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DIVISION II

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STATE OF WASHINGTON
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NO. 39334-4-II

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

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON/SEIU LOCAL
1948,

Appellant,

v.

WASHINGTON STATE LABOR RELATIONS OFFICE, a division of
the OFFICE OF FINANCIAL MANAGEMENT,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Under the State Civil Service Law, RCW 41.06, the Washington State Department of Personnel (DOP) implements and oversees a comprehensive and statewide job classification system. Every position covered by the Civil Service Law is “allocated,” or assigned, to a job classification. Each classification describes a certain type of job in some detail. Employees do not always agree with the job classification determined to best describe their work. Employees have a right to seek “reallocation” of their positions to different job classifications before DOP, and ultimately, before the Washington State Personnel Resources Board (Board). The decisions of the Board are final and binding.

The Personnel System Reform Act of 2002, RCW 41.80, (PSRA or the Act), amended the Civil Service Law. The Act did not eliminate the Board’s jurisdiction over employees covered by the Act who seek reallocation of their positions within the statewide classification system.

The Act defines the collective bargaining rights of the state, its institutions of higher education, and many employees covered by RCW 41.06. Each collective bargaining agreement negotiated under the Act must include a grievance procedure culminating with final and binding arbitration of all disputes arising over the interpretation and application of the agreement. The Act permits negotiated limitations on

substantive arbitrability, but requires the parties to arbitrate any disputes over the limiting language.

Beginning in 2004, the Public School Employees of Washington, (PSE or Union), negotiated under the Act for seven collective bargaining agreements covering union members at the Western or Central Washington Universities. While negotiating all seven contracts, PSE repeatedly bargained and agreed to contract language precluding arbitration of the merits of certain types of disputes. In many instances, PSE proposed such language. In 2008, Western Washington University, (Western), believed that language in one of its contracts with PSE precluded the arbitration of disputes arising under Washington's statewide classification system. Accordingly, Western exercised its contractual and statutory rights to have an arbitrator interpret that language. On August 6, 2008, the arbitrator concluded PSE had bargained language committing the resolution of classification disputes to DOP, rather than arbitrators.

Two days later, PSE filed the lawsuit before the Court, seeking a declaration that all language limiting the arbitrability of certain types of disputes, including those pertaining to classification, is illegal. PSE continued acting inconsistently with its claimed position after filing suit. While bargaining contracts for the 2009-11 biennium, PSE could have

attacked allegedly illegal proposals by demanding interest arbitration with Western, or by filing unfair labor practice charges with the Public Employment Relations Commission (PERC). Instead, it continued to propose, bargain and agree to the very limitations it now asks the Court to declare unenforceable.

Perhaps recognizing that its conduct at the bargaining table undercut its claim of an actual controversy, PSE attempted to create one during summary judgment proceedings. It referenced positions it would take in future negotiations, and it claimed in its petition that the collective bargaining provisions it had negotiated at arms-length were “contracts of adhesion.” PSE further asserted that DOP is a “kangaroo court,” apparently arguing that resolution of any classification dispute within the DOP system categorically amounts to harm. Finally, PSE asked the PERC to declare it would be entitled to demand interest arbitration during future negotiations to follow the determination of the Office of Financial Management that contracts for the 2009-11 biennium were not financially feasible.

The trial court dismissed PSE’s petition, properly declining to become involved in an academic dispute. PSE’s petition for declaratory judgment did not establish a justiciable controversy, but was an invitation to render an advisory ruling.

Because PSE is asking the Court to misinterpret the PSRA, the Court has a second basis upon which to affirm the trial court's dismissal of the Union's lawsuit. The Act requires arbitration of all questions of contract interpretation, including questions of substantive arbitrability. It does not, however, categorically prohibit negotiated limitations on the application of contractual grievance mechanisms to the merits of certain classes of disputes.

PSE proposes an interpretation of the law which would effectively grant unilateral control over questions of substantive arbitrability to covered labor unions statewide, regardless of bargained contract language. The Respondent urges the Court to reject such an interpretation of the PSRA, which would be inconsistent with plain language, in conflict with the Civil Service Law, and contrary to well-established principles of common law.

II. RESTATEMENT OF THE ISSUE

1. Did the trial court correctly determine the absence of a justiciable controversy under the Uniform Declaratory Judgment Act (UDJA), RCW 7.24, where the plaintiff seeking a declaration that certain bargaining proposals and the resulting contract terms are illegal originated much of the challenged language itself, and bargained or agreed to the rest?

2. If PSE has stated a justiciable controversy, may the parties to the collective bargaining process established by the PSRA agree they will not arbitrate the merits of certain classes of disputes?

III. RESTATEMENT OF THE CASE

From 2004 to 2006, PSE negotiated four contracts with Western, which was assisted or represented in collective bargaining by the Summit Law Group. Clerk's Papers (CP) at 451-56. During 2008, PSE began bargaining its first agreement with Central Washington University (Central). CP at 770. The Labor Relations Office (LRO) represented Central in negotiations for this interim contract, which remained in effect through June 30, 2009. *Id.* In bargaining for 2009-11 contracts, the Summit Law Group assumed representation of Central, while LRO assumed representation of Western. CP at 455, 635.

All of the agreements produced by these negotiations contained language precluding arbitration over the merits of certain classes of disputes, including classification. CP at 46-47, 54, 141, 146, 451-56, 634-37. PSE first contended such language was illegal at the bargaining table in 2008, after Western challenged the substantive arbitrability of a grievance pertaining to classification. CP at 452-56, 566, 772, 929, 935-36. Despite its claimed position, PSE continued proposing and agreeing to

language limiting substantive arbitrability, even after filing the lawsuit at issue. CP at 635-37, 773, 775, 929-36.

On April 3, 2009, Judge Hicks of the Thurston County Superior Court granted Respondent's Motion for Summary Judgment and denied PSE's Motion for Summary Judgment, because PSE's Petition for Declaratory Judgment failed to present a justiciable controversy. CP at 1368-78. Judge Hicks also determined that, even had the dispute been justiciable, he would not agree with PSE's suggested interpretation of RCW 41.80.030. *Id.*

A. PSE Has Historically Proposed, Bargained, And Agreed To Limitations On The Arbitrability Of Certain Classes Of Disputes, Including Those Relating To Classification

During 2004 and 2005, PSE and Western bargained contracts for the 2005-07 biennium. CP at 452. Western was not represented by LRO. CP at 451-52. Bargaining Unit D (B.U.D.) of the Union proposed limitations on the grievance procedure. CP at 452-53. On April 11, 2005, B.U.D. proposed: "The Employer may discipline or discharge a probationary employee at any time during the probationary period, and such action will not be subject to the grievance procedure." CP at 453, 506-7. The B.U.D. proposal also precluded employees from taking disputes over trial service reversions to arbitration. *Id.* During bargaining, in response to employer concerns, B.U.D. proposed: "This paragraph [the

preamble] shall not be subject to the grievance process.” CP at 453, 508.

