

COURT OF APPEALS
DIVISION II
2012 APR 23 10:11:42
STATE OF WASHINGTON
BY Cm
DEPUTY

NO. 44183-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD, INC.

Appellant

v.

KITSAP COUNTY and
KITSAP COUNTY SHERIFF

Respondents

APPELLANT'S REPLY BRIEF

Christopher J. Casillas
Attorney for Appellant

2003 Western Avenue, Suite 550
Seattle, Washington 98121
(206) 838-8770
WSBA No. 34394

MM 7/22/13

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. The County Misapplies the Relevant Balancing Test Applied under RCW Chapter 41.56.....2

 1. The County Relies on the *First National* Balancing Test under the National Labor Relations Act in Error..... 2

 2. The State Courts and PERC Have Developed Their Own Balancing Analysis under RCW 41.56. 6

 B. The County is Wrong in Arguing the Superior Court Conducted the Balancing Test.....8

 C. Application of the Balancing Test Does not Support the Conclusion Drawn by the County that the Layoff Decision in this Case Was a Non-Mandatory Subject of Bargaining.....9

 D. PERC’s Case Law Has Followed the Bargaining Dichotomy Established by *Fibreboard* and *First Nat’l.*13

 E. The County’s Claim is Not Justiciable Because the Guild Demanded to Bargain the Layoff Decision and Not the County’s Decision to Reduce its Budget, Operations, or Staffing Levels.17

 F. The Guild Has Not Waived its Right to Bargain Over the Layoff Decision.19

 1. Contractual Waivers Must be Clear and Unmistakable and Expire at the End of an Agreement. 19

 2. The Contract Was Expired at the Time of the Layoffs and there is No Clear and Unmistakable Language in the Contract that Could Constitute a Waiver..... 22

III. CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases

<i>Everett v. Estate of Sumstad</i> , 95 Wn.2d 853 (1981)	20
<i>Fire Fighters, Local 1052 v. PERC</i> , 113 Wn.2d 197, 203; 778 P.2d 32 (1989)	7
<i>Green River Community College District No. 10 v. Higher Education Personnel Bd.</i> , 107 Wn.2d 427, 432; 730 P.2d 653 (1986)	4
<i>Plumbing Shop, Inc. v. Pitts</i> , 67 Wn.2d 514 (1965)	20
<i>Yakima County v. Yakima County Law Enforcement Officers' Guild</i> , 2013 Wash. App. LEXIS 620 (Div. II, 2013)	6, 7

Statutes

RCW 41.56.030	8
RCW 41.56.140	6, 19
RCW 41.56.440	21
RCW 41.56.450	22
RCW 41.56.470	21, 24
WAC 391-45-550.....	20

Other Authorities

<i>Chelan County</i> , Decision 5469-A (PECB, 1996)	19, 20
<i>City of Anacortes</i> , Decision 6830-A (PECB, 2000)	14
<i>City of Bellevue</i> , Decision 10830 (PECB, 2010) (<i>rev'd</i> in part on other grounds).....	10, 14, 15
<i>City of Centralia</i> , Decision 1534-A (PECB, 1982)	10, 15
<i>City of Kelso</i> , Decision 2633-A (PECB, 1988).....	10, 15

<i>City of Mercer Island</i> , Decision 1026-A (PECB, 1981).....	10, 15
<i>City of Pasco</i> , Decisions 4694, 4695 (PECB, 1994).....	21
<i>City of Seattle</i> , Decision 9938 (PECB, 2007).....	18
<i>City of Tukwila</i> , Decision 10536 (PECB, 2009).....	18
<i>City of Vancouver</i> , Decision 10616 (PECB, 2009).....	18
<i>City of Wenatchee</i> , Decision 8802-A (PECB, 2005).....	19, 20
<i>City of Yakima</i> , Decision 3564 (PECB, 1990).....	19
<i>City of Yakima</i> , Decision 3564-A (PECB, 1991).....	20, 21
<i>Island County Fire District 1</i> , Decision 9867 (PECB, 2007).....	22
<i>King County</i> , Decisions 10576-A, 10577-A, 10578-A (PECB, 2010).....	10, 15
<i>Lakewood School District</i> , Decision 755-A (PECB, 1980).....	19
<i>North Franklin School District</i> , Decision 5945 (PECB, 1997).....	10, 15
<i>State – Social and Health Services</i> , Decision 9690-A (PSRA, 2008).....	18
<i>Tacoma-Pierce County Employment and Training Consortium</i> , Decision 10280 (PECB, 2009)	10
<i>Val Vue Sewer District</i> , Decision 8963 (PECB, 2005).....	18
<i>Whatcom County</i> , Decision 7643 (PECB, 2002).....	21

