

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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Case No. 42697-8-II

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

YAKIMA COUNTY DEPUTY SHERIFF'S OFFICERS'
GUILD

Appellant,

vs.

YAKIMA COUNTY and
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Respondents.

RESPONDENT YAKIMA COUNTY'S OPENING BRIEF

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TABLE OF CONTENTS

	Page(s)
I. ASSIGNMENTS OF ERROR	1
<u>Issue Number 1</u> : Was the Public Employment Relations Commission (PERC) correct in determining that the Guild’s proposed Article 7.3A regarding paid release time for training was a permissive subject of bargaining?	1
<u>Issue Number 2</u> : Was the Public Employment Relations Commission (PERC) correct in determining that the Guild’s proposed Article 7.3B regarding paid release time for union business was a permissive subject of bargaining?	1
II. STATEMENT OF THE CASE	1
A. PERC’s Review of This Matter	2
1. PERC Specifically Decided the Following Regarding <i>Training</i>	4
2. PERC Specifically Decided the Following Regarding <i>Paid Release Time</i>	5
3. PERC Specifically Decided the Following Regarding <i>Mandatory Subjects of Bargaining</i>	6
4. PERC Specifically Decided the Following Regarding <i>Permissive Subjects of Bargaining</i>	6
5. PERC issued a “Cease and Desist Order” Against the Guild	7
B. The Superior Court’s Review of This Matter	8
C. Procedural History With the Court of Appeals in This Matter	9

III.	ARGUMENT	10
	A. Standard of Review	10
	B. It is an Unfair Labor Practice to Pursue a Non-Mandatory Subject of Bargaining to Impasse	11
	C. PERC, as Affirmed by the Superior Court, Was Correct in Determining the Guild’s Proposal was Outside the Scope of Mandatory Bargaining.....	13
	1. PERC’s Ruling is Consistent with State and Federal Law and the Legislative Intent Behind the Law	14
	2. Deference is Given to PERC in Determining Scope Of Bargaining	18
	3. The Guild’s Proposed Article 7.3A Regarding Paid Release Time for Training is a Permissive Subject of Bargaining	22
	4. The Guild’s Proposed Article 7.3B Regarding Paid Release Time for Union Business is a Permissive Subject of Bargaining	26
	D. The Guild Inappropriately Relies Upon Case Law in Its Opening Brief	28
	1. The <i>Northshore</i> Case is Not Applicable	28
	2. The <i>Green River</i> Case is Not Applicable	31
	3. The <i>Shoreline</i> Case is Not Applicable.....	31
	E. The Guild Mischaracterizes the Superior Court’s Verbatim Affirmation of PERC’s Cease and Desist Order as a Separate Injunctive Action	33

F. The Guild’s Argument Regarding <i>Future</i> Bargaining Rights Being Improperly Restricted by the “Cease and Desist Order” Issued by PERC is Barred From Review by This Court According to RAP 2.5(a)	34
1. The Court May Refuse Claimed Errors Not Previously Raised	34
2. PERC Has Broad Discretion in Issuing Restraining Orders	37
IV. CONCLUSION	38

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Axelson, Inc., Subsidiary of U.S.A. Industries, Inc. v. N.L.R.B., 599 F.2d 91 (C.A.5, 1979)</u>	21
<u>Beers v. S. Pac. Transp. Co., 703 F.2d 425 (9th Cir. 1983)</u>	11
<u>Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604, 119 Wn.2d 373, 831 P.2d 738 (1992)</u>	19, 20
<u>Children's Hosp. and Med. Ctr. v. Dept. of Health, 95 Wn.App. 858, 975 P.2d 567 (1999)</u>	11
<u>City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n, 117 Wn.2d 655, 818 P.2d 1076 (1991)</u>	11, 13, 19, 20
<u>City of Pasco v. Public Employment Relations Comm'n., 119 Wn.2d 504, 833 P.2d 381 (1992)</u>	20
<u>Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)</u>	20
<u>First Nat'l Maintenance Corp. v. NLRB 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981)</u>	12
<u>Ford Motor Co. v. National Labor Relations Board, 441 U.S. 488, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979)</u>	32, 33
<u>Gehr v. South Puget Sound Cmty. Coll., 155 Wn. App. 527, 228 P.3d 823 (2010)</u>	37

<u>Green River Cmty. Coll. Dist. 10 v. Higher Education Personnel Board,</u> 107 Wn.2d 427, 730 P.2d 653 (1986)	31, 32
<u>In re Case E-368,</u> 65 Wn.2d 22, 395 P.2d 503 (1964)	37
<u>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,</u> 146 Wn.2d 29, 42 P.3d 1265 (2002)	37
<u>Int'l Ass'n of Firefighters, Local 469 v. Pub. Employment Relations Comm'n,</u> 38 Wn. App. 572, 686 P.2d 1122 (1984)	10, 32
<u>International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Com'n,</u> 113 Wn.2d 197, 778 P.2d 32 (1989)	12, 15
<u>Klauder v. San Juan Cy. Deputy Sheriff's Guild,</u> 107 Wn.2d 338, 728 P.2d 1044 (1986)	11, 12
<u>Maple Valley Fire Professionals, Local 3062 v. King County Fire Protection Dist. No. 43,</u> 135 Wn. App. 749, 145 P.3d 1247 (2006)	14, 18
<u>Municipality of Metropolitan Seattle v. Public Employment Relations Com'n.,</u> 60 Wn. App. 232, 803 P.2d 41 (1991)	38
<u>NLRB v. Erie Resistor Corp.,</u> 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963).....	21
<u>NLRB v. Insurance Agents,</u> 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960)	21
<u>NLRB v. Iron Workers,</u> 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978).....	20, 21

<u>NLRB v. Truck Drivers Union,</u> 354 U.S. 87, 1 L.Ed.2d 676, 77 S.Ct. 643 (1957)	21
<u>NLRB v. Wooster Div. of Borg-Warner Corp.,</u> 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958)	12, 15
<u>Nucleonic Alliance v. WPPSS,</u> 101 Wn.2d 24, 677 P.2d 108 (1981)	14, 15, 38
<u>Pasco Police Officers' Ass'n v. City of Pasco,</u> 132 Wn.2d 450, 938 P.2d 827 (1997)	10, 11, 34
<u>Public Employment Relations Com'n v. City of Kennewick,</u> 99 Wn.2d 832, 664 P.2d 1240 (1983)	10, 11, 13, 19, 20
<u>Roza Irrigation Dist. v. State,</u> 80 Wn.2d 633, 497 P.2d 166 (1972)	38
<u>Scott Paper Co. v. Anacortes,</u> 90 Wash.2d 19, 578 P.2d 1292 (1978)	29
<u>Seattle First National Bank v. National Labor Relations Board,</u> 444 F.2d 30 (9 th Cir. 1971)	33
<u>Shoreline Cmty. Coll. Dist. No. 7 v. Employment Security Department of the State of Washington,</u> 59 Wn. App. 65, 795 P.2d 1178 (1990)	31, 32, 33
<u>Smith v. Shannon,</u> 100 Wn.2d 26, 666 P.2d 351 (1983)	35
<u>Spokane Educ. Ass'n v. Barnes,</u> 83 Wn.2d 366, 517 P.2d 1362 (1974)	12, 32
<u>State v. Lord,</u> 117 Wn.2d 829, 822 P.2d 177 (1991)	35