During 2005, the Professional and Technical Employees bargaining unit of PSE negotiated its first contract with Western. CP at 452. That contract, like the B.U.D. contract, contained limitations on the grievance mechanism and committed classification disputes to DOP for resolution.¹ *Id.*

While negotiating with Western during 2006 for contracts applicable to the 2007-09 biennium, PSE again bargained agreements limiting the substantive arbitrability of certain types of disputes, including classification.² CP at 453-55, 512, 518-19, 539-41, 548. PSE proposed a “hybrid” classification system, under which PSE would participate in the compensation aspects of the DOP classification system, but have disputes arising within that system resolved outside of DOP, by a union-approved “hearings officer.” *Id.* Western repeatedly rejected that proposal. CP at 454-55. PSE ultimately agreed to an article providing that classification disputes would be resolved in accordance with WAC 357, under which the DOP provides final and binding resolution of

¹ See CP at 451-56, 462-505; Article 22.1.2, relating to probationary discipline and discharge - CP at 451-52, 485; Article 22.2.5, relating to trial service reversions - CP at 451-52, 486; and Article 2.1, relating to classification, CP at 453-55, 466.

² For example, the agreement between the PTE unit of PSE and Western stated in part: “This paragraph [preamble] shall not be subject to the grievance process.” CP at 512. It also limited or precluded arbitration of the merits of certain types of disputes pertaining to non-discrimination Article 8.3; CP at 518-19; discipline and discharge of probationary employees Article 25.5.1; CP at 540-41; and trial service reversions Articles 25.2.5 and 32.7; CP at 451-53, 541, 548.

classification disputes. CP at 454-55; WAC 357-52-210, 49-018, 49-035(2). PSE nonetheless later claimed a contractual right to resolve classification disputes outside the DOP system, via arbitration. CP at 614, 618-19.

B. PSE Demanded Resolution of A Classification Dispute Before An Arbitrator, Rather Than DOP

In 2007, PSE member McNeely requested that his position as an Information Technology Specialist 3 be “reallocated” to an Information Technology Specialist 4 within Washington’s statewide classification system. CP at 618, 656-57, 660-61. PSE President Banton e-mailed Western Human Resources on behalf of Mr. McNeely. CP at 660-61. She stated in part: “We believe that the contract language [of Article 24 governing classification review] applies to first requesting a re-consideration from the employer **prior to a review with DOP**. Additionally, we are unable to identify a formal deadline for this action in WAC 357...” *Id.* (bracketed text and emphasis added). Notwithstanding its bargaining history with Western, or this statement by PSE President Banton, PSE filed a grievance and demanded arbitration over the allocation of Mr. McNeely’s position. CP at 614-15.

C. PSE Took The Position Asserted In Its Lawsuit About A Week After Western Sought An Arbitrator's Interpretation Of Bargained Language Committing The Resolution Of Classification Disputes To DOP, But PSE Continued Acting Inconsistently With Its Stated Position

On February 13 and 14, 2008, counsel for Western responded to PSE's demand for arbitration of the McNeely grievance, advising that Western wished to obtain an arbitrator's interpretation of whether its 2007-09 contract with PSE precluded the arbitration of a classification dispute. CP at 565-66, 633. Approximately a week later, PSE began asserting that all language precluding the arbitration of classification and other substantive disputes was illegal. CP at 741-43. It took this position notwithstanding having agreed to such limitations for years, and having proposed limitations on arbitrability on February 5, 2008. CP at 741-43, 769-72. PSE claimed Central had "insisted to impasse that provisions relating to certain mandatory subjects of bargaining, e.g. classification and terms and conditions of employment for temporary employees, be excluded from the grievance procedure, and not subject to arbitration." CP at 743.

The very same day it threatened an unfair labor practice (ULP) objecting to limitations on the contractual grievance mechanism, PSE signed a tentative agreement with Central precluding the arbitrability of oral and written reprimands. CP at 773. It also continued to make

package proposals to Central containing language limiting the application of the contractual grievance mechanism to certain types of disputes. CP at 775, 925-28, 934. In the first agreement it negotiated with Central, settled on April 30, 2008, PSE agreed to limitations on the applicability of the contractual grievance mechanism to performance evaluations and disciplinary matters involving probationary employees. CP at 46-48, 65, 98. Central and PSE further discussed classification, and, in exchange for other concessions from the employer, PSE ultimately agreed that classification disputes would not be subject to the grievance mechanism. CP at 935.

D. Two Days After An Arbitrator Confirmed PSE Had Bargained Language Precluding Arbitration Of The Merits Of Classification Disputes, PSE Filed The Lawsuit Now At Issue

a.

On August 4, 2008, the arbitrator confirmed that the 2007-09 CBA between Western and PSE precluded arbitration of the merits of a classification dispute. CP at 565-67, 622. He declined to rule on PSE's contention that RCW 41.80.030(a) rendered it illegal to refer classification decisions to DOP instead of an arbitrator, noting PERC might have jurisdiction over that issue. CP at 621-23. He observed, however, that PSE witnesses "testified that arbitrability was what they *wanted*" and "nothing in the testimony of the PSE bargaining representatives supports the claim that they *believed* that the disputed language supported the

conclusion that the DOP allocation decisions would be subject to review- or collateral attack, by a grievance arbitrator.” CP at 622. (emphasis in original).

On August 6, 2008, two days after receiving that decision, and approximately two weeks before PSE and Western settled on their 2009-11 contract, PSE filed the lawsuit at issue. CP at 4. PSE stated, “the LRO regularly proposes that certain provisions of the CBA between Western and PSE be exempt from the grievance procedure. . . .” but attached only one example, pertaining to classification. CP at 6, 9-11.

E. PSE Proposed, Bargained, Or Agreed To the Very Provisions It Now Attacks In Its Lawsuit

The only allegedly illegal proposal PSE identified in its lawsuit pertained to classification. *Id.* However, during discovery and at summary judgment, PSE referenced a total of ten allegedly illegal provisions³ in its CBA with Western, all of which it now attributes to the supposed insistence of LRO.⁴

PSE itself proposed limitations on arbitrability in five of those ten provisions during bargaining for a 2009-11 CBA with Western - prior to

³ A single allegedly objectionable contract *article* can contain multiple *provisions* to which PSE purports to object. *See* Article 22, pertaining to both Probationary Separations and Trial Service. CP at 990.

⁴ Preamble; Non-Discrimination; Probationary Separations; Trial Service Reversions; Performance Evaluations; Health and Safety; Classification and Re-classification; Uniformed Shared Leave Pool; Temporary Appointments; and Discipline and Discharge. CP at 21-2, 231-32.

receiving any input from LRO during those negotiations.⁵ PSE bargained or agreed to the remaining five allegedly illegal terms in its contract with Western, as follows. PSE initially proposed removing any limitation on the applicability of the grievance mechanism to matters relating to non-discrimination, but ultimately proposed re-insertion of that limitation, in response to an Employer proposal for an election of remedies clause (Article 8.3); CP at 22, 231-32, 290, 932. Similarly, when Western proposed language limiting the applicability of the grievance mechanism to the shared leave pool for uniformed service members, PSE did not propose eliminating that language. (Article 20.13(F)); CP at 232, 309-11 933. When Western made a counter-proposal regarding temporary appointments which precluded arbitration of such disputes, PSE suggested modifications to that counter-proposal which retained the limitation on arbitrability. (Article 33.6A); CP at 232, 330-32 933. Although PSE proposed that employees reverting to their original positions from trial service positions be permitted to grieve to arbitration, it ultimately agreed to language precluding arbitration. (Articles 30.2); CP at 325-26 990-92. PSE persisted in attributing allegedly illegal contract language to the LRO