I. INTRODUCTION

Kitsap County's reliance on federal case law interpreting the National Labor Relations Act ("NLRA") is misplaced and unwarranted. Both the Public Employment Relations Commission ("PERC") and the State courts have adopted a clear balancing analysis for categorizing subjects of bargaining as mandatory, permissive, or illegal and, thereafter, determining the parties' respective bargaining obligations concerning that subject under RCW chapter 41.56. The PERC and State court analysis, as well as local case law ruling on whether the subject of a layoff is considered a mandatory subject of bargaining, serves as authority for deciding the question in this matter. The issue for this Court, therefore, is whether the County has an obligation to bargain over its decision to engage in layoffs in an effort to reduce its labor costs.

The application of precedent arising under RCW chapter 41.56, to the facts of this case, makes clear that an economically motivated layoff is, indeed, a mandatory subject of bargaining. Subsequently, the County's refusal to bargain such a decision is, itself, an unfair labor practice. The County is wrong to rely on federal court decisions interpreting a different statutory scheme for the proposition that the layoff in this matter does not constitute a mandatory subject of bargaining. PERC, despite the County's incorrect categorization of its decision in this area, has been clear in

holding that economically motivated layoffs stemming from an intent to reduce labor costs are mandatory in nature; whereas, layoff decisions that result from programmatic revisions or facility closings are permissive. The evidence in this case makes clear that the situation in Kitsap County is of the former, and not latter, category and should be classified as a mandatory topic of bargaining.

Finally, the County's efforts to reconstitute the Guild's actual demand to bargain over the layoff decision to one involving the County's "budget, operations, and staffing levels" should be rejected. Defining the scope of what the Guild requested to bargain over is critical, and the fact that the Guild never sought to bargain over the County's budget makes the County's original claim in this case not justiciable. The County is also mistaken in its efforts to argue that the Guild waived any rights to bargain the layoff decision, since the contract contains no such waiver nor could it, legally, because the contract was expired at the time this matter arose.

II. ARGUMENT

A. **The County Misapplies the Relevant Balancing Test Applied under RCW Chapter 41.56.**

1. **The County Relies on the *First National* Balancing Test under the National Labor Relations Act in Error.**

It is an undisputed fact that this case arises under, and is governed by, RCW chapter 41.56, the Public Employees Collective Bargaining Act

("PECBA"). Yet, for reasons unknown, the County relies on, and urges this Court to adopt, a standard for analyzing this case first developed by the U.S. Supreme Court in *Fibreboard*¹ and later expounded upon in *First National Maintenance*² interpreting provisions of the NLRA. Since this case is governed by Washington State law, and both the Washington courts and PERC have adopted a uniform balancing analysis for classifying subjects of bargaining under PECBA, the County's emphasis on federal cases interpreting the NLRA make little sense and should be rejected. The Supreme Court, in *First National Maintenance*, also expressly limited its holding to the facts of that case – involving a private company's decision to close its operations at a particular location, which is significantly distinct from the facts herein.

Although it is certainly the case that both PERC and the State courts have looked to decisions by the National Labor Relations Board ("NLRB") and the federal courts, interpreting the NLRA, as persuasive authority when interpreting PECBA, the federal law on this issue is of little significance due to the wide array of direct authority from PERC and the State courts analyzing PECBA. There are numerous decisions issued by the State's adjudicative bodies interpreting the relevant provisions of

¹ *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203; 85 S. Ct. 398; 13 L.Ed.2d 233 (1964).