State v. Scott,
110 Wn.2d 682, 757 P.2d 492 (1988)35

State ex rel. Graham v. Northshore Sch. Dist.
No. 417
99 Wn.2d 232, 662 P.2d 38 (1983).....28, 29, 30

State ex rel. Washington Federation of State
Employees, AFL-CIO v. Bd. of Trustees of Central
Wash. University,
93 Wn.2d 60, 605 P.2d 1252 (1980)37

Suquamish Indian Tribe v. Kitsap County,
92 Wn. App. 816, 965 P.2d, 636 (1998)34, 35

Washburn v. Beatt Equipment Co.,
120 Wn.2d 246, 840 P.2d 860 (1992)35

PERC Cases

City of Burlington,
Decisions 5840, 5841, 5842, 5843 (PECB, 1997)14, 24, 26

City of Pasco,
Decision 3582 (PECB, 1990)17, 25, 26

City of Pasco,
Decision 3582-A (PECB, 1991)14, 19

City of Yakima,
Decision 3564 (PECB, 1990)19

Enumclaw Education Ass'n,
Decision 222 (EDUC, 1977)14, 26

Federal Way School District,
Decision 232-A (EDUC, 1977)12, 15

King County,
Decision 1957 (PECB, 1984) 22

<u>King County Fire Dist. 16,</u> Decision 3714 (PECB, 1991)	22
<u>Kitsap County,</u> Decision 8292-A (PECB, 2007)	14
<u>North Thurston Sch. Dist.,</u> Decision 4765-B (EDUC, 1995)	14
<u>State – Individual Providers,</u> Decision 10193 (PECB, 2008)	20
<u>State – Office of Financial Management,</u> Decision 8761-A (PSRA, 2005)	22
<u>Spokane County Fire Dist. 9,</u> Decision 3661-A (PECB, 1991)	22
<u>Washington State Patrol,</u> Decision 2900 (PECB, 1988)	14, 15, 16
<u>Yakima County,</u> Decision 10204-A (PECB, 2011)	23, 38
 <u>NLRB Cases</u>	
<u>Aerovox Corp.,</u> 102 N.L.R.B. 1526 (1953)	17
<u>General Shoe Corp.,</u> 90 N.L.R.B. 1330 (1950)	17
<u>Manufacturing Co.,</u> 247 N.L.R.B. 1139, 1172 (1980)	38

Statutes

RCW 28A.58.10028

Administrative Procedure Act (APA), Chapter
34.05 RCW 10

RCW 34.05.570 10, 34

Chapter 41.56 RCW 15, 16, 17, 18,
20, 33

RCW 41.56.030 11, 14

RCW 41.56.04016

RCW 41.56.090 12

RCW 41.56.140 14, 15, 16, 28,
29, 30

RCW 41.56.150 24

RCW 41.56.16010, 19, 33, 37,
38

RCW 41.58.00510, 13

RCW 41.58.01010, 13

WAC 391-45-55012, 19, 20

Other Authorities

29 U.S.C. § 15832

Const. Art. 8, § 531

The Developing Labor Law, Second Edition,
Morris 26

Legislative History of the National Labor Relations Act,
National Labor Relations Board, Volume I16

National Labor Relations Act (NLRA), Section 8.....15, 16, 32

RAP 2.5 34, 35, 37, 39

RAP 10.3(b) 1

WASHINGTON PRACTICE: Rules Practice RAP 2.5,
(6th Ed. 2004), Karl B. Tegland 35

I. ASSIGNMENTS OF ERROR

Respondent, Yakima County, is not seeking review. However, Respondent, Yakima County, is not satisfied with the Assignment of Errors and Issues Presented as set forth in Appellant's Opening Brief.

In accordance with RAP 10.3(b), Respondent believes the issues should be formed as provided below:

Issue Number 1: Was the Public Employment Relations Commission (PERC) correct in determining that the Guild's proposed Article 7.3A regarding paid release time for training was a permissive subject of bargaining?

Issue Number 2: Was the Public Employment Relations Commission (PERC) correct in determining that the Guild's proposed Article 7.3B regarding paid release time for union business was a permissive subject of bargaining?

II. STATEMENT OF THE CASE

The facts in this case are not in dispute. This matter involves a complaint filed on April 1, 2008, by Respondent, Yakima County (hereinafter "County"), against Appellant, Yakima County Law Enforcement Officers' Guild (hereinafter "Guild"), with the Public Employment Relations Commission (hereinafter "PERC"). The primary issue within the complaint was an allegation by the County that the Guild

unlawfully presented a proposal and insisted to continue bargaining that proposal to impasse on issues that are not mandatory subjects of bargaining.

On October 16, 2008, hearing examiner Robin Romeo issued an order dismissing the unfair labor practice charge. The County appealed the hearing examiner's order to PERC. On January 11, 2011, PERC found the Guild committed an unfair labor practice. The Guild appealed to Thurston County Superior Court which upheld the PERC order on September 21, 2011. This appeal by the Guild follows.

A. PERC's Review of This Matter.

The Commission correctly found that the only relevant fact was the union's insistence to impasse on its final offer. The final offer covering Article 7.3 A. and B. is set forth below:

- A. The Guild may send one or two representatives to state or national meetings or conferences concerning training in labor issues concerning administration of the agreement or law enforcement. A total of twelve working days with pay are allowed per year, but no representative is allowed more than twelve working days with pay per year. Time off with or without pay shall not exceed five working days per conference per person.

The representatives or the Guild president shall give the Sheriff at least three weeks notice of each conference or meeting. If the conference or meeting is scheduled on an emergency basis, the

representative or Guild president shall give the Sheriff notice as soon as is reasonably possible. The Sheriff may disallow attendance by the Guild representative if the Sheriff has a special need for that employee's expertise at the time of the conference, or if, because of an unforeseen shortage of available employees, the Sheriff cannot reasonably spare the employee at the time of the conference.

- B. The Sheriff may routinely allow Guild officers a reasonable amount of time while on duty to conduct or participate in general membership and/or Guild board meetings concerning collective bargaining or enforcement of the agreement ~~or to conduct necessary Guild financial business~~ which cannot otherwise be performed while off duty. Guild representatives shall guard against undue interference with the assigned duties and against the use of excessive time in performing such responsibilities.

(CP 69-70).

As stated by the Commission, “[t]he only question that we must now resolve is the legality of the union’s proposal under Chapter 41.56 RCW.” **(CP 70).**

On January 11, 2011, the Commission issued its decision reversing hearing examiner Robin Romeo’s decision in its entirety and finding that the Guild committed an unfair labor practice. The order of PERC specifically held:

3. The Yakima County Law Enforcement Officers’ Guild unlawfully insisted to impasse on a proposal concerning paid employee leave to

attend meetings or conferences concerning training in labor issues concerning administration of the agreement or law enforcement in violation of RCW 41.56.150(4) and (1).