⁵ Preamble, CP at 930-32, 937, 940, 1025, 1030; Probationary Separation (Articles 22.6.2 and 30.1.1); CP at 930-32, 990, 1084; Performance Evaluations (Articles 26.7 and 34.4); CP at 930-32, 997, 1091; Health and Safety (Articles 38.13 and 46.9); CP at 930-932, 1013-1014, 1108-1109; and Discipline and Discharge (Articles 28.6, 28.11, 36.1, 36.6); CP at 930-32, 1000, 1094. These provisions were first identified in discovery, received by agreement March 3, 2009.

in its appellate brief, but again, PSE either, proposed, bargained, or agreed to that language.⁶

PSE again proposed that members participate in the compensation aspects of the statewide classification system, but have disputes resolved by a union-approved “Classification Review Hearings Officer” outside the system. CP at 636-37, 930-32, 979, 1073. Western again rejected this proposal. CP at 636-37. PSE ultimately agreed with Western to language providing classification disputes were not subject to review by arbitrators. *Id.*

At Western, PSE had the right during negotiations for a 2009-11 contract to demand interest arbitration to prevent an allegedly illegal contract terms. CP at 636. It did not do so. CP at 637. Instead, approximately two weeks after filing its lawsuit, PSE settled a contract with Western, which, had it been deemed financially feasible, would have provided PSE members with pay increases tied to the DOP classification system. CP at 6, 231, 273, 318, 637, 1117, 1321-23. PSE counsel stated

⁶ Brief of Appellant (Br. Appellant) at 16 (Claiming that the content of performance evaluations are not subject to the grievance procedure, and claiming presence of agreed language precluding arbitration of the discipline or termination of probationary employees is in contracts because “LRO insisted,” despite the fact that PSE itself proposed language the same or similar to that at issue). CP at 931, 990, 997, 1000, 1091, 1084, 1094. PSE also attributed the inability of employees to arbitrate oral reprimands and limitations on the grievability of written reprimands to LRO. Br. Appellant at 16. However, one of PSE’s proposals to Western precludes arbitration over written reprimands, while the other precludes arbitration over oral reprimands. CP at 1001, 1096.

in part: “My clients are appreciative of Western’s willingness to meet us halfway on some issues which have been contentious in the past.” CP at 651.

In addition to incorrectly attributing objectionable language in its 2009-11 CBA with Western to the LRO, PSE also claimed in summary judgment proceedings that the LRO illegally insisted upon multiple unenforceable “exemptions” from the grievance procedure at Central.⁷ CP at 22, 26-27, 42, 46. As was the case at Western, many of the provisions PSE claims are illegal were the same or similar to ones that it actually originated prior to input from LRO during bargaining for the 2009-11 biennium.⁸ CP at 26-7, 770-75. PSE bargained and or agreed to the remaining limitations, one of which was classification. CP at 65, 116, 773, 934-36.

IV. STANDARD OF REVIEW

This Court’s review of an order granting summary judgment is de novo, and the Court engages in the same inquiry as the trial court.

⁷ Probationary Discipline and Discharge; Oral and Written Reprimands; Performance Evaluations; Temporary Appointments; Classification. CP at 26-27, 46.

⁸ At Central, PSE proposed limitations on the application of the grievance mechanism and/or arbitrability for: probationary discipline and discharge (Article 26.1.1); CP at 820; oral reprimands (Article 32.6); CP at 832; and the content of performance evaluations (Article 30.4); CP at 927.

Tyrrell v. Farmers Ins. Co. of Wash., 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). An appellate court may affirm on any ground supported by the record, even if not considered or applied by the trial court. *E.g.*, *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989); *see also Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004).

V. ARGUMENT

A. The Trial Court Correctly Dismissed This Matter For Lack Of A Justiciable Controversy

In dismissing this petition for declaratory judgment, the trial court properly declined an invitation to render an advisory ruling. “While . . . the Uniform Declaratory Judgment Act, [RCW 7.24], provides a procedure peculiarly well suited to the judicial determination of controversies concerning constitutional rights and . . . the constitutionality of legislative action, we [the Washington Supreme Court] have resolutely maintained that no decisions should be made under the Act absent a justiciable controversy.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d. 403, 417, 27 P.3d 1149 (2001) (emphasis added, internal quotes omitted). For declaratory judgment to be appropriate in the absence of an issue of overriding public import, the four justiciability factors articulated by the Supreme Court must “coalesce,” to ensure that the Court will be rendering

a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution. *To-Ro Trade Shows*, 144 Wn.2d at 411.

A justiciable controversy is defined as one: “(1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement; (2) between parties having genuine and opposing interests; (3) which involve interests that must be direct and substantial, rather than potential, theoretical, abstract, or academic; (4) a judicial determination of which will be final and conclusive.” *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). Inherent in justiciable controversy tests are the “traditional limiting doctrines of standing, mootness and ripeness, as well as the federal case-or-controversy requirement.” *To-Ro Trade Shows* at 411. The standing requirement tends to overlap the justiciable controversy requirement. *Id.* at 411, n.5. In order to have standing, “a party must show, in addition to ‘sufficient factual injury,’ that ‘the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* at 414 (quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 493-94, 585 P.2d 71 (1978) (discussing the requirements of standing to seek a declaratory judgment on a constitutional claim). Although RCW 7.24.020 is drafted broadly, and

designed to be liberally construed, “a party lacking a direct, substantial interest in the dispute will lack standing.” *Id.* at 417.

Cases such as this one, which fail to satisfy all four elements of the justiciability test, must be dismissed. *DiNino v. State*, 102 Wn.2d 327, 330-31, 684 P.2d 1297 (1984); *Diversified Indus.*, 82 Wn.2d at 811. PSE’s lawsuit is not based on an actual, present controversy, but on a “position” the Union has contrived in order to circumvent the effects of the contractual provisions it proposed, bargained, or agreed to. The issues PSE seeks to raise are not of overriding public import.

1. There is no actual, present and existing dispute

PSE attempted to create a controversy by claiming that during negotiations, “LRO insisted,” illegally, on exemptions from the contractual grievance procedure, despite the fact that during 2008, in bargaining with LRO at Western, PSE proposed, bargained, or agreed to each of the provisions now attributed to alleged illegal “insistence” by LRO. CP at 6, 21-22, 26-27, 231-32, 635-37, 930-34. *See also supra* note 4, 5. Similarly, in bargaining at Central, which PSE did not reference in its complaint but raised during discovery and at summary judgment, PSE proposed, bargained, or agreed to the provisions it now attributes to LRO “insistence.” CP at 65, 116, 773, 934-36; *See also supra* note 8, 9. To force the employer to agree to arbitrate classification disputes, PSE

claimed at Central that all “exemptions” to the contractual grievance mechanism are illegal, and threatened to file ULP charges. CP at 742-43, 772. However, it never filed those charges, and instead continued acting in a manner entirely inconsistent with the existence of any real dispute, even after filing suit in this case.