² *First Nat'l Maintenance Corp., v. NLRB*, 452 U.S. 666; 101 S. Ct. 2573; 69 L.Ed.2d 318 (1981).

PECBA in order to classify a particular subject of bargaining and determine whether a refusal to engage in collective bargaining constitutes an unfair labor practice.

Both the State courts and PERC have noted the substantial similarity between PECBA and the NLRA, given that the State law was patterned after its federal forefather. As a result, “[w]hile not controlling, decisions under the NLRA are persuasive in construing state labor acts which appear to be based on or are similar to the federal act.”³ Thus, relying on *First National Maintenance*, the County mistakenly posits that the “balancing test” that must be applied in these cases looks at whether “the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.”⁴

However, beyond the fact that federal court decisions can only rise to the level of “persuasive authority” in interpreting PECBA, their significance is even less when PERC, and the State courts themselves have issued numerous decisions directly interpreting RCW chapter 41.56 and the parties’ obligations thereunder. In this case, such ample authority is readily available and constitutes the controlling authority, with any federal decisions interpreting the NLRA as minimally significant persuasive

³ *Green River Community College Dist. No. 10 v. Higher Education Personnel Bd.*, 107 Wn.2d 427, 432; 730 P.2d 653 (1986).

⁴ *First Nat’l Maintenance*, 452 U.S. at 679 (1981).

authority. The balancing analysis adopted by adjudicative authorities in this State interpreting PECBA is not in alignment with the analysis advocated for by the County based on *First National*. The County's subsequent analysis under the standard from *First National* is of little value because it is not the test local authorities have applied to determine the parties' respective bargaining obligations under RCW chapter 41.56.

In *First National*, rather than adopting a uniform balancing analysis, the Supreme Court expressly noted the limitations of its ruling to the specific facts of that case. As the Court concluded:

In order to illustrate the limits of our holding, we turn again to the specific facts of this case.... The decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely.⁵

This matter between Kitsap County and the Guild in no way involves a change in operations, such as going out of business, and is instead a traditional layoff designed to reduce the County's labor costs. Even if the County's preferred balancing analysis from *First National* was, generally, binding on this Court, the Supreme Court's express limitation in its holding to the specific facts of that case make it inapposite herein. Instead, this Court must look to how the balancing analysis has been applied under RCW chapter 41.56, to which we now turn.

⁵ *First Nat'l Maintenance*, 452 U.S. at 687.

2. The State Courts and PERC Have Developed Their Own Balancing Analysis under RCW 41.56.

This Court of Appeals has recently had cause to take up a matter analogous to our own where it was called upon to determine the status of a particular topic of bargaining. In *Yakima County*,⁶ this Court restated the contours of the balancing analysis that must be engaged in, and has been relied upon by the Guild herein, in order to determine within what category of collective bargaining a particular issue falls. As this Court noted, it is only after application of the balancing analysis that the legal obligations of the parties to a collective bargaining agreement can subsequently be determined.

As restated by this Court, to determine whether an employer has refused to engage in collective bargaining in contravention of RCW 41.56.140(4), it must first be determined within which of “three broad categories of issues related to collective bargaining”⁷ the relevant issue falls. The three categories include: “(1) mandatory issues, (2) permissive issues, and (3) illegal issues.” “Parties to a CBA *must* bargain in good faith on mandatory issues;” therefore, “categorizing a subject of bargaining as mandatory or permissive determines whether one party may

⁶ *Yakima County v. Yakima County Law Enforcement Officers' Guild*, 2013 Wash. App. LEXIS 620 (Wash. Ct. App. March 19, 2013).