4. The Yakima County Law Enforcement Officers' Guild unlawfully insisted to impasse on a proposal concerning paid release time for employees to conduct or participate in general membership and/or union board meetings concerning collective bargaining or enforcement of the agreement or to conduct necessary union financial business which cannot otherwise be performed while off duty in violation of Chapter 41.56 RCW.

(CP 76-77).

1. PERC Specifically Decided the Following Regarding Training.

1. Discretionary training time as proposed by the Guild, was not equivalent to sick leave, vacation, or military leave. Discretionary training time does not impact wages, hours and working conditions. (CP 73).

2. Public employers are not required to train or subsidize the training of their represented employees on how to engage in collective bargaining. Such training is to be completed on the employee's own time. (CP 73).

3. Release time for union discretionary training is a permissive subject of bargaining. (CP 73).

4. The Commission is not bound by decisions of other jurisdictions when interpreting Washington state law. (CP 74).

5. Public employers have the right to determine and select which law enforcement training its employees will be paid to attend. (CP 69).

2. PERC Specifically Decided the Following Regarding Paid Release Time.

1. Paid release time is limited to contract administration. Unrestricted paid leave for union business is unlawful. (CP 74).

2. Release time without a direct relationship between the union, the employer, and the administration of the parties' collective bargaining agreement is a permissive subject of bargaining. (CP 75).

3. Employer-funded attendance by bargaining unit members at union activities is improper where the union activities are not limited to those involving direct interaction with a particular employer and the union does not reimburse the employer. (CP 74).

4. Paid release time for other union matters not directly related to the administration of the agreement between the employer and the bargaining representative are permissive in nature and it is an unfair labor practice to attempt to bargain those matters to impasse. (CP 75).

3. PERC Specifically Decided the Following Regarding Mandatory Subjects of Bargaining.

1. A proposal for paid release time for purpose of internal union business, general membership meetings or board meetings, is not a mandatory subject of bargaining. (CP 69).

2. Paid release time to attend meetings about “collective bargaining” is too general in nature, and is not a mandatory subject of bargaining, as it fails to relate to the particular employer. (CP 76).

3. Paid release time for internal union affairs meetings is not a mandatory subject of bargaining because it does not involve direct interaction with the employer. (CP 76).

4. PERC Specifically Decided the Following Regarding Permissive Subjects of Bargaining.

1. The PERC Commission held the union’s proposals asking for paid release time to attend collective bargaining or law enforcement training is a permissive subject of bargaining because it was not narrowly tailored to matters directly related to the administration of the collective bargaining agreement between the union and the employer. (CP 69).

2. Additionally, paid release time for general membership or board meetings is a permissive subject of bargaining, as it relates to internal union affairs. (CP 69).

5. PERC Issued a “Cease and Desist Order” Against the Guild.

PERC ordered the Guild to take immediate action to remedy its unfair labor practices. Specifically, PERC ordered the following:

The Yakima County Law Enforcement Officers’ Guild, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE and DESIST from:
 - a. Refusing to bargain collectively with Yakima County by insisting to impasse on proposals concerning paid release time for attendance at state or national meetings or conferences concerning training in labor issues concerning administration of the agreement or law enforcement and paid release time to conduct or participate in general membership meetings and/or union board meetings concerning collective bargaining or enforcement of the agreement or to conduct necessary union financial business which cannot otherwise be performed while off duty.
 - b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by the laws of the State of Washington.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:
 - a. Withdraw all proposals advanced in collective bargaining with Yakima County on the subject of paid union release time for bargaining unit employees.
 - b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer’s premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that

such notices are not removed, altered, defaced, or covered by other material.

- c. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.
- d. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice he provides. **(CP 77-78)**.

PERC found the Guild committed an unfair labor practice. The Guild appealed PERC's decision to Thurston County Superior Court.

B. The Superior Court's Review of This Matter.

On February 9, 2011, the Guild filed its Petition for Review with the Thurston County Superior Court. The Guild's opening brief, filed on July 26, 2011, asserted that PERC erred in determining that the Guild's proposal was outside the scope of bargaining. No argument was put forth regarding any future restraint on bargaining rights within the "cease and desist order" issued by PERC. The County filed its response brief on August 12, 2011. The Guild filed its reply brief on August 24, 2011. No argument was put forth regarding the future restraint on bargaining rights within the "cease and desist order" issued by PERC.

Oral argument was held in front of the Honorable Christine A. Pomeroy on September 9, 2011. On September 21, 2011, the court

ordered that Yakima County, Decision 10204-A, dated January 22, 2011, be “affirmed in its entirety.” (CP 220). The superior court further provided that PERC’s “cease and desist order” was to be affirmed. The Guild concedes within its opening brief that the “cease and desist order” issued by the superior court adopted verbatim the “cease and desist order” language in the PERC order. (Appellants Opening Brief, p. 9).

The superior court upheld PERC’s order. The Guild appealed the superior court’s ruling to this Court.

C. **Procedural History With the Court of Appeals in This Matter.**

The Guild filed its Notice of Appeal to this Court on October 14, 2011, and filed its opening brief on January 30, 2012. In its opening brief the Guild puts forth the argument, for the first time, that PERC’s “cease and desist order,” issued against the Guild, inappropriately prohibits *future* bargaining rights by not limiting the order to this specific dispute.

Specifically, the Guild asserts the following issue: “Did PERC and the Superior Court err by issuing an overbroad restraining order which prohibits the Guild from presenting future contract proposals that might allow lawful release time?” (Appellant’s Opening Brief, p. 3, Issue Number 3).

The County’s Response follows.

III. ARGUMENT

A. Standard of Review.

The decision under review is the decision of the Public Employment Relations Commission (PERC), not that of the hearing examiner or the superior court. Int'l Ass'n of Firefighters, Local 469 v. Pub. Employment Relations Comm'n, 38 Wn. App. 572, 575-76, 686 P.2d 1122 (1984).

Appellate review of an appeal from a PERC decision in an unfair labor practice claim is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW. Pasco Police Officers' Ass'n v. City of Pasco, 132 Wn.2d 450, 458, 938 P.2d 827 (1997). The court may provide relief when an agency order is based on an erroneous interpretation of the law or is unsupported by substantial evidence. RCW 34.05.570(3)(d), (e). The party challenging the agency action has the burden of demonstrating the invalidity of that action. RCW 34.05.570(1)(a).

Great deference should be given to the Commission's findings of fact as well as its expertise in interpreting labor relations law. Public Employment Relations Com'n v. City of Kennewick, 99 Wn.2d 832, 842, 664 P.2d 1240 (1983). PERC unquestionably has authority to rule on unfair labor practice complaints. RCW 41.56.160. Indeed, PERC is recognized both by statute (RCW 41.58.005(1), .010(2)) and case law as

possessing expertise in the labor relations area. Public Empl. Relations Comm'n v. Kennewick, 99 Wn.2d 832, 841-42, 664 P.2d 1240 (1983); City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n, 117 Wn.2d 655, 674-65, 818 P.2d 1076 (1991). The court may on occasion substitute their interpretation of the law for that of PERC, but the court generally gives substantial weight to an agency's view of the law if it falls within the agency's expertise. Pasco Police Officers' Ass'n, 132 Wn.2d at 458, 938 P.2d 827; Children's Hosp. and Med. Ctr. v. Dept. of Health, 95 Wn. App. 858, 864, 975 P.2d 567 (1999).