Washington courts have refused to adjudicate hypothetical and speculative controversies, which is what PSE presents. *DiNino*, 102 Wn.2d at 329-32. (Request for declaration that Natural Death Act unconstitutionally infringed on claimed right to execute directive calling for withholding of life-sustaining procedures regardless of pregnancy, and directing termination of pregnancy before withdrawal of life-sustaining measures not justiciable, where plaintiff was neither pregnant nor ill.); *Bercier v. Kiga*, 127 Wn. App. 809, 822, 103 P.3d 232 (2004) (Attempt to enjoin hypothetical compact between State of Washington and Puyallup Tribe in absence of evidence that such compact currently existed or was under consideration not justiciable).

An actual dispute is an indispensable element of a justiciable action under the UDJA, and a party cannot merely claim that a dispute exists. PSE may argue that filing this action before settling a 2009-11 CBA with Western establishes a controversy, but this argument fails where the Union purports to object to the very language it proposed, and

the Union's actions remain contrary to its stated position even after filing suit. Br. Appellant at 9. The fact that PSE did not demand interest arbitration to prevent any allegedly objectionable language from becoming part of its 2009-11 agreement with Western further demonstrates the absence of a real dispute.

PSE argues the instant case is based on language the LRO originated and "insisted" upon, and to which the Union capitulated under duress. Br. Appellant at 7-9, 28. However, PSE's lawsuit, like those of *DiNino* and *Bercier*, is predicated on facts that do not exist. While Central and Western in some cases declined to make concessions, as authorized by the PSRA (RCW 41.80.005(2)), the indisputable facts establish that they did not insist, illegally, on "exempting certain provisions" from the grievance mechanism.⁹ Instead, the parties bargained and contractually agreed to the scope of their contractual grievance mechanism, notwithstanding the fact that PSE could have filed ULP charges, or, at Western, demanded interest arbitration to prevent the contractual

⁹ At Central, the LRO did make it clear that classification was a type of substantive dispute it would not arbitrate, which it was entitled to do. However, in exchange for certain concessions, PSE agreed with Central that it would not arbitrate classification decisions. CP at 935. Moreover, as explained below at pages 31-36, as a matter of law, the Employer cannot be compelled to arbitrate classification disputes.

provisions to which it now purports to object. CP at 637.¹⁰ Thus, the facts demonstrate the absence of any real dispute.

To avoid how its bargained agreements eliminate the existence of a dispute, PSE now argues it agreed to language because it would be separable from the contract, because of the “implacable intransigence” of Western that allegedly caused PSE to file multiple ULP charges against Western, and because it was facing a “contract of adhesion.” Br. Appellant at 9-10. These claims are baseless. As a threshold matter, PSE proposed much of the language. Second, not one of the ULP charges PSE references involved LRO in any way, nor do they relate to the permissible scope of bargaining over contractual grievance mechanisms, or even to bargaining under the PSRA generally. CP at 1237-42, 1246-319. PSE did not file any ULP charges while negotiating the provisions it now attacks. CP at 455, 933-35.

Third, there is no merit to PSE’s argument that it faced “adhesion” because there was no procedural unconscionability in the negotiation of the 2009-11 contract between PSE and Western, or the interim agreement

¹⁰ PSE’s request to PERC that interest arbitration be available to it during future “re-opened” negotiations at Western was made months after settlement of the 2009-11 agreements containing the provisions it attacked in its lawsuit. CP at 1243-44, 1321-30. This Union request relating to future bargaining, which was reportedly based on the determination of OFM that contracts for the 2009-11 biennium were financially infeasible, was immaterial to a determination of the existence of a current and actual dispute. *Id.*

between PSE and Central. As explained by the Washington Supreme Court:

[T]o the extent that the characterization of a contract as an adhesion contract has any relevance to determining the *validity* of a contract, it is only in looking for procedural unconscionability: . . . The characterization of a lease as an adhesion contract because exacted by reason of a gross disparity in bargaining power is to enable the court to protect the injured party from an unconscionable contract provision.

Yakima Cy. W. Valley Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993).

Parties to a CBA are presumed to have equal bargaining strength. *Waggoner v. Dallaire*, 649 F.2d 1362, 1367 (9th Cir., 1981). The CBA provisions PSE now attacks were negotiated at arms length, over time, by two bargaining teams. PSE is represented by capable counsel.

PSE, however, claims adhesion due to the “October 1 deadline” in the PSRA, but this position should be rejected.¹¹ Br. Appellant at 28-30. The parties reached contractual agreement at Western and Central in August and April 2008, respectively, well before any statutory deadlines.

¹¹ PSE’s assertion that the October 1, 2008, deadline gives rise to unenforceable contracts of adhesion does not create an actual controversy, but is an attempt to “cherry-pick” the contracts. Under this view of the law, PSE would gain unilateral control over the contents of contracts, because it could have any negotiated provision struck from a contract, merely by citing the October 1 deadline and claiming it had no choice but to agree.

Furthermore, a statutory deadline does not insert unconscionable procedures into the negotiations. CP at 637, 935.

Perhaps recognizing that its conduct at the bargaining table at Western undercut its claim of an actual controversy, PSE attempted to meet the actual controversy requirement by referencing potential future events. Br. Appellant at 22. According to PSE, due to the determination that the CBA's for the 2009-11 biennium were not financially feasible: "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 potential future negotiations. Br. Appellant at 22 (emphasis added).

Speculation about what would transpire when the parties next bargained was irrelevant to a determination of justiciability. The simple and necessarily vague declaration of PSE counsel that the parties would "revisit" certain contract language the next time they met at the table did not create a justiciable controversy. CP at 1244-45. The fact that the parties might discuss, and even disagree, over issues in future bargaining sessions is the very essence of bargaining; it does not make declaratory judgment regarding those issues appropriate.

PSE's argument that its "duty of fair representation" established

rights creating a justiciable controversy is groundless. Br. Appellant at 21-22. The mere fact that an organization has an interest in representing its members is distinct from the question whether the positions the organization takes state an actual controversy, or meet the other justiciability requirements established by the Washington Supreme Court.

PSE's attempts to substitute a "waiver by conduct" analysis, relevant to determining the enforceability of contract terms, for the justiciability tests established by the Washington Supreme Court for determining whether a court should assert jurisdiction to hear a case under the UDJA. Br. Appellant at 23-26. The question of justiciability in an action for declaratory judgment, and the question whether a party can legally waive a statutory right, are entirely distinct. The answer to the latter question has no application to a determination whether an actual conflict exists, or to whether the other justiciability requirements have been fulfilled. *To-Ro Trade Shows*, 144 Wn.2d at 417.