⁷ *Yakima County*, 2013 Wash. App. LEXIS 620, at *11.

argue the issue to impasse without engaging in an unfair labor practice.”⁸

“[W]ages, hours, and other terms and conditions of employment are subjects about which the parties must bargain, and are categorized as ‘mandatory’ subjects.” Mandatory subjects are “limited to matters of direct concern to employees.” “Permissive subjects of bargaining include ‘[m]anagerial decisions that only remotely affect ‘personnel matters’, and decisions that are predominately ‘managerial prerogatives.’”⁹

“A balancing test is used to determine whether a subject is a mandatory or permissive subject of bargaining.” “Under the *Fire Fighters, Local 1052* test, we balance ‘the relationship the subject bears to ‘wages, hours and working conditions’ and the extent to which the subject lies ‘at the core of the entrepreneurial control’ or is a management prerogative.” “The focus of the balancing test is ‘to determine which of these characteristics predominates.’”¹⁰

Unlike the fact-specific analysis adopted by the Supreme Court in *First Nat’l*, the State courts and PERC have conclusively settled on a general balancing analysis that can be applied in each case where there is a dispute over the status of a particular subject of bargaining and the parties’ bargaining obligations thereunder. The State test, relying directly on the

⁸ *Yakima County*, 2013 Wash. App. LEXIS 620, at *12.

⁹ *Yakima County*, 2013 Wash. App. LEXIS 620, at *13.

¹⁰ *Yakima County*, 2013 Wash. App. LEXIS 620, at *13 (quoting *Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 203; 778 P.2d 32 (1989)).

definition of “collective bargaining” in RCW 41.56.030(4), weighs the proximity of where a particular issue lies with respect to the meaning of “wage, hour, and working conditions” versus traditional managerial prerogatives. The outcome of that analysis determines the classification of the bargaining subject, and it is this analysis that must be applied herein.

B. The County is Wrong in Arguing the Superior Court Conducted the Balancing Test.

At the outset of the County’s argument regarding whether the Superior Court applied the balancing analysis just described, it readily admits that the Court’s Order “did not make any specific findings of fact related to a balancing test.”¹¹ The record, or lack thereof, clearly supports this observation, and the combination of those two things should be dispositive on the question of whether the Superior Court committed reversible error in failing to articulate and apply the balancing analysis in determining whether there was an obligation to bargain over the County’s decision to engage in layoffs.

At most, the County can only cite to a short passage during oral arguments in front of the Superior Court where the judge noted that she had reviewed the testimony and declarations “carefully,”¹² and pieces of the record from an unrelated interest arbitration proceeding between the

¹¹ Respondent’s Appeal Brief, p. 24.

¹² RP (10/11/12) 4: 7.

parties that had occurred earlier in the year. Although a factual record based on a series of declarations and attached exhibits was submitted for consideration by the Superior Court, it does not override the fact that the court is then required to apply the balancing analysis, as detailed above, to determine what category of bargaining the issue falls within and the parties' respective legal obligations as a result.

The term "balancing analysis" is not used by the Superior Court during oral arguments or as part of the Order. On top of that fact, there is no indication, terminology aside, that the Superior Court analyzed the matter in any way resembling the balancing analysis mandated by the State courts and PERC. There simply was no effort undertaken to determine which of the characteristics – between a wage, hour, and working condition versus something that is considered a traditional management prerogative – predominates in this case, despite the fact that the Guild had briefed the Superior Court on this issue and advocated for such an approach during oral arguments.¹³

C. Application of the Balancing Test Does not Support the Conclusion Drawn by the County that the Layoff Decision in this Case Was a Non-Mandatory Subject of Bargaining.

As detailed by the Guild in its opening brief on appeal, both under a plain reading of the phrase "wage, hours and working conditions" and

¹³ RP (9/21/12) 33: 1-22.

based on PERC's prior case law¹⁴ addressing this topic, the subject of layoffs, when motivated by economic factors, weighs heavily in favor of being declared a mandatory subject of bargaining. A layoff designed to reduce labor costs is perhaps one of the most significant employment actions (perhaps only short of being terminated for cause) available because it results in the complete severing of the employment relationship. Simply put, there can be no greater impact on an individual employee's wages or working conditions than the complete loss of their job.