When the material facts are not disputed, as is the case here, the court's sole task is to determine whether the substantive law was correctly applied. Beers v. S. Pac. Transp. Co., 703 F.2d 425, 428 (9th Cir.1983).

B. It is an Unfair Labor Practice to Pursue a Non-Mandatory Subject of Bargaining to Impasse.

As defined in RCW 41.56.030(4), the duty to bargain extends to "personnel matters, including wages, hours and working conditions" The scope of mandatory bargaining thus is limited to matters of direct concern to employees. Managerial decisions that only remotely affect "personnel matters," and decisions that are predominantly "managerial prerogatives," are classified as non-mandatory subjects. See Klauder v.

San Juan Cy. Deputy Sheriffs' Guild, 107 Wn.2d 338, 341, 728 P.2d 1044 (1986); Federal Way Educ. Ass'n v. Board of Directors, Federal Way Sch. Dist. 210, Pub. Empl. Relations Comm'n, Dec. 232-A (EDUC, 1977), reprinted in 2 Wash. State Pub. Empl. Rel. Rptr. PD-101; see also Spokane Educ. Ass'n v. Barnes, 83 Wn.2d 366, 375, 517 P.2d 1362 (1974); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981).

A party commits an unfair labor practice if it insists to impasse on bargaining over a non-mandatory subject. See Klauder, 107 Wn.2d at 341-42; see also NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958); International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Com'n, 113 Wn.2d 197, 200-01, 778 P.2d 32, 34 (1989).

PERC is the agency the legislature has created to determine mandatory versus permissive subjects of bargaining. RCW 41.56.090 (“The commission shall promulgate, revise or rescind such rules and regulations as it may deem necessary or appropriate to administer the provisions of this chapter in conformity with the intent and purpose of this chapter and consistent with the best standards of labor-management relations.”); WAC 391-45-550 (“The commission deems the determination as to whether a particular subject is mandatory or nonmandatory to be a

question of law and fact to be determined by the commission, and which is not subject to waiver by the parties by their action or inaction. It is the policy of the commission that a party which engages in collective bargaining with respect to a particular issue does not and cannot confer the status of a mandatory subject on a nonmandatory subject.”) (emphasis added).

Great deference should be given to the Commission's findings of fact as well as its expertise in interpreting labor relations law. Public Employment Relations Com'n v. City of Kennewick, 99 Wn.2d 832, 842, 664 P.2d 1240 (1983). PERC is recognized both by statute (RCW 41.58.005(1), .010(2)) and case law as possessing expertise in the labor relations area. Public Empl. Relations Comm'n v. Kennewick, 99 Wn.2d 832, 841-42, 664 P.2d 1240 (1983); City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n, 117 Wn.2d 655, 674-65, 818 P.2d 1076 (1991).

C. **PERC, as Affirmed by the Superior Court, Was Correct in Determining the Guild's Proposal was Outside the Scope of Mandatory Bargaining.**

The Guild incorrectly asserts in their opening brief that their proposal contained mandatory subjects of bargaining. It is the County's position, as held by PERC and affirmed by the Thurston County Superior Court, that the Guild's proposal asking for release time to attend collective

bargaining or law enforcement training is a permissive subject of bargaining.

PERC has consistently held that unrestricted union leave would cause an employer to violate RCW 41.56.140(2) and is therefore not a mandatory subject of collective bargaining under RCW 41.56.030(4). See City of Pasco, Decision 3582-A (PECB, 1991); City of Burlington, Decision 5840, 5841, 5842, and 5843 (PECB, 1997); State of Washington (Washington State Patrol), Decision 2900 (PECB, 1988); Kitsap County, Decision 8292-A (PECB, 2007); Enumclaw Education Ass'n, Decision 222 (EDUC, 1977); North Thurston Sch. Dist., Decision 4765-B (EDUC, 1995).

Prior agency decisions are to be given great weight and deference by the court. Maple Valley Fire Professionals, Local 3062 v. King County Fire Protection Dist. No. 43, 135 Wn. App. 749, 145 P.3d 1247 (2006).

1. **PERC's Ruling is Consistent with State and Federal Law and the Legislative Intent Behind the Law.**

The Supreme Court of the State of Washington has ruled that decisions construing the National Labor Relations Act are persuasive in interpreting state laws which are similar to or based on the federal law. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24, 677 P.2d 108 (1981). The Supreme Court of the State of Washington has endorsed interpretation of

Chapter 41.56 RCW in a manner consistent with precedent developed by the National Labor Relations Board (NLRB) and the federal courts interpreting the similar provisions of the National Labor Relations Act (NLRA). Nucleonics, 101 Wn.2d 24; IAFF v. PERC (City of Richland), 113 Wn.2d 197, 778 P.2d 32 (1989). The Commission has followed National Labor Relations Board (NLRB) and federal court precedents which distinguish between “mandatory,” “permissive,” and “illegal” subjects of bargaining. Federal Way Sch. Dist., Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg Warner, 356 U.S. 342, 78 S.Ct. 718 (1958).

Most of Chapter 41.56 RCW is a paraphrase of the federal law making it unlawful for an employer to control, dominate, or interfere with bargaining. Washington State Patrol, Decision 2900 (PECB, 1988). For example, RCW 41.56.140(2) is the counterpart to Section 8(a)(2) of the NLRA. Section 8(a) of the National Labor Relations Act (Unfair Labor Practices) provides in relevant part:

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay[.]

As noted in Washington State Patrol, Decision 2900 (PECB, 1988), employer influence in the selection and internal affairs of unions was of key concern in the Congressional debate which preceded adoption of the National Labor Relations Act (NLRA), and Section 8(a)(2) of the NLRA was adopted to preclude improper employer assistance to unions. Such a concern is equally apt under RCW 41.56.040, which secures for public employees “the free exercise of their right to organize and designate representatives of their own choosing.”

Like most of Chapter 41.56 RCW, RCW 41.56.140(2) adopted in 1969 is a paraphrase of the federal law, making it unlawful for employers to control, dominate or interfere with a bargaining representative. That provision parallels Section 8(a)(2) of the National Labor Relations Act, which was designed to protect employees from employer interference in the internal affairs of unions. See Legislative History of the National Labor Relations Act, National Labor Relations Board, Volume I pages 15-26, 37-44, 46-57 and 89 ff; Washington State Patrol, Decision 2900 (PECB, 1988). We have no legislative history indicating that our Legislature intended anything substantially different from the federal law. Indeed, the “domination” provisions of the Educational Employment Relations Act adopted in 1975, of the Marine Employees Act adopted in 1983, and of the Community College Faculty Collective Bargaining Act

adopted in 1987, are also essentially the same. City of Pasco v. Int'l Ass'n of Fire Fighters, Decision 3582 (PECB, 1990).