2. The Issues PSE Asserts Are Not Of "Broad Overriding Import," And Do Not Warrant An Exercise Of Discretionary Jurisdiction

In weighing whether issues justify discretionary exercise of jurisdiction over otherwise non-justiciable controversies, judicial considerations have included whether the questions are of great public interest, whether an opinion of the court would be beneficial to the public

and to other branches of the government, and the desirability of an authoritative determination for future guidance of public officers. *Snohomish Cy. v. Anderson*, 124 Wn.2d 834, 840-41, 881 P.2d 240 (1994). The mere fact that a right is important does not qualify a case as one presenting “issues of broad overriding public import.” *DiNino*, 102 Wn.2d at 332. Topics courts have found to be of broad overriding public import for jurisdictional purposes include: the implications of Const. art. IX § 1 and 2 on public school funding mechanisms, *Seattle Sch. Dist.*, 90 W.2d at 485-90; whether Const. art. II § 13 precluded candidacy and re-election of legislators who had enacted a pay increase applicable to the Legislature (*State v. Dubuque*, 68 Wn.2d 553, 413 P.2d 972 (1966)); and the implications of Const. art II § 2 and 20 on the validity of legislative procedure and resulting enactments (*State v. Kinnear*, 80 Wn.2d 175, 176-77, 492 P.2d 1012 (1972)). Unlike the issues raised in the foregoing cases, the interests PSE now purports to assert are not of great public interest. To the extent there is any issue, it can be addressed in another forum, such as the Public Employment Relations Commission. Because the PSE petition fails to state a justiciable controversy, the decision of the trial court to dismiss this case should be affirmed on that basis.

B. The Petition Should Be Dismissed As A Matter Of Law, Because The PSRA Ensures Arbitral Interpretation Of Disputes Over The Interpretation And Application Of Contracts, But Does Not Prohibit Language Precluding The Arbitration Of Certain Classes Of Disputes

In the alternative, the Court may affirm dismissal of PSE's petition because PSE's suggested interpretation of the PSRA ignores the plain language of that statute, adds language that is not there, and ignores basic principles of contract and labor law.

As explained by the Washington Supreme Court:

if a statute is clear on its face, its meaning is to be derived from the language of the statute alone. This court has repeatedly held that an unambiguous statute is not subject to judicial construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it. A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable. If a statute is ambiguous, this court resorts to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it.

Killian v. Atkinson, 147 Wn.2d 16, 20-21, 50 P.3d 638, 640 (2002).

1. The Plain Language of the PSRA Does Not Prohibit The Parties To The Collective Bargaining Process From Contractually Defining Arbitrators' Authority

Since the inception of the PSRA, the participants in the collective bargaining process it established have consistently negotiated language

defining and limiting the scope of contractual grievance mechanisms. Nothing in RCW 41.80.030(2) prohibits those negotiations, so long as the resulting language provides for complete processing of disciplinary matters and terminations within the contractual mechanism, and for arbitral resolution of disputes over the application and interpretation of the agreement.

RCW 41.80.030(2) states, in pertinent part:

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...(b) Requires processing of disciplinary actions or terminations of employment of employees...entirely under the procedures of the collective bargaining agreement.

RCW 41.80.130(4) provides a mechanism by which a party may seek a judicial order compelling arbitration, providing in pertinent part:

“...Disputes concerning compliance with grievance procedures shall be reserved for determination by the arbitrator. Arbitration shall be ordered if the grievance states a claim that on its face is covered by the collective bargaining agreement [and] doubts as to coverage shall be resolved in favor of arbitration.” (emphasis added)

The PSRA establishes that arbitrators, not courts, must resolve disputes between the parties regarding interpretation and application of their agreements. It permits arbitral determination of whether the parties

have contractually agreed to arbitrate the merits of certain types of disputes, and is consistent with negotiated language clearly and unmistakably providing that in some instances, the answer to that question will be no.

PSE, however, seeks a judicial declaration that, by law, the parties must arbitrate the substantive merits of any dispute claimed to relate to any provision of a CBA negotiated under the PSRA. For example, PSE now argues that language stating that the content of performance evaluations won't be arbitrable violates the PSRA. Br. Appellant at 16-17. There is nothing in RCW 41.80.030(2), nor in the remainder of the PSRA, which states the parties cannot agree that the merits of some types of disputes will not be arbitrated. PSE's suggested "plain language" interpretation of RCW 41.80.030(2)(a) adds language that isn't there.

2. The Principles Of Statutory Construction Support An Interpretation Of The PSRA Permitting Bargaining Over Arbitrators' Authority

The principles of statutory construction further reveal the error of PSE's suggested interpretation. Sub-part (a) of RCW 41.80.030(2) should not be read in a vacuum, but in conjunction with sub-part (b), the remainder of the PSRA, and other applicable law. *Killian*, 147 Wn.2d. at 20-21. By specifying disciplinary actions and terminations as the one substantive issue that must be processed "entirely" under the contractual

procedures, the statute precludes the implication that every substantive dispute arising between the parties to a collective bargaining agreement must be subject to the grievance procedure required by sub-part (a) of RCW 41.80.030(2).

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the Legislature under the maxim *expressio unius est exclusio alterius* - specific inclusions exclude implication.

Jacobsen v. Dep't. of Labor & Indus., 127 Wn. App. 384, 392, 110 P.3d 253, 257 (Div. II, April 19, 2005), *as amended on reconsideration*, (June 29, 2005).

Arbitral interpretation of language defining the applicability of contractual grievance proceedings comports not only with RCW 41.80.030(2), but also with RCW 41.80.130(4), providing for judicial review of refusals to submit grievances to arbitration, but mandating: "...Arbitration shall be ordered if the grievance states a claim that on its face is covered by the collective bargaining agreement. Doubts as to coverage shall be resolved in favor of arbitration." RCW 41.80.130(4) indicates legislative recognition of the fact that the scope of arbitrators' authority is defined, and limited, by contract. This conclusion is further supported by the fact that the PSRA enumerates subjects the parties are

prohibited from bargaining, but does not forbid negotiations over arbitrators' authority. RCW 41.80.020(4)-(5). Again, the PSRA shows that the Legislature is cognizant of how to write mandatory language.

Next, PSE's suggested interpretation of RCW 41.80.030(2)(a) is inconsistent with the statutory scheme of collective bargaining established by the PSRA itself, and would serve as a disincentive to bargaining. RCW 41.80.005(2) establishes that, except as otherwise specified in the PSRA, the parties to the collective bargaining process need not agree to a proposal or make a concession. Thus, a party could attempt to prevent some subjects from passing through the grievance process by declining to accept proposals relating to those subjects, thereby excluding them from the agreement.¹² It could also exclude grievances pertaining to the permissive subjects of bargaining in RCW 41.80.020(2), including classification, by declining to discuss them at the bargaining table. An interpretation of RCW 41.80.030 which forces the parties to the bargaining process to choose between arbitrating the merits of a dispute on every subject mentioned in the contract, and attempting to omit those subjects from their contract entirely, is nonsensical.

¹² Bargaining history and past practice may become an implied part of the agreement, such that mere absence of an express contract term relating to a matter will not necessarily exclude that matter from arbitration. *Meatcutter's Local No. 494 v. Rosauer's Super Markets, Inc.*, 29 Wn. App 150, 156, 627 P.2d 1330 (1981).

a. The Interpretation Of The PSRA Which PSE Suggests Is Contrary To That Law, And It Would Create Conflict Between the PSRA And The Civil Service Law, Amended By The PSRA

The only example of an illegal proposal PSE plead in its Complaint was one pertaining to classification, and that is what this case is really about. PSE has repeatedly proposed at the bargaining table that it participate partially in the statewide classification system, tying the compensation of its members to that system, while having disputes resolved by a union-approved hearings officer outside of it. CP at 454-55, 932. Western and Central rejected those proposals, and PSE seeks to achieve through litigation what it did not during bargaining. CP at 454-55, 772-74, 934-35.

