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I. INTRODUCTION

Respondent Amalgamated Transit Union, Local 1576 (“ATU”) works hard to stretch, extend, and connect labor law principles it likes to create an argument in favor of a legal requirement that public employers must continue to arbitrate contract grievances after their contract with interest arbitration eligible employees expires. Its vigorous rhetoric fails to establish legislative intent in support of the new rule issued by the Public Employment Relations Commission (“PERC”). Nor does ATU explain how the PERC can overrule judicial precedent on an issue of law. For these and other reasons described further below, PERC’s action must be invalidated under the Washington State Administrative Procedure Act (“APA”).

II. ARGUMENT

A. **ATU Concedes That PERC Acted Without Specific Statutory Authority.**

ATU expressly concedes that there is no statute in the Public Employees’ Collective Bargaining Act (“PECBA”), chapter 41.56 RCW, that states that grievance arbitration clauses in collective bargaining agreements continue in existence after the contract expires for employees who are eligible for interest arbitration. Brief of Respondent (“BR”) at 26 (“No provision of the PECBA addresses whether any of the terms of an expired CBA continue to remain in effect with respect to uniformed employees.”) ATU even expressly agrees with Community Transit that RCW 41.56.470 does not grant this right. BR at 30-31 (“Contrary to what

CT suggests, PERC did not base its decision in this case upon its interpretation of the language of RCW 41.56.470.”) Therefore, ATU directly concedes that PERC did not act with specific statutory authority when it granted this legal right to interest arbitration eligible employees.

Nevertheless, ATU argues that the action is allowable because PERC did something similar in 1977 when it created a doctrine referred to as the “unilateral change doctrine.” BR at 25-26. ATU’s attempt to analogize to that exercise of authority falls apart upon examination. PERC did not dismiss the complaint before it in the 1977 case; it *adjudicated* that complaint, held a hearing, and *then* rendered a decision in support of its order. *See Ridgefield School District*, Decision 102-A (PECB, 1977). In this case, PERC dismissed the complaint, never held a hearing, and affirmed the dismissal, but then also issued a new rule that it did not apply to the parties before it.¹ In other words, PERC’s decision in 1977 was adjudication, not rule-making, and on that basis distinct from the current case.²

¹ ATU blatantly mischaracterizes the PERC’s action in this case in an obvious attempt to save it from invalidation under the APA by describing it as an adjudication that PERC chose not to apply retroactively “in the exercise of its remedial discretion.” BR at 36. PERC did not remedy (and did not have the authority to remedy) anything because it found that no unfair labor practice violation had occurred.

² ATU claims that federal administrative law supports its position, arguing that the plurality opinion in *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed. 2d 709 (1969) cited by Community Transit was “repudiated” in *National Labor Relations Board v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d.134 (1974). BR at 39. ATU exaggerates the holding of *Bell Aerospace*, which addressed different legal issues and never purported to overrule *Wyman-Gordon*, as ATU claims. *Wyman-Gordon* continues to be cited as persuasive legal authority on the

B. PERC Does Not Have Authority to Overrule Controlling Judicial Precedent on an Issue of Law.

ATU asserts that an administrative agency may overrule its prior interpretation of a statute even when an appellate court has adopted the agency's initial interpretation. BR at 32. Tellingly, ATU fails to cite any Washington State legal authority for its argument. Nor does ATU cite any persuasive federal authority for its position.

The only decision ATU cites is *W & M Properties of CT, Inc v. NLRB*, 514 F.3d 1341 (D.C. Cir. 2008). BR at 32. In *W& M Properties of CT*, the court held that under federal administrative law, the National Labor Relations Board was “not at liberty to ignore its prior decisions” in a manner that “glosses over” a change, but found the Board had satisfied that legal standard. *W& M Properties* at 1346. The court noted that the Board's prior precedent had been “enforced” by the Third Circuit Court of Appeals. *Id.* at 1347.

ATU overstates the relevance of *W& M Properties*. Here, PERC is purporting to overrule the Washington State Court of Appeals on an issue of law the court has decided in a case that did not involve PERC at all.