The legislative intent of RCW 41.56 is to mimic federal law which has specifically prohibits an employer from paying employees for time spent in discussing or engaging in general internal union affairs. In general, violations of the NLRA have been found where:

... [A]n employer furnishes a meeting place on its premises to a union and pays employees for time spent at such meetings or during other union-related activities, or provides supplies and other services of benefit to a union. An employer also engages in unlawful support if it requires job applicants to sign union dues check-off cards as a condition precedent to their future employment, pays membership fees or other dues to a union on behalf of its employees or gives direct financial assistance to a union or its members. Morris, The Developing Labor Law, Second Edition, p. 296 (emphasis added).

Section 8(a) provides that an employer may pay employees for time spent meeting on company property to process specific grievances before members of management or in labor negotiations. Aerovox Corp., 102 N.L.R.B. 1526 (1953). However, an employer may not pay employees for time spent in discussing or engaging in general internal union affairs. General Shoe Corp., 90 N.L.R.B. 1330 (1950). As a result, it would naturally ring true that the same actions that violate the NLRA would in turn violate RCW 41.56.

The Guild's proposal goes directly contrary to those actions authorized under RCW 41.56. and the NLRA. PERC's ruling, as affirmed by the Thurston County Superior Court, that the Guild committed an unfair labor practice by attempting to bargain to impasse time spent in discussing or engaging in general internal union affairs is consistent with both state and federal law and should be upheld.

2. Deference is Given to PERC in Determining Scope of Bargaining.

In its opening brief, the Guild skirts past the principle that courts are to give great deference to the expertise of the Washington Public Employment Relations Commission (PERC) in interpreting labor relations law RCW 41.56. Maple Valley Prof'l Fire Fighters Local 3062, Int'l Ass'n of Fire Fighters, AFL-CIO v. King County Fire Protection Dist. No. 43, 135 Wn. App. 749, 145 P.3d 1247 (2006). PERC has extensive experience in defining and determining both mandatory and permissive subjects of bargaining.¹ Due to its expertise in the area of collective

¹ Case precedent include the following non-exhaustive list of PERC precedents: **Mandatory Subjects** - City of Yakima, Decision 3564-A (PECB, 1991); City of Pasco, Decision 4197-A (PECB, 1991); City of Spokane, Decision 5054 (PECB, 1995); City of Pasco, Decision 9181 (PECB, 2005); Snohomish County, Decision 8733-C (PECB, 2006); King County First District 11, Decision 4538-A (PECB, 1994); City of Tacoma, Decision 45399-A (PECB, 1994). **Permissive Subjects** – City of Kelso, Decision 2633-A (PECB, 1988); Federal Way School District, Decision 232-A (PECB, 1999); City of Seattle, Decision 6662 (PECB, 1999); Renton School District, Decision 706 (EDUC, 1979); Kent School District, Decision 595-A (EDUC, 1979); Lake Chelan School District, Decision 4940-A (EDUC, 1995).

bargaining, PERC “is entitled to substantial weight and great deference.” Bellevue v. Int’l Ass’n of Fire Fighters, Local 1604, 119 Wn.2d 373, 382, 831 P.2d 738 (1992); Public Employment Relations Com’n v. City of Kennewick, 99 Wn.2d 832, 842, 664 P.2d 1240 (1983); Public Empl. Relations Comm’n v. Kennewick, 99 Wn.2d 832, 841-42, 664 P.2d 1240 (1983); City of Yakima v. International Ass’n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass’n, 117 Wn.2d 655, 674-65, 818 P.2d 1076 (1991).

The Legislature has delegated the determination of unfair labor practice cases to the Public Employment Relations Commission. RCW 41.56.160. The Commission decides “scope of bargaining” disputes in that context. WAC 391-45-550; City of Pasco v. Int’l Ass’n of Fire Fighters, Local 1433, Decision 3582-A (PECB, 1991). Whether a particular item is a mandatory subject of bargaining is a question of both law and fact, to be determined by the Commission. WAC 391-45-550; City of Yakima, Decision 3564 (PECB, 1990). Therefore, it is the Commission, *not the parties*, that determines the mandatory or permissive status of a particular subject. While parties are encouraged to engage in free and open exchange of proposals on all matters, the act of talking about or discussing something at the table does not convert it into a

mandatory subject. WAC 391-45-550; SEIU Healthcare 775NW v. Washington State – Individual Providers, Decision 10193 (PECB, 2008).

“[W]here an agency is charged with the administration and enforcement of a statute, the agency's interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous.” City of Pasco v. Public Employment Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992) (citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)).

“Because of the expertise of PERC members in labor relations, ...the courts of this state give ‘great depth’ to PERC decisions and interpretations of the collective bargaining statutes.” Bellevue v. Int’l Ass’n of Fire Fighters, 119 Wn.2d 373, 381, 831 P.2d 738 (1992); Public Employment Relations Com'n v. City of Kennewick, 99 Wn.2d 832, 842, 664 P.2d 1240 (1983); Public Empl. Relations Comm'n v. Kennewick, 99 Wn.2d 832, 841-42, 664 P.2d 1240 (1983); City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n, 117 Wn.2d 655, 674-65, 818 P.2d 1076 (1991).

The great weight granted to PERC in interpreting RCW 41.56 is consistent with the great weight granted to the NLRB. The NLRB’s statutory interpretation should be given due deference. See NLRB v. Iron Workers, 434 U.S. 335, 350, 98 S.Ct. 651, 659, 54 L.Ed.2d 586, 598

(1978); NLRB v. Erie Resister Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1149, 10 L.Ed.2d 308, 319 (1963).

Although courts may prefer a different application of the relevant sections, they have long been cognizant that the onerous task of striking a balance between legitimate conflicting interests to effectuate national labor policy has been committed by Congress to the National Labor Relations Board, subject to limited judicial review. E.g., NLRB v. Iron Workers, 434 U.S. 335, 350, 98 S.Ct. 651, 659, 54 L.Ed.2d 586, 598 (1978); NLRB v. Insurance Agents, 361 U.S. 477, 499, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960); NLRB v. Truck Drivers Union, 354 U.S. 87, 96, 1 L.Ed.2d 676, 77 S.Ct. 643 (1957); Axelson, Inc., Subsidiary of U.S.A. Industries, Inc. v. N.L.R.B., 599 F.2d 91, 93 (C.A.5, 1979).

As previously stated, PERC has found in this matter, and the Thurston County Superior Court has affirmed, that the Guild unlawfully insisted to impasse on a proposal concerning permissive subjects involving training and internal union affairs. (CP 76-77).

The Court should grant PERC great deference in determining proper subjects of bargaining and uphold PERC's prior decision in this matter finding the subjects at issue are permissive subjects of bargaining.

3. **The Guild's Proposed Article 7.3A Regarding Paid Release Time for Training is a Permissive Subject of Bargaining.**

The Guild's final proposal at issue in this case reads as follows:

- A. The Guild may send one or two representatives to state or national meetings or conferences concerning training in labor issues concerning administration of the agreement or law enforcement. A total of twelve working days with pay are allowed per year, but no representative is allowed more than twelve working days with pay per year. Time off with or without pay shall not exceed five working days per conference per person.