(1) The PSRA and The Civil Service Law Must Be Harmonized

PSE seeks a declaration interpreting the PSRA to require the arbitration of disputes over “classification.” As a matter of law, it cannot obtain this relief. Statutes addressing the same subject “must be read together to give each effect and to harmonize each with the other.” *U.S. W. Comm’n, Inc., v. Wash. Utils. & Transp. Comm’n*, 134 Wn.2d 74, 118, 949 P.2d 1337, 1359 (1998). The PSRA and RCW 41.06 were clearly intended to be read together and harmonized. The PSRA amended RCW 41.06, both govern the state employees PSE represents, and the

rules governing the state's current classification system were revised based on a mandate contained in the PSRA. RCW 41.80.005(6), 41.06.020(1), (3), 040(2), 070; CP at 1152, 1158-62, 1164-65.

RCW 41.06 exists in part "to establish for the state a system of personnel administration based on merit principles and scientific methods governing . . . classification and pay plan" RCW 41.06.010. It establishes the DOP, and makes the DOP Director responsible for adopting a state salary schedule and revising a comprehensive classification plan covering all positions in the classified service statewide. RCW 41.06.030, 130, 133(10), 150(4).¹³

The PSRA directed DOP to begin implementation of the revised classification system January 2005, the same year the first CBA's negotiated under the PSRA took effect. RCW 41.80.001, 41.06.136, 139, 150(4). The first CBA's negotiated under the PSRA and the DOP rules governing the revised classification system took effect the same day, July 1, 2005. RCW 41.80.001; WAC 357-01-045.

¹³ RCW 41.06 mandates the maintenance of "comparable worth," defined as the "the provision of similar salaries for positions that require or impose similar responsibilities, judgments, knowledge, skills and working conditions." RCW 41.06.020(5).

(2) Under the PSRA, And Under The Civil Service Law As Amended By The PSRA, There Is No Requirement To Arbitrate Classification Disputes

RCW 41.06 and the PSRA establish the PRB as the forum in which employees believing they have been allocated to the wrong classification within the statewide system may seek redress. RCW 41.06.110, 170(4); Laws 2002, ch. 354, § 213(4); CP 1177-78. Appeals to the PRB are final and binding. WAC 357-52-210; RCW 41.06.139.

RCW 41.06.170 establishes that, while represented employees covered by CBAs negotiated under the PRSA may not appeal disciplinary matters to the PRB, their right to take classification disputes to the Personnel Appeals Board¹⁴ or the PRB was unchanged by the PSRA. RCW 41.06.170(4), 170(5); PSRA § 213; CP at 1177-78.

Although PSE seeks a declaration interpreting the PSRA to mandate de-centralized administration of the statewide classification system by arbitrators, the law contains no such directive.¹⁵ In enacting the PSRA, the Legislature granted classified employees full scope bargaining rights as to most matters, while excluding some subjects and making

¹⁴ Prior to December 31, 2005, appeals were to the Personnel Appeals Board, and subsequently, to the Personnel Resources Board. RCW 41.06.170(4).

¹⁵ RCW 41.06.150 (7) provides for localized administration and management of classification issues by the institutions of higher education, but maintains DOP oversight, calling for periodic audit and review by DOP. It contains no language committing the resolution of classification disputes to arbitrators, nor does RCW 41.06.170(4), which provides employees the right to appeal classification disputes to the Board, contain any language excluding the employees of higher education institutions.

others permissive. RCW 41.80.020. Classification, which the PSRA establishes as a “permissive” subject of bargaining, need not be bargained at all, and may thus be excluded from the contract and therefore from the contractual grievance mechanism. RCW 41.80.020(2)(c). Accordingly, a declaration interpreting the law to order the arbitration of classification disputes is contrary to the PSRA, which specifically provides:

The Employer is not required to bargain over matters pertaining to: . . . Rules of the director of personnel or the Washington personnel resources board adopted under Section 203, chapter 354, Laws of 2002 [RCW 41.06.150]. RCW 41.80.020(2)(c) (emphasis added).

RCW 41.80.020(2)(c) precludes mandatory bargaining over the rules adopted under § 203 of the PSRA. Section 203(4) in turn requires the director of DOP to adopt rules governing select subjects, including the basis for adoption and revision of a comprehensive classification plan, in accordance with rules adopted under § 205, for all positions in the classified service. CP at 1151-53, 1158-60; RCW 41.06.150(4).¹⁶ Section 205(2) directed the board,¹⁷ by March 14, 2004, to “adopt new rules governing classification, allocation and reallocation of positions in the

¹⁶ RCW 41.06.150 refers to that provision as amended by 2002 c 354. The RCW also includes a copy of RCW 41.06.150 as amended by 2002 c 110 § 1; 2002 c 354 § 202; and 2002 c 371 § 906 each without reference to the other. Statutory construction in such situations is governed by RCW 1.12.025(1). In the absence of a conflict between the intent and purpose of the acts, each is given effect.

¹⁷ “Board” in the PSRA refers to the PRB, or its predecessor, the PAB.

classified service”¹⁸ RCW 41.06.136(2); CP at 1164-65. Finally, § 206 of the PSRA specifically states, in pertinent part, that under the revised comprehensive classification system the director must begin implementing January 1, 2005:

Any employee who believes that the director has incorrectly applied the rules of the board in determining a job classification of a job held by that employee may appeal the director’s decision to the board by filing a notice in writing within thirty days of the action from which the appeal is taken. Decisions of the board concerning such appeals are final and not subject to further appeal.

RCW 41.06.139; CP at 1165.

Were classification disputes *required* by the PSRA to be subject to arbitral review, the statutory scheme within RCW 41.06, as amended by the PSRA, would be rendered meaningless – appeals to DOP could not be final as required by statute and WAC 357.

PSE contends that classification and re-classification are mandatory subjects of bargaining, while the rules of the DOP and PRB pertaining to those subjects are not. Br. Appellant at 38-39. This

¹⁸ The rules adopted pursuant to RCW 41.06.150 are found in WAC 357, under which final and binding review of classification disputes is provided by the PRB, not an arbitrator. WAC 357-10-010. The regulations empower employees to seek internal review of position allocation, and provide the process for appeal of unfavorable internal decisions. WAC 357-13-065. The employee can appeal the employer’s decision to the director of DOP. WAC 357-13-080, 357-49-010. The director’s determination is final unless one of the parties appeals to the PRB. WAC 357-49-018, -035(2). Decisions and orders of the PRB are final, and the process for review of employer allocation decisions is exclusive, final, and binding. WAC 357-52-210.

approach is not logical, it is contrary to the plain language of RCW 41.80.020(2)(c), and would render that provision meaningless. Under RCW 41.80.020(6), “Except as otherwise provided in this chapter,” the terms of a CBA negotiated under the PSRA prevail over a conflicting administrative rule. If an employer were required to bargain classification, all rules governing classification would become null and void except to the extent they did not conflict with bargained contract language on the same subject. RCW 41.80.020(6). The court should read the PSRA as a whole, and reject an interpretation rendering a portion of it meaningless. *Wright v. Engum*, 124 Wn.2d 343, 352, 878 P.2d 1198 (1994) (“... courts should read the statute as a whole, considering all provisions in relation to each other and giving effect to each provision.”)