Under the balancing analysis, while a subject of bargaining may bear a close relationship to "wages, hours, and working conditions," that relationship must be assessed against the degree to which that subject lies within a traditional managerial prerogative. While the issue of layoffs is admittedly a decision over which management has a vested interest, PECBA requires negotiations over decisions in this area when the predominant characteristics of the subject more closely align with a "wage, hour, and working condition." In this case, the County has been unable to overcome the fact that the layoff decision in this case, motivated

¹⁴ See *City of Kelso*, Decision 2633-A (PECB, 1988); *City of Centralia*, Decision 1534-A (PECB, 1982); *City of Mercer Island*, Decision 1026-A (PECB, 1981); *South Kitsap School District*, Decision 472 (PECB, 1978); *North Franklin School District*, Decision 5945 (PECB, 1997); *City of Bellevue*, Decision 10830 (PECB, 2010) (*rev'd* in part on other grounds); *King County*, Decisions 10576-A, 10577-A, 10578-A (PECB, 2010). See also *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280 (PECB, 2009)

by a desire to reduce labor costs, more predominantly impacts a wage, hour, and working condition and, thus, is properly classified as a mandatory subject of bargaining.

Knowing this, the County unsuccessfully seeks to recast the “subject” of bargaining over which the Guild demanded to bargain from what the Guild actually requested – a demand to bargain the layoff decision – to something the Guild did *not* request to bargain over –the County’s ability to set its budget, operations, or staffing levels. Under this alternative paradigm, the County then goes on to make the case that its ability to set and determine its budget is not something the County could ever be required to bargain over with the Guild, citing to an array of alleged problems. However, in recognizing that the County’s whole argument is premised on a misidentification of the actual subject of bargaining at issue in this case – the layoff decision – it becomes clear that their argument fails.

The County believes the facts of this case demonstrate that its decision to layoff members was the result of its budgetary constraints. However, even if this is accurate, such a sequence of events does not make these two discrete subjects of bargaining – layoffs and budgets – one and the same. A short thought exercise examining different scenarios where the parties could have simply bargained over the layoff decision without

ever impacting the County's decision to set the budget at a particular level can help to exemplify this point.

In October of 2011, the County had established a preliminary budget for 2012 that included cuts to the Sheriff's Office budget compared to 2011. [CP 329 ¶11; CP 333-334] Operating within the constraints of the anticipated budget for 2012, the County could have approached the Guild indicating a need to reduce its costs and suggested, as an opening offer, that this be achieved through laying off two of its members. The Guild could have negotiated over, and eventually accepted this approach, or it could have offered any number of different proposals that operated within the County's established fiscal parameters but carried out any reductions differently.

For instance, the Guild could have offered to suspend the payment of certain premium pays to which its members were entitled under the collective bargaining agreement. The Guild could have offered to forego any wage increases for a period of time, or it could have offered to pay more in health care premiums for a designated time period to reduce costs for the 2012 budget. Why would the members consider such options? Because they may have rationally determined that the costs associated with the loss of additional personnel outweighed their own personal financial situation. There are any number of potential options, but the

central point here is that the method for achieving any savings, in this case layoffs, could have been the subject of productive and meaningful negotiations between the parties without ever implicating the County's ability to set its budget at a particular level.

All of the examples provided above are offered in the context of the County having pre-determined the size of its budget within which the jail and its employees must operate. The fact that all of these different proposals could have been considered by the parties in negotiating over the layoff decision within the confines of accepting the County's pre-setting of its budget, conclusively demonstrate that the Guild's request to bargain over the layoff decision is *in no way one and the same* with a request to bargain over the County's budget.

D. PERC's Case Law Has Followed the Bargaining Dichotomy Established by *Fibreboard* and *First Nat'l*.

The County's reliance on *First Nat'l*, and its critique of PERC case law on cases of staffing reductions as allegedly being inconsistent and contradictory, is misplaced. The central flaw in the County's analysis stems from its continued insistence that the subject of bargaining at issue in this case centers on the County's budget, operations, and staffing levels rather than, as the Guild asserts, being about the County's decision to layoff two members to reduce costs. In examining PERC's cases directly on the issue of layoffs (or the short-term version of layoffs, known as

furloughs), PERC has actually developed a clear analysis for understanding the employer's bargaining obligations that should be applied in this case.