In general, PERC has recognized training is a permissive subject of bargaining. See Spokane County Fire Dist. 9, Decision 3661-A (PECB, 1991); King County, Decision 1957 (PECB, 1984); King County Fire Dist. 16, Decision 3714 (PECB, 1991). In State - Office of Financial Management, Decision 8761-A (PSRA, 2005), the Commission affirmed the Examiner's ruling, which held that a union proposal for supplemental training for home care workers was a permissive subject of bargaining. Likewise, in Spokane Fire Dist. 9, Decision 3661-A (PECB, 1991), the Commission held that a decision to require particular training courses was a permissive subject. See also King County Fire District 16, Decision 3714 (PECB, 1991). In these cases, decisions relating to the type of

training required of employees were determined to be within the managerial control of the employer, and therefore were permissive subjects.

In the present matter, the Commission specifically held discretionary training, whether it be collective bargaining training that is related to the administration of the agreement or law enforcement, in no way impacts wages, hours and working conditions; and public employers are not required to train or subsidize the training of their represented employees on how to engage in collective bargaining; such training should be conducted on the employee's own time; the training proposal was found to be a permissive subject of bargaining. Yakima County, Decision 10204-A at p. 6 of 13. (CP 73).

As further recognized by PERC in this matter, the County is not obligated to provide employees paid release time to attend discretionary collective bargaining or law enforcement training. (CP 68 - 80). The Guild's 7.3A proposal is in the disjunctive. It provides for paid leave to Guild representatives to attend state or national meetings concerning training in labor issues concerning the administration of the Agreement or law enforcement. The proposal is vague as to the type of conference that would be attended and provides no limitation on the type of meeting that could be attended as long as it concerns labor or law enforcement.

Furthermore, there is no evidence that the Guild's proposal concerns necessary training for bargaining unit employees to perform their work. Employees would not be disciplined for not attending training as it would not relate to the work they perform.

As previously argued by the County and affirmed by both PERC and the Thurston County Superior Court, labor issues involving law enforcement is just as broad as "association business." Such a proposal by a guild in the Burlington Police Employees Guild v. City of Burlington, Decision 5840 (PECB 1997), case was found to be illegal. In City of Burlington, the Guild proposed forty (40) hours of paid leave,

"for Guild business such as attending labor conventions, conferences or seminars."

This proposal was found to be illegal, and the appropriate remedy for the union's violation of RCW 41.56.150(2) and (4) was an order directing the union to withdraw its paid union leave proposal, and post the appropriate notice. City of Burlington, Decision 5840 (PECB 1997).

The Yakima Guild's proposal specifically provides for paid leave to Guild representatives to attend state or national meetings concerning training in labor issues concerning law enforcement. As identified by PERC, this could be for any training on labor issues related to law enforcement inclusive of organizing employees of other employers. This

is specifically contrary to the holding in the City of Pasco, which found that where paid time was spent on any association business, including organizing the employees of some other employer, such provision was contrary to the law and an unfair labor practice. City of Pasco v. IAFF Local 433, Decision 3582 (PECB 1990).

The PERC cases of City of Burlington and City of Pasco are not distinguishable. The proposal made by the Guild, 7.3A, still provides for unrestricted use of paid leave to do union business at the Guild's discretion. See proposed Article 7.3A. Proposed 7.3A is a permissive subject of bargaining.

Of importance, the County has the managerial right to determine and select which law enforcement training its employees will attend. It is the County's prerogative to determine what kinds of training are necessary for employees to accomplish the employer's mission; employer training is not to be determined by the Guild. The Guild's alleged "mutual benefit" received by the parties from the training does not convert the Guild's discretionary training into a mandatory subject of bargaining.

The Guild committed an unfair labor practice by insisting to bargain to impose their overreaching proposal asking for release time to attend collective bargaining or law enforcement training. As a result, PERC's ruling should be upheld.

4. **The Guild's Proposed Article 7.3B Regarding Paid Release Time for Union Business is a Permissive Subject of Bargaining.**

Article 7.3B, as proposed by the Guild, provides for paid time off, for Guild representatives, to participate in general membership, or Guild board meetings. The proposal is in conflict with previous PERC decisions, specifically, City of Pasco, supra. “In general, violations of Section 8(a)(2) have been found where: [A]n employer furnishes a meeting place on its premises to a union and pays employees for time spent at such meetings or during other union-related activities . . .” City of Pasco, supra (citing Morris, The Developing Labor Law, Second Edition, p. 296) (emphasis added).

Commission precedents hold that in limited circumstances paid release time is a mandatory subject of bargaining, *provided* certain safeguards are put in place. The paid release time cannot “suffer[] the fatal defect of putting no-limitation whatever on the purpose for which the union could use . . . the paid leave time. City of Pasco, Decision 3583 (PECB, 1990). “[E]mployer-funded attendance by bargaining unit members at union activities is improper where the union activities are not limited to those involving the particular employer and the union does not reimburse the employer. City of Burlington, Decision 5840, (citing Enumclaw School District, Decision 222).

Case precedent has established that the kinds of paid release time that are mandatory subjects of bargaining are those limited to matters that directly involve the administration of the agreement between the employer and the particular union, such as labor management meetings, the processing and adjustment of grievances, and negotiations regarding changes to the existing agreement. The Guild's proposal addressed no such kinds of paid release time.

In the case at hand, PERC specifically found that paid release time is to be limited to contract administration (**CP 74**); unrestricted paid leave for union business is unlawful (**CP 74**); employer-funded attendance by bargaining unit members at union activities is improper where the union activities are not limited to those involving the particular employer and the union does not reimburse the employer (**CP 74**); and paid release time for other union matters not directly related to the administration of the agreement between the employer and the bargaining representative are permissive in nature and it is an unfair labor practice to attempt to bargain those matters to impasse (**CP 75**).

The Guild conceded in its opening brief that overboard release time arrangements "creates an environment enabling unlawful interference with employee relations." (Appellant's Opening Brief, p. 11).

As referenced above, it is contrary to RCW 41.56.140(2) to provide paid leave time for union's general business meetings. As a result, the County was not obligated to bargain to impasse unrestricted paid leave time for the union's business meetings. As previously identified by PERC, and affirmed by the Thurston County Superior Court, the Guild committed an unfair labor practice under RCW 41.56.140 (4) and (1) by demanding to bargain to impasse a permissive subjects of bargaining. As a result, PERC's decision should be upheld.

D. The Guild Inappropriately Relies Upon Case Law in Its Opening Brief.

1. The Northshore Case is Not Applicable.

Contrary to the assertions by the Guild in its opening brief, the Northshore² case is not applicable in this action. The Northshore case stands for two (2) propositions. The first proposition is that a school district has the authority to permissively agree to certain release time. The issue of whether release time is a mandatory or permissive subject of bargaining was not before the Northshore court. The court defined the issues presented on appeal as follows:

1. Did the school districts have statutory authority pursuant to RCW 28A.58.100, to contract for the

² In State ex rel. Graham v. Northshore Sch. Dist. No. 417, 99 Wn.2d 232, 662 P.2d 38 (1983).

release time provisions involved in the consolidated cases? We hold they did.

State v. Northshore Sch. Dist. No. 417, 99 Wn.2d 232, 235, 662 P.2d 38 (1983) (emphasis added).