The PERC precedent PSE cites for the proposition that classification is a mandatory subject of bargaining under the PSRA addresses neither classification nor the PSRA. Br. Appellant at 39-41. The cases PSE cited in summary judgment briefing for the same proposition are similarly inapplicable, because they were decided prior to enactment of the PSRA. CP at 1144-46. Supposing, *arguendo*, that classification would generally be a mandatory subject due to its relationship with compensation, the specifically applicable statutory and regulatory schemes established by the PSRA are controlling.

Waste Mgmt. of Seattle Inc., v. Util. & Transp. Comm'n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) (In face of two controlling statute, more specific controls).

PSE's apparent contention that RCW 41.06.070 confers an absolute right to collateral appeal outside the PRB, by stating an employee "may" appeal an adverse allocation decision to the PRB, is meritless. Br. Appellant at 36. The simple use of a permissive term establishing an employee's right of appeal cannot create such an implication, nor does PSE cite any authority for this assertion.

PSE's additional contentions that the legislature demonstrated an intent that classification disputes be substantively arbitrable by failing to expressly exclude them from arbitration in RCW 41.06.170 and RCW 41.80.030(2)(a) are similarly illogical. Br. Appellant at 35-38. PSE's arguments regarding RCW 41.80.030 and RCW 41.06.170 presuppose the validity of the very position they are supposed to support. Specifically, unless RCW 41.80.030(2)(a) establishes a rule requiring the parties to arbitrate the merits of any factual question somehow relating to any provision within a CBA, there is no reason for the legislature to list exclusions to that supposed general rule.

PSE's claim that classification disputes must be subject to grievance arbitration because classification is not a management right or a

prohibited subject of bargaining incorrectly presumes the parties must bargain all subjects they are not prohibited from bargaining. Br. Appellant at 36-38. If the “management rights” clause of the PSRA creates a relevant implication at all, it is that the parties can bargain the disputes to which their contractual grievance mechanism will apply – because, unlike management rights, such matters are not listed as a subject the parties cannot bargain.

3. Case Law Further Establishes That The PSRA Does Not Prohibit Negotiated Limitations On The Scope Of The Contractual Grievance Mechanism

The presence in a collective bargaining agreement of a broad standard arbitration clause¹⁹ such as that required by RCW 41.80.030(2) neither eliminates questions of arbitrability, nor negates the authority of the parties to the collective bargaining process to determine which matters they will submit to arbitration. Common law governing the arbitrability of disputes in the context of collective bargaining relationships, and interpreting language analogous to that of the PSRA, is instructive.

In Washington, the three cases known together as the federal

¹⁹ The language of RCW 41.80.030(2)(a) calling for the arbitration of “all disputes arising over the interpretation or application of the collective bargaining agreement...” is consistent with arbitration clauses considered “standard” or “boilerplate” in common law. *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 571, 80 S. Ct. 1343, 1364-1365, 4 L. Ed. 2d 1403 (1960); *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App 347, 355-56, 35 P.3d 389 (2001).

*Steelworker's Trilogy*²⁰ govern the arbitrability of public sector labor-management disputes. *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, 722, 81 P.3d 111 (2003). The *Steelworkers Trilogy* and progeny establish several principles. The first is that because arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. *Warrior & Gulf Nav. Co.*, 363 U.S. at 582; *see also Steelworkers*, 363 U.S. at 568. Arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *AT&T Tech. Inc., v. Comm'n Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415 (1986); *see also Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374, 94 S. Ct. 629 (1974); *City of Yakima v. Yakima Police Patrolman's Ass'n*, 148 Wn. App. 186, 192, 199 P.3d 484, 488 (2009) (Arbitrator confined to interpretation and application of the collective bargaining agreement and award legitimate only so long as it draw its essence from the CBA).

The second principle established by the *Steelworkers Trilogy* is that: "unless the parties to the collective bargaining agreement

²⁰ *Steelworker*, 363 U.S. at 564; *Steelworker v. Warrior & Gulf Navigation Co.*, 363 U.S. 564, 80 S. Ct. 1363, 4 L.Ed.2d 1432 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

unmistakably provide otherwise, the question of whether the parties agreed to arbitrate must be decided by the court”; and the third principle is, in answering that question, the courts are not to rule on the merits of the underlying claims. *AT&T Tech.*, 475 U.S. at 648-50. The final principle of the *Steelworkers Trilogy* is that courts interpreting questions of arbitrability in contracts containing an arbitration clause employ a “presumption of arbitrability,” meaning that “[a]n 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 dispute. Doubts should be resolved in favor of coverage.” *AT&T Tech.*, 475 U.S. at 650.²¹

Although the arbitration clause mandated by RCW 41.80.030(2) is

²¹ In Washington, the principles of the *Trilogy* have been framed as follows: “Although it is the Court’s duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which *on its face* is governed by the contract. (2) An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (3) There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication. *Peninsula*, 130 Wn. 2d at 413-14. (quoting *Coun. of Cy. & City Employees v. Spokane Cy.*, 32 Wn. App. 422, 424-25, 647 P.2d 1058 (review denied) 98 W.2d 1002 (1982) (emphasis in original).

broad,²² it does not eviscerate the core principle of contract law that the parties to the collective bargaining process may contractually determine, and limit, the issues they will submit to arbitration. *Peninsula Sch. Dist.*, 130 Wn.2d at 414-15. In *Peninsula*, the court considered the arbitrability of a dispute under an agreement negotiated in accordance with the Public Employees Collective Bargaining Act (PECBA). RCW 41.56.122(2); *Peninsula*, 130 Wn. 2d at 407, 414-15. The PECBA provides parties may agree to a provision calling for binding arbitration of disputes arising from the interpretation and application of their agreement, and the court in *Peninsula* considered (in part) the arbitrability of a decision not to re-employ someone because of her unacceptable performance evaluation. *Peninsula* 130 Wn. 2d at 403, 407, 414-15. Contract language stated “matters involving employee evaluation are specifically excepted and excluded from being arbitrable...” *Peninsula* 130 Wn.2d at 403, 414-15. Noting the presumption of arbitrability, and the fact that neither party had addressed this exclusionary language, the court did not order the parties to arbitrate the merits of their dispute, but held that an arbitrator should

²² *Yakima Cy, Law Enforcement Officer's Guild*, 133 Wn. App. at 285-286; *Local Union No. 77, Int'l Brotherhood of Electrical Workers*, 40 Wn. App. 61, 696 P.2d 1264 (1985) (Ordering arbitration of dispute over claimed skimming where alleged need for contract interpretation not patently baseless). If unqualified, such a clause may be interpreted to mean the parties have agreed to arbitrate any dispute the moving party asserts involves construction of the substantive provisions of the contract. *Steelworkers of Am.*, 363 U.S. at 571 (Brennan, J. concurring); *Westinghouse v. Hanford Atomic Metal Trades Coun.*, 940 F.2d 513 (1991).