Both *First Nat'l* and *Fibreboard* involved situations where union members lost their jobs, but the bargaining obligations directly at issue in those cases involved decisions to go out of business and contracting out work, respectively. Specifically, *First Nat'l* involved an employer decision to shutter part of its operations for economic reasons. In contrast, *Fibreboard* was the result of an employer decision to terminate a collective bargaining agreement with the union and contract out the work. The Supreme Court determined that the employer in *Fibreboard* did have a duty to bargain when deciding to contract out union work, but did not have a duty to bargain when it closed part of its operations for economic reasons in *First Nat'l*. PERC has subsequently adopted the reasoning from these two Supreme Court cases in analogous situations arising under RCW chapter 41.56, and similarly concluded that an employer may be required to bargain over the decision to contract out, but does not when it decides to shut down part of its business for entrepreneurial reasons.¹⁵

While all of the above-described cases involve the eventual layoff of employees, the layoff decision itself is only a consequence of an early

¹⁵ See *City of Anacortes*, Decision 6830-A (PECB, 2000); *City of Bellevue*, Decision 10830-A (PECB, 2012).

decision that is the ultimate subject of those cases—either a decision to contract out or go out of the business. As just noted, when the case involves a decision by the employer to alter the scope of its enterprise or engage in significant programmatic changes, the consequence of which is often layoffs, PERC has consistently, in line with *First Nat'l*, found the initial decision to be a managerial prerogative, with the layoffs only being viewed as a consequence of that initial entrepreneurial decision.

Notwithstanding the foregoing, there is a separate line of PERC cases that confront the decision to engage in layoffs directly when those layoffs, or other work reductions like furloughs, *are motivated by an economic desire to reduce labor costs*. In this separate line of cases, directly analogous to the situation herein, PERC has been equally consistent in finding that when an employer is economically motivated to reduce their labor costs and elects to accomplish such a goal through layoffs or furloughs, the layoff or furlough decision itself becomes a mandatory subject of bargaining.¹⁶

The evidence in this case undoubtedly supports the conclusion that Kitsap County, in laying off two members of the Corrections Guild at the

¹⁶ See *City of Kelso*, Decision 2633-A (PECB, 1988); *City of Centralia*, Decision 1534-A (PECB, 1982); *City of Mercer Island*, Decision 1026-A (PECB, 1981); *South Kitsap School District*, Decision 472 (PECB, 1978); *North Franklin School District*, Decision 5945 (PECB, 1997); *City of Bellevue*, Decision 10830 (PECB, 2010) (*rev'd* in part on other grounds); *King County*, Decisions 10576-A, 10577-A, 10578-A (PECB, 2010).

outset of 2012, was motivated in this decision by a desire to reduce its labor costs. In his declaration, the Chief of Corrections, Ned Newlin, made clear that the Sheriff's Office sought to achieve a labor savings by laying off two Corrections Officers following a decision by the Board of County Commissioners to reduce the overall Sheriff's Office budget by \$513,000 in 2012. [CP 329 ¶11; CP 333-334]. Some of these reductions were achieved through "cuts to supplies and services," but the Sheriff's Office also elected to achieve some savings by eliminating "three (3) additional positions in the jail." [CP 334]. Notably, there is nothing in the record suggesting that the layoffs were the result of a change in the scope of the enterprise or the shutting down of all or part of the facility; rather, the cuts were motivated by a perceived necessity to achieve a reduction in the Sheriff's Office labor costs.

With such a goal in mind, PERC's repeated determinations that when employment actions, like layoffs or furloughs, are done with the goal of achieving some labor savings, *even when that goal is based on an effort to manage its budget*, they fall within the definition of a mandatory subject of bargaining. As such, the County is required to give the Guild notice of an intent to make a change, and upon demand by the Guild to bargain, to then bargain in good faith with the Guild until a resolution on the matter is achieved through bilateral negotiations. Only upon

completion of that process could the County move forward with a change affecting employee wages or working conditions.

E. The County's Claim is Not Justiciable Because the Guild Demanded to Bargain the Layoff Decision and Not the County's Decision to Reduce its Budget, Operations, or Staffing Levels.

