation of the statutory requirement of arbitration contained in RCW 41.80.030.

The *Steelworkers Trilogy*⁵ involved three cases all brought by the

⁵ *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed. 2d 1403 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1363, 4 L.Ed. 2d 1432 (1960).

United Steelworkers of America (USWA), under Section 301 of the Labor Management Relations Act (LMRA).⁶ *Steelworkers v. American Manufacturing* involved the employer's refusal to arbitrate the grievance of an employee who had been partially disabled, and whom the employer refused to re-employ. The parties' collective bargaining agreement contained a clause that required arbitration of all disputes arising under its provisions, but the company had refused to arbitrate based on its assertion that the grievance was frivolous. The Court ordered the company to arbitrate the employee's grievance based on its determination that a promise to arbitrate contained in a collective bargaining agreement is enforceable regardless of the court's view of the merits of the underlying grievance. Specifically, the Court found that "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." *Steelworkers v. American Manufacturing*, 363 U.S. at 568.

In *Steelworkers v. Warrior & Gulf*, the issue involved whether the employer was required to arbitrate a "contracting out" grievance in the face of an arbitration clause that excluded from arbitration "matters which are strictly a function of management." The employer refused to arbitrate

⁶ Suits for violation of contracts between an employer and a labor organization. . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a) (2000).

based in large part on its argument that subcontracting was indeed a strict function of management. The Court rejected the argument and ordered the company to arbitrate, but acknowledged the rule that arbitration could not be ordered unless parties had consented to arbitrate:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. *Steelworkers v. Warrior & Gulf*, 363 U.S. at 582-83.

In *Steelworkers v. Enterprise Wheel and Car Corp.*, the parties had arbitrated a grievance arising out of their collective bargaining agreement, but the employer had refused to honor the arbitrator's award. The Court held that the arbitrator's award must be enforced, based on the principle that an arbitral award should be enforced regardless of the court's view of the merits of the dispute. The standard of judicial review of arbitral awards was stated as follows:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. at 597.

While the *Steelworkers Trilogy* cases are of considerable importance in defining the general parameters of labor arbitration, as stated *supra*,

they have nothing to do with the issues presented by the instant case. Unlike the *Steelworker's Trilogy* cases and the other cases cited by the LRO, the Court is not being asked to interpret whether an arbitration provision *already contained* in a collective bargaining agreement is applicable to a given dispute, or whether an arbitration decision must be enforced. Instead, the Court is being asked to determine whether the parties to a collective bargaining agreement bargained under the PSRA may exclude any provision from the contractual grievance procedure culminating in binding arbitration under RCW 41.80.030.

The cases cited by the LRO in the Brief of Respondent are irrelevant for an additional reason: they all address the issue of arbitrability in the context of collective bargaining agreements bargained under a wholly different act: RCW 41.56 (the Public Employees Collective Bargaining Act "PECBA"). Unlike RCW 41.80.030, RCW 41.56.122 provides that the parties to a collective bargaining agreement *may* agree to a provision calling for binding arbitration of disputes arising from the interpretation and application of their agreement, but does not require it. And again, in the bulk of state cases cited by the LRO⁷, the Court was being asked to

⁷ *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 924 P.2d 13 (1996); *Mt. Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 81 P.3d 111 (2003); *Yakima Cy. Law Enf. Officers Guild v. Yakima Cy.*, 133 Wn.App. 281, 135 P.3d 558 (2006); *General Teamster's Local 231 v. Whatcom Cy.*, 38 Wn.App. 715, 687 P.2d 1154 (1984).

determine whether the parties intended to arbitrate certain disputes, not whether a specific contractual exclusion from the grievance and arbitration process *itself* was lawful under the statute.

The LRO clearly confuses the issues before the Court. PSE has never argued that the merits of all disputes, even those which are not addressed by its collective bargaining agreement, are arbitrable. Nor is PSE asking the Court to interpret an arbitration clause contained in its collective bargaining agreements with either CWU or WWU. PSE is instead simply asking the Court to determine whether any provision contained in a collective bargaining agreement, *specifically bargained under the PSRA*, may exclude provisions from the grievance procedure culminating in arbitration contrary to what appears to be the plain language of RCW 41.80.030. The cases cited by the LRO will not aid the Court in any way in making this determination.