address the applicability of the exclusion and other relevant language. *Peninsula*, 130 Wn.2d at 414-415. Although the court did not discuss RCW 41.56.122, or confirm that the clause at issue mirrored the language authorized by statute, its decision further established the generally recognized common law principles that arbitration is a matter of contract, and that under the presumption of arbitrability, even in the face of a presumably broad arbitration clause, one of the questions arbitrators must answer is whether the parties have specifically excluded the merits of certain classes of disputes from arbitration. *Peninsula*, 130 Wn. 2d at 414, 924. See also *Yakima Cy. Law Enforcement Officer's Guild v. Yakima Cy.*, 133 Wn. App. 281, 135 P.3d 558 (2006) (In face of ambiguity between provisions giving employee right to grieve disputes involving interpretation, application or alleged violation of agreement and provision committing review of certain disciplinary actions to Civil Service Commission, arbitration appropriate because court could not say “with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”); *General Teamster's Local 231 v. Whatcom Cy.*, 38 Wn. App 715, 687 P.2d 1154 (1984) (Concluding disputes over classification (which did not involve state's plan) arbitrable, but only after determining the absence of both: 1) express provision excluding such disputes from arbitration and 2) forceful

evidence of a purpose to exclude); *Hanford Guards Union of Am.*, 57 Wn.2d 491, 494-95, 358 P.2d 307 (1961) (ordering arbitration but noting that court must "...refrain from blindly throwing into arbitration every case involving an 'arbitration of interpretation' clause..."); *East Pennsboro Area Sch. Dist. v. Pennsylvania Labor Relations Bd.*, 78 Pa. Cmwealth 301, 304-306, 467 A.2d 1356, 1359 (1983) (Interpreting Section 903 of Pennsylvania Public Employee Relations Act providing: "Arbitration of disputes or grievance arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory," and ordering arbitration, but noting: (1) "...courts are not at liberty to require submission to arbitration unless the parties have agreed expressly to do so;" and (2) "*the best evidence that the parties intended not to arbitrate concerning a class or classes of disputes or grievance is an express provision in the collective bargaining agreement excluding certain questions from the arbitration process.*"²³

²³ Like the Supreme Court of Pennsylvania, the Supreme Court of Montana also considered the implications of a statutorily mandated arbitration clause. *Belgrade Educ. Ass'n. v. Belgrade Sch. Dist. No. 44*, 324 Mont. 50, 102 P.3d 517 (2004). MCA 39-31-306(5) states in part that "an agreement to which a school is a party must contain a grievance procedure culminating in final and binding arbitration of unresolved and disputed interpretations of agreements." *Id* at 54. In *Belgrade*, the court struck down a negotiated provision providing that grievances would be submitted to arbitration only upon the mutual consent of both parties as violative of statute. *Id* at 56. However, in that case, unlike the one at bar, the issue was whether either party could unilaterally, and without an arbitral interpretation of contract language, refuse to arbitrate. The facts of the instant case, in which the Respondent has never refused to arbitrate, but asserts its right to an arbitrator's determination of contractual intent regarding questions of arbitrability, are entirely distinct from those of *Belgrade*.

In the face of broad, or standard, arbitration clauses, parties wishing to exclude matters from arbitration must do so plainly *Warrior & Gulf*, 363 U.S. at 584-85, discussed in *AT&T Tech*, 475 U.S. at 650. However, the duty to arbitrate a dispute must be founded in the contract itself. *Int'l Ass'n of Firefighters Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 217, 45 P.3d 186, 191 (2002).

The fact that the PSRA incorporates a standard arbitration clause and a presumption of arbitrability does not render the merits of all disputes arbitrable. The U.S. Supreme Court has cautioned that the presumption of arbitrability: “does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA.” *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 78, 119 S. Ct. 391, 142 L.Ed. 2d 361, (1998) (emphasis in original).

C. The Interests PSE Seeks To Vindicate Are Not Protected By Public Policy

Even if one supposed for the sake of argument that the PSRA entitles PSE to arbitrate the merits of any dispute it claims is related to any term within a CBA, PSE would not be entitled to the relief it seeks. Washington law permits parties to waive rights – even those conferred by law, provided such waiver is knowing and voluntary.

Harvey v. Univ. of Wash., 118 Wn. App. 315, 321, 76 P.3d 276, (2003) (Upholding knowing waiver of statutory right to appeal from private trial where waiver furthered public policy of Arbitration Act). Litigants may even contract away constitutional rights, and the rights to trial by jury and appeal in criminal cases. *Id.* Similarly, “It is well settled that a union may lawfully waive certain statutory rights of represented employees in a collective bargaining agreement,” but may not waive those rights serving a public policy purpose. *Shoreline Cmty. Coll. Dist. No. 7 v. Emp. Sec. Dep’t.*, 120 Wn.2d 394, 409-10, 842 P.2d 938 (as amended 1993), (citing *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983)).

The “rights” PSE asserts here are not protected by public policy, but are an attempt to undermine the very provisions it knowingly negotiated and even proposed. The Union cites cases *ad nauseam* establishing that public policy indeed favors the final and binding arbitration of contractual disputes, but those cases do not support the proposition that parties should not be held to the language they bargain. PSE should not be permitted to attack the provisions it knowingly negotiated.

D. Equity And The Integrity Of The Bargaining Process Demand That This Lawsuit Be Dismissed

Since the beginning of its collective bargaining relationship with Western in 2004, long before LRO entered the picture, PSE proposed, bargained, and agreed to negotiated limitations on the contractual grievance mechanism. Having failed to achieve all of its goals at the bargaining table, having ratified contracts containing limitations on the contractual grievance mechanism, and having received an adverse arbitration decision interpreting a classification article, PSE sought declaratory judgment. Dismissal of this case should be affirmed as a matter of equity.

PSE struck numerous bargains regarding the applicability of contractual grievance mechanisms to various types of disputes. It also agreed to submit questions over the meaning and application of the contract to an arbitrator. PSE should not be permitted to extract concessions from the employer at the bargaining table, and, having obtained them, litigate to modify contract terms and avoid the effects of bargained language.

As succinctly stated by the Sixth Circuit Court of Appeals “If adjudication bases no sanctions on commitments made therein by the bargaining agent, it imparts futility to a bargaining process hopefully

developing in the interest of industrial peace.” *Timken Roller Bearing Co. v. National Labor Relations Bd.*, 161 F.2d 949, 956 (1947).

VI. CONCLUSION

Based on the foregoing discussion, the points and authorities cited therein, and the entire record in this matter, the Respondent respectfully requests that the Court affirm the order of the trial court dismissing this matter with prejudice.

RESPECTFULLY SUBMITTED this 13th day of November, 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to be 'RM', with a long horizontal line extending to the right.

GIL HODGSON
Assistant Attorney General
WSBA # 34121

NO. 39334-4-II

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

PUBLIC SCHOOL EMPLOYEES
OF WASHINGTON/SEIU LOCAL
1948,

Appellant,

v.

WASHINGTON STATE LABOR
RELATIONS OFFICE, a division of
the OFFICE OF FINANCIAL
MANAGEMENT,

Respondent.

CERTIFICATE OF
SERVICE

NOV 15 AM 9:09
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
DIVISION II

I certify that I served a copy of Brief of Respondent on all parties
or their counsel of record on
November 13, 2009 as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by:

TO:

Elyse Maffeo/Eric Nordlof
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of November, 2009 at Olympia, WA.



PATTI HAMBLIN