The second proposition dealt with in Northshore is also defined by the court as:

3. Do the provisions granting release time constitute an unfair labor practice pursuant to RCW 41.59.140? We answer the question in the negative.

Northshore, 99 Wn.2d at 235.

The issue in the Northshore case involving an unfair labor practice charge was the issue of whether the employer's agreement for paid release time contributed to the financial or other support of the association. The court resolved the matter by indicating that:

“Accordingly, there is a gift concept inherent in the ordinary meaning of contribution. We have held that adequate consideration may preclude the finding of a gift and if intent to give a gift is lacking, the elements of a gift are not present. Scott Paper Co. v. Anacortes, 90 Wash.2d 19-32-33, 578 P.2d 1292 (1978), and cases cited therein. No intent to give a gift is apparent. Release time was negotiated for and the Auditor has never asserted that consideration for said agreements did not flow to the school districts. Consequently, the school districts' agreeing to afford employees release time to engage in certain association business, while of undoubted benefit to the organization and employees, is not a contribution and thus is not proscribed by RCW 41.59.140(1)(b).” See Northshore, 99 Wn.2d at 244.

Again, the court did not decide the issue of whether or not release time is a mandatory or permissive subject of bargaining. The court simply said the employer could permissively bargain certain release time if the employer so chooses.

As the Guild points out in its opening brief at page 24, the Northshore court specifically stated, “agreeing to afford employees release time to engage in certain association business, while of undoubted benefit to the organization and employees, is not a contribution and thus is not proscribed by RCW 41.59.140(1)(b).” Northshore, 99 Wn.2d at 244 (emphasis added).

The court clearly recognized that not *all* association business is allowable for employee release time by using the term “certain.” This language is consistent with the PERC’s decisions that terms such as “association business” must be limited in their scope.

The Guild inaccurately cites the Northshore court’s holding when it states, at page 24 of the Guild’s Brief, the Northshore court broadly allowed union release time finding unobjectionable the listed items. Northshore does not stand for the proposition that paid release time to attend union workshops and conferences is a mandatory subject of bargaining.

2. The Green River Case is Not Applicable.

Likewise, the Guild's citation to Green River Cmty. Coll., 107 Wn.2d 427, 438, 730 P.2d 653 (1986) is misplaced. The case does not address the issue of mandatory versus permissive subjects of bargaining. In Green River, the college argued "that granting release time with pay may be an unconstitutional gift of public funds in violation of Const. art. 8, § 5." Green River, 107 Wn.2d at 438. In the alternative, the college argued that "granting of release time may constitute an unfair labor practice." Id. The Court stated that "[t]he HEP board rejected these arguments, as do we. Whatever lingering doubt there may have been with regard to these issues was put to rest in the controlling case of State ex rel. Graham v. Northshore Sch. Dist. 417, 99 Wn.2d 232, 662 P.2d 38 (1983)." Green River, 107 Wn.2d at 438.

This holding does not address in any fashion the issue of whether or not release time is a permissive or mandatory subject of bargaining. It only addresses authority to permissively bargain the subject, and enforce any agreement reached.

3. The Shoreline Case is Not Applicable.

Even farther afield, is the Guild's citation to Shoreline Cmty. Coll. Dist. No. 7 v. Employment Security Department of the State of

Washington, 59 Wn. App. 65, 795 P.2d 1178 (1990). (Petitioner's Opening Brief, p. 26).

The Shoreline Community College case does not address release time in any fashion whatsoever. The case involved disputed formula regarding the computation of hours of employment for unemployment purposes.

The Shoreline case *does* outline the standard of when an issue is a mandatory or permissive subject of collective bargaining. The Shoreline holding is consistent with general PERC holdings and the holding of this case. The court stated:

A subject or issue which has only an indirect or uncertain impact on employees and their job security does not qualify as a term or condition of employment and is not subject to collective bargaining. Spokane Educ. Ass'n v. Barnes, 83 Wash.2d at 375, 517 P.2d 1362. See also International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission, 113 Wash.2d 197, 200-291, 204, 778 P.2d 32 (1989). Shoreline, 59 Wn. App. at 71 (**emphasis added**).

The case goes on to cite federal decisions:

Decisions of the federal courts construing the phrase "terms and conditions of employment," as used in the National Labor Relations Act § 8(d), 29 U.S.C. § 158(d), are persuasive authority when construing state labor laws. Green River Community College Dist. 10 v. Higher Education Personnel Board, 107 Wash.2d at 432, 730 P.2d 653. The Supreme Court in Ford Motor Co. v. National Labor Relations Board, 441 U.S. 488,

497-501, 99 S.Ct. 1842, 1849-51, 60 L.Ed.2d 420 (1979), found that “terms and conditions of employment” include issues that are “ ‘plainly germane’ to the working environment” or that “vitaly affect” some aspect of the relationship between the employer and the employee. The court in Seattle First National Bank v. National Labor Relations Board, 444 F.2d 30, 32 (9th Cir. 1971), stated that the phrase “terms and conditions of employment” must be interpreted in a limited sense and that the phrase does not include “every issue that might be of interest to unions or employer.” **The court found that an issue is a term or condition of employment only if it materially and significantly affects employment or the employee’s job security.** Seattle First National Bank v. National Labor Relations Board, 444, F.2d at 33, 35.

Shoreline, 59 Wn. App at 71-72 (**emphasis added**).

The Guild’s reliance in its opening brief on case precedent that does not address the precise issue that was before PERC, the superior court, and now before this Court - the permissive or mandatory nature of the Guild’s proposals 7.3A and 7.3B under Chapter 41.56 RCW.

E. **The Guild Mischaracterizes the Superior Court’s Verbatim Affirmation of PERC’s Cease and Desist Order as a Separate Injunctive Action.**

The Guild’s argument that the superior court “further restrained” the Guild through its order affirming PERC’s decision is a mischaracterization of procedural history. The Guild concedes that “PERC has authority by statute to issue cease and desist orders.” (Appellant’s Opening Brief, p. 39) (citing RCW 41.56.160). The Guild

further concedes that the “cease and desist order” issued by the superior court adopted “verbatim” the “cease and desist order” language in the PERC order. (Appellants Opening Brief, p. 9). Through the Guild’s own admissions, the superior court order simply affirmed PERC’s cease and desist order and placed no additional restrictions on the Guild.

The superior court simply affirmed PERC’s cease and desist order verbatim and added no additional provisions. Attempting to argue that the superior court’s “verbatim” acceptance of PERC’s cease and desist order acts as injunctive relief is improper and mischaracterizes the superior court’s actions. There is no dispute that the superior court had authority to review and affirm PERC’s order. See RCW 34.05.570; Pasco Police Officers’ Ass’n v. City of Pasco, 132 Wn.2d 450, 938 P.2d 827 (1997).