3. The LRO Cannot Claim “Equity” As Grounds For Relief Based On Its Own Conduct.

The law provides that a party may not seek equity if that party has himself or herself, in prior conduct related to the transaction, violated equitable principles. *J.L. Cooper and Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 63, 113 P.2d 845 (1941). Here, it is interesting indeed that the LRO claims dismissal of this case should be affirmed as a matter of “equity”,

despite the fact that it did not demonstrate any concern for “equity” when it bargained with PSE of WWU.

Despite the fact that the LRO, a Division of the Office of Financial Management, knew or should have known of the State’s projected budgetary shortfall, it agreed to certain wage and fringe benefits for PSE of WWU members in exchange for other concessions by PSE. [CP 1243]. The director of the Office of Financial Management subsequently refused to certify that the compensation and fringe benefit provisions contained in the 2009-2011 collective bargaining agreement between PSE and WWU were financially feasible, repudiating the contract. [CP 1320-1323].

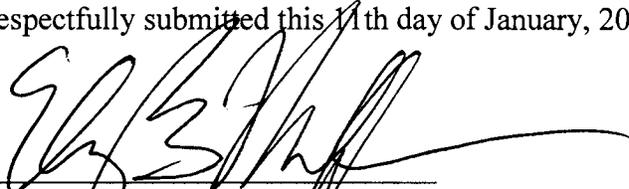
PERC had ordered the presence of a mediator and binding interest arbitration for negotiations for the 2009-2011 collective bargaining agreement between PSE and WWU because of WWU “historical pattern of rejecting the basic principles of collective bargaining.” [CP 1241; CP 1244]. As an exercise of own good faith, PSE decided to attempt to reach an agreement without insisting on PERC’s further involvement. [CP 1242]. However, upon receiving notice of the repudiation of the collective bargaining agreement, however, PSE asked PERC to re-instate the interest arbitration. Both WWU and the LRO opposed PSE’s motion to reinstate the interest arbitration and mediation provisions and this relief was denied

to PSE.⁸ Again, had the LRO been truly concerned with equity, it would not have agreed to wage and fringe benefits it was in a position to know would not be economically feasible, nor would it have so adamantly opposed PSE's desire to reinstate PERC's assistance in reaching another collective bargaining agreement. Clearly, the LRO cannot claim "equity" as it did not act consistently with equitable principles.

IV. CONCLUSION

For all of the reasons set forth above, as well as the reasons set forth in PSE's Opening Brief, the relief outlined in PSE's Opening Brief should be granted by the Court.

Respectfully submitted this 11th day of January, 2010.



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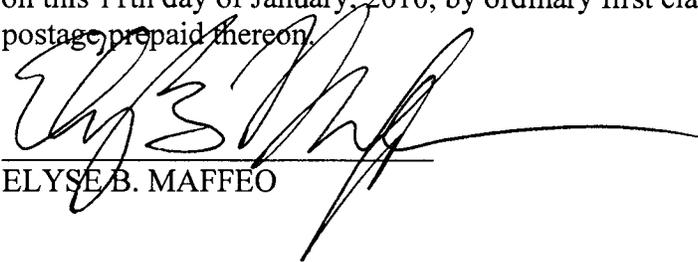
⁸ It is interesting that the LRO persistently argues in its Brief of Respondent that PSE should have requested interest arbitration yet neglects to advise the Court that it ultimately resisted PSE's attempt to do so.

V. CERTIFICATE OF MAILING

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

Gil Hodgson
Assistant Attorney General
Attorney General of Washington
7141 Cleanwater Drive SW
Tumwater, WA 98504-0145

on this 11th day of January, 2010, by ordinary first class mail, with postage prepaid thereon.



ELYSE B. MAFFEO

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