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administrative question of what constitutes rule-making. See *Andrews v. District of Columbia Police and Firefighters Retirement and Relief Board*, 991 A.2d 763, 771 n. 15 (D.C. 2010) (holding that when an agency supplements rather than construes a statute, it engages in rule-making as distinct from adjudication). In any case, Community Transit is not arguing that PERC does not have authority to generate general rules in adjudicatory proceedings. However, PERC did not conduct an adjudication here. PERC dismissed ATU's complaint, did not hold a hearing, and *nevertheless* announced a prospective new rule of general applicability.

District No. 43, 135 Wn. App. 749, 145 P.3d 1247 (2006), was a dispute between a union and an employer. The union sued to compel the employer to arbitrate a grievance. The Court of Appeals held that the employer was not required to arbitrate the grievance. The court was not reviewing or enforcing a PERC decision. It reached its conclusion independently from PERC and outside the APA. Therefore, this is not a case where PERC's prior decision had merely been enforced. This is a case where a Court of Appeals has rendered a decision on the issue of law PERC is purporting to overrule.

C. ATU Ignores Numerous Statutes Demonstrating Legislative Intent that Grievance Arbitration Should Be Voluntary for Interest Arbitration Eligible Employees.

Appellant Community Transit cited numerous statutes and agency rules demonstrating that grievance arbitration should be voluntary for interest arbitration eligible employees. Brief of Appellant at 27-33. They included RCW 41.58.020(4), which states, "Final adjustment *by a method agreed upon by the parties* is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *Id.* (emphasis added). That is the general rule, to which the Legislature has carved out specific exceptions.

In its response, the only statute ATU cites as direct support for its position is RCW 41.56.100(3). BR at 21. This statute provides,

If a public employer implements its last and best offer where there is no contract settlement, allegations that either party is violating the terms of the implemented offer shall be subject to grievance arbitration procedures if and as such

procedures are set forth in the implemented offer, or, if not in the implemented offer, if and as such procedures are set forth in the parties' last contract.

This statute does not apply to interest arbitration eligible employees.

Employees who are eligible for interest arbitration are never in a position where their employer implements its last and best offer because they are entitled to have an interest arbitrator decide what the terms of the contract should be if the parties cannot agree. RCW 41.56.450. Therefore, ATU's reliance on this statute is misplaced. Indeed, the fact that this statute exists for employees who are not entitled to interest arbitration provides further proof that the Legislature intended for employees who are not eligible for interest arbitration to have different legal rights and privileges relating to grievance arbitration than employees who are eligible for interest arbitration.

In the face of statutory language that demonstrates intent to treat certain groups of employees differently with respect to arbitration obligations, ATU argues that Community Transit failed to articulate a "reason" why the Legislature would choose to treat employees eligible for interest arbitration differently from employees who are not eligible for interest arbitration. BR at 24-25. The Legislature designed very different processes for these two groups of employees when their collective bargaining agreements expire, and the different requirements with respect to arbitration make sense within the different schemes.

Employees who are not eligible for interest arbitration may become subject to a contract consisting of the employer's last, best and

final offer, which can be unilaterally imposed one year after the contract expires. *See* RCW 41.56.100; 41.56.123. It is logical that the Legislature extended grievance arbitration to these employees as a matter of law because they may become subject to a contract unilaterally imposed by the employer, which may not contain grievance arbitration provisions. If they are going to be subject to a new contract imposed by the employer, it only makes sense to provide them with a mechanism for enforcing the terms the employer unilaterally imposed.

In contrast, employees eligible for interest arbitration can never be subject to a unilaterally imposed contract and, by virtue of that right, enjoy significant leverage in bargaining. An interest arbitrator will decide the contract terms if the parties cannot agree, and either party can advocate for an arbitration provision. In addition, the Legislature sought to minimize situations where employees eligible for interest arbitration would be working without a contract in effect. Thus, the Legislature required that negotiations for a successor contract begin well before the employer's budget is finalized and require prompt mediation and interest arbitration if the parties fail to agree on a new contract. RCW 41.56.440 - .450. By not requiring arbitration of disputes after the contract expires, the Legislature provided another incentive for the parties to reach an agreement or move promptly to interest arbitration.