F. The Guild’s Argument Regarding *Future Bargaining Rights Being Improperly Restricted by the “Cease and Desist Order” Issued by PERC is Barred From Review by This Court According to RAP 2.5(a).*

1. This Court May Refuse Claimed Errors Not Previously Raised.

Although this court reviews the PERC record de novo, RAP 2.5(a) prohibits review of claims of error that were not raised in the trial court. De novo review does not detract from the force of the rule of appellate procedure which permits this Court to refuse review of any claim of error not raised in the trial court. RAP 2.5(a); see, e.g., Suquamish Indian Tribe

v. Kitsap County, 92 Wn. App. 816, 826, 965 P.2d 636, 641 (1998) (a Land Use Petition Act (LUPA) claim where the Court, sitting in de novo review, refused to consider an argument not made below).

The primary reason for the general rule is judicial economy. The rule is based upon the belief that the trial court should be given the opportunity to correct an error, in order to avoid the time and expense of an unnecessary appeal if possible. Smith v. Shannon, 100 Wn.2d 26, 666 P.2d 351 (1983); State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988).

RAP 2.5(a) also assures fairness to the opposing party. “[T]he opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.” See 2A Karl B. Tegland, WASHINGTON PRACTICE: Rules Practice RAP 2.5 (6th ed. 2004). A number of Washington cases have said that issues and theories may not be raised for the first time on appeal. See, e.g., Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 840 P.2d 860 (1992); State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991).

The Guild has presented for review a new error allegedly committed by PERC. The Guild is asserting that PERC’s cease and desist order is improper by its application not being limited to the proposal at

hand. In the Guild's opening brief it asserts, for the first time, that the restraining order issued by PERC improperly "impedes [the Guild's] ability to conduct *future* contract negotiations." (Appellant's Opening Brief, p(s). 1-2; 39-43) (*emphasis added*). The Guild asserts that PERC's directive "barred the Guild from bargaining to impasse *future* contract proposals." (Appellant's Opening Brief, p(s). 8; 39-43) (*emphasis added*).

Any alleged improper restraints on future bargaining placed upon the Guild, were ordered by PERC and reviewable at the superior court level. As previously stated, the Guild conceded within its opening brief that the cease and desist order issued by the superior court adopted "verbatim the restraining language in the PERC order." (Appellants Opening Brief, p. 9; CP 9). As a result, no additional restraints were put in place by the superior court that were not already in place by the PERC decision. Any issue regarding the alleged encroachment or impediment on *future* bargaining rights within the cease and desist order, issued by PERC, could have been raised, and *should* have been raised, at the superior court level for review.

The Guild failed to raise the reach of the restrictions within the restraining order as a violation of *future* rights of labor organizations at the superior court level. The Guild failed to present any argument or legal authority on this issue at the superior court level. The trial court was not

given the opportunity to correct the claimed error. The County was not given an opportunity to address the claimed error at the trial court level. Raising this issue for the first time with this Court is improper and should not be reviewed in accordance to RAP 2.5(a). See, e.g., Gehr v. South Puget Sound Cmty. Coll., 155 Wn. App. 527, 533 n.2, 228 P.3d 823 (2010); see, e.g., Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 42 P.3d 1265 (2002).

2. PERC Has Broad Discretion in Issuing Restraining Orders.

Even if the Guild's argument regarding the reach of the restraining order is considered by this Court, PERC has broad discretion in issuing cease and desist orders and PERC's remedial orders are entitled to liberal construction.

Administrative agencies are vested with broad discretion and have the duty to determine what remedy is appropriate to effect the purposes of the legislature. In re Case E-368, 65 Wn.2d 22, 27-28, 395 P.2d 503 (1964); State ex rel. Washington Federation of State Employees, AFL-CIO v. Bd. of Trustees of Central Wash. University, 93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980).

RCW 41.56.160, which permits PERC to fashion appropriate solutions, is remedial in nature and, hence, is entitled to a liberal

construction to affect its purposes. Nucleonics Alliance, Local Union No. 1-369 v. WPPSS, 101 Wn.2d 24, 29, 677 P.2d 108 (1984); Roza Irrigation Dist. v. State, 80 Wn.2d 633, 639, 497 P.2d 166 (1972). PERC's remedy is entitled to deference. Manufacturing Co., 247 N.L.R.B. 1139, 1172 (1980); Municipality of Metropolitan Seattle v. Public Employment Relations Com'n, 60 Wn. App. 232, 240-41, 803 P.2d 41, 45 (1991).

PERC has authority to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act. Municipality of Metropolitan Seattle v. Public Employment Relations Com'n, 118 Wn.2d 621, 634-35, 826 P.2d 158 (1992). In Municipality of Metropolitan Seattle v. PERC, the Supreme Court of the State of Washington approved a liberal construction of the remedial authority conferred by RCW 41.56.160, in order to accomplish the purposes of the Public Employees' Collective Bargaining Act. The authority granted to the Commission has been interpreted as broad enough to even authorize an award of attorney fees. METRO, supra.

PERC's cease and desist order is consistent with state law and the legislative intent behind the law and should be upheld.

IV. CONCLUSION

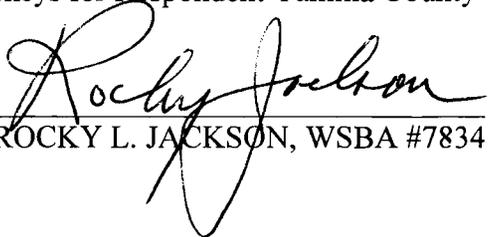
PERC is granted the exclusive authority to determine whether a bargaining subject is permissive or mandatory. PERC is given great

deference by Courts in determining permissive and mandatory subjects of bargaining. PERC found in this matter that the County was not obligated to bargain for paid time off for union business as framed in Articles 7.3A and 7.3B of the Guild's proposal as the subject matter was a permissive subject of bargaining. The Thurston County Superior Court correctly affirmed PERC's ruling. The Guild committed an unfair labor practice by insisting to bargain to impasse over permissive subjects. The Guild mischaracterizes the superior court's verbatim affirmation of PERC's cease and desist order as a separate injunctive action. The Guild's argument regarding *future* bargaining rights being improperly restricted by the cease and desist order issued by PERC should be barred from review by this Court according to RAP 2.5(a).

The County respectfully submits that PERC's Decision 10204-A (PECB), and the superior court's order affirming the same, should be affirmed. The Guild committed an unfair labor practice.

DATED this 27th day of February, 2012.

Menke Jackson Beyer Ehlis Harper
& Plant, LLP
Attorneys for Respondent Yakima County

By: 
ROCKY L. JACKSON, WSBA #7834

COURT OF APPEALS
DIVISION II

12 FEB 28 AM 9:37

STATE OF WASHINGTON
BY [Signature]
DEPUTY

CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
: ss:
County of Yakima)

I hereby certify under penalty of perjury under the laws of the State of Washington that I am an employee of the Attorneys for Respondent Yakima County, am familiar with the above-captioned action but not a party thereto, that I am a citizen of the United States and over the age of twenty-one years; that on February 27th, 2012 I forwarded via email and U.S. Mail, a true and correct copy of the foregoing *RESPONDENT YAKIMA COUNTY'S OPENING BRIEF* to the following parties as shown:

Original and One Copy
Via UPS Overnight Courier

Mr. David Ponzoha, Clerk
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Via Email and U.S. Mail

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Dated: 2/27/12
at Yakima, Washington

[Signature]
Natalie Bennett