The very distinct approaches adopted for the two groups of employees reflect a careful balancing by the Legislature of the respective rights and interests of these groups of employees when their contract

expires. ATU's suggestion that the same rules should apply to both groups irrespective of the Legislature's obvious choice of different statutory language and processes for them is illogical, if not absurd.

D. Community Transit Has Standing.

ATU admits that Community Transit has standing to challenge PERC's action if it is considered rulemaking. BR at 10, n. 2. Yet ATU continues to dispute whether Community Transit has standing to challenge PERC's final action in an adjudicative process to which Community Transit was a *party*. ATU's arguments prove unconvincing.

The APA standard for standing contains three parts. RCW 34.05.530. ATU does not dispute and therefore concedes that Community Transit satisfies the second part (*i.e.*, that Community Transit's interests are among those the agency was required to consider.) Therefore, the only dispute is whether Community Transit satisfies the first and third parts:

- (1) The agency action has prejudiced or is likely to prejudice Community Transit; and
- (3) A judgment in favor of Community Transit would substantially eliminate or redress the prejudice to Community Transit caused or likely to be caused by the agency action.

RCW 34.05.530.

The first and third parts of standing overlap and essentially ask whether a party "has been" prejudiced or "is likely to be" prejudiced by agency action. ATU argues that the court should find that Community Transit fails this test mainly because, according to ATU, (1) Community Transit did not assert the same injuries at the trial court level, (2) there is

no evidence in the record supporting Community Transit's standing arguments, and (3) future workplace grievances are speculative. BR at 6-8.

ATU raised standing in a *footnote* to the trial court. CP 75, n. 2. Community Transit responded with argument reciting the "has prejudiced or is likely to prejudice" statutory requirement and explaining several reasons why it has standing, namely: (1) arbitration is costly; (2) unions have less incentive to settle successor collective bargaining agreements; and (3) unions will have two "bites at the apple" to litigate claims that an employer has changed the status quo between contracts (*i.e.*, an unfair labor practice and a grievance.) CP 111. Community Transit adequately asserted the "likely to prejudice" portion of the standing test at the trial court level and has consistently asserted the same basis for standing. An argument that unions have less incentive to settle is equivalent to an argument that an employer has lost bargaining leverage to settle a successor contract.

Second, there is little evidence in the record supporting Community Transit's standing arguments because this is an appeal of an administrative decision not to conduct an adjudicatory hearing under RCW 34.05.416. The fact that there is no evidence in the record is therefore no surprise. The APA expressly prohibits courts from admitting new evidence on review of an agency action. *See* RCW 34.05.562. A dispute over standing is not listed as a permissible basis to admit new evidence. RCW 34.05.562. Unfortunately, instead of simply dismissing

ATU's complaint as it should have according to RCW 34.05.416, PERC proceeded to change the law in a way that adversely affects all public employers, including Community Transit.

Whether or not grievances are filed (and the record shows that grievances are filed following the expiration of a contract, CP 15), the PERC's action still results in the other injuries Community Transit brought to the trial court and this court's prior attention. Namely, the change in the legal requirement shifts the balance between the parties, such that an employer negotiating a successor agreement will have to arbitrate any grievances filed after expiration of the last contract, whether or not it has agreed to do so.

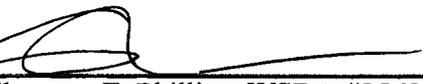
III. CONCLUSION

For the reasons discussed above, Community Transit respectfully requests that this Court invalidate the portion of the PERC's Decision 10267-A in which it pronounced a change in the law.

DATED this 28th day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

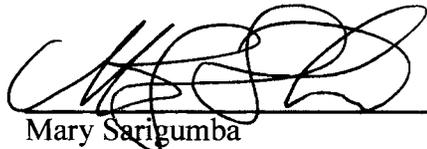
I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Brief of Appellant to be served by hand delivery, addressed to the following:

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DATED December 28, 2011, at Seattle, Washington.


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