There is undoubtedly a live and active controversy in front of this Court, but it is not the one presented by the County and the subject of the order issued by the Superior Court. The Superior Court's order ruled in favor of Kitsap County on its declaratory judgment action seeking a determination that the County has no obligation to bargain over the County's "budget, operations, or staffing levels" with the Guild. There is not a single piece of evidence in the record demonstrating the Guild ever made such a demand. In contrast, the formal demands made by the Guild clearly evidence a desire to bargain over just the layoff decision. The County can only desperately point to passages, taken out of context, where the Guild and its representatives made some passing reference to the term "budget" to attempt to recast the Guild's demand to bargain into something it was not.

This is not just an issue of semantics, with the County arguing that it does not really matter "what label either side placed on the issue."¹⁷ The "label," however, matters considerably because it frames the parties'

¹⁷ Respondent's Appeal Brief, p. 39.

obligations and discussions during any bargaining. The absurdity of the County's position can be exemplified with a simple analogous example.

PERC has repeatedly stated that employee work schedules constitute a mandatory subject of bargaining.¹⁸ The type of schedule a department works, however, can potentially impact an employer's budget, for example through higher overtime costs, which ties the issue back to the budget. It would be absurd, however, to suggest that because the issue of work schedules has an impact on the employer's budget that a hypothetical request to bargain over work schedules is, in actuality, a demand to bargain over the employer's budget, over which the employer has no obligation to bargain. Since almost all mandatory subjects of bargaining implicate an employer's budget on some level, this line of reasoning would effectively nullify collective bargaining in this State and almost all decisions by the courts and PERC finding a variety of subjects of bargaining as mandatory in nature.

While there has been no effort by the Guild to bargain directly with the County over its budget, and thus no justiciable claim related to the County's declaratory judgment action, the Guild's counterclaim that was dismissed by the Superior Court – seeking a ruling that layoffs are a

¹⁸ See *City of Vancouver*, Decision 10616 (PECB, 2009); *City of Tukwila*, Decision 10536 (PECB, 2009); *State – Social and Health Services*, Decision 9690-A (PSRA, 2008); *Snohomish County*, Decision 9770 (PECB, 2007); *City of Seattle*, Decision 9938 (PECB, 2007); *Val Vue Sewer District*, Decision 8963 (PECB, 2005).

mandatory subject of bargaining and the County committed an unfair labor practice in refusing to bargain over this decision – is a live controversy in front of this Court. On these claims, there is an actual case and controversy because the parties dispute whether the County’s decision to layoff Guild members is a mandatory subject of bargaining. The Guild also argues that the County’s refusal to bargain the layoff decisions, as is well supported by the record, is itself an unfair labor practice in violation of RCW 41.56.140. The Superior Court erred in dismissing the Guild’s claims, and it is those issues that the Guild pursues in this appeal.

F. The Guild Has Not Waived its Right to Bargain Over the Layoff Decision.

1. Contractual Waivers Must be Clear and Unmistakable and Expire at the End of an Agreement.

“A waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable.”¹⁹ “The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver.”²⁰ “We have long held the general management rights clauses often asserted by employers as waivers of union bargaining rights are generally found inadequate under the high standards for finding a waiver.”²¹ “The Washington courts have adhered

¹⁹ *City of Wenatchee*, Decision 8802-A (PECB, 2005) (citing *City of Yakima*, Decision 3564 (PECB, 1990)).

²⁰ *Id.*; citing *Lakewood School District*, Decision 755-A (PECB, 1980).

²¹ *Id.*; see *Chelan County*, Decision 5469-A (PECB, 1996).

to an objective manifestation theory in construing words and acts of contractual parties, and impute to a person an intention corresponding to the reasonable meaning of the words and acts.”²² “Emphasizing the outward manifestation of assent by each party to the other, courts have found the subjective intention of the parties irrelevant.”²³

“Waivers of statutory bargaining rights are not, themselves, a mandatory subject of bargaining.”²⁴ “Employers are sometimes willing to agree on a “permissive” subject, knowing that they will be able to back out of that agreement when the contract expires.”²⁵ “Employers are sometime willing to make concessions on other issues, in order to obtain waivers of union bargaining rights giving them a free (or less hindered) hand in administering their operations during the life of the contract.”²⁶ “In practical application, one of the principal distinctions between ‘mandatory’ and ‘permissive’ subjects is that the status quo must be maintained on mandatory subjects after the expiration of a collective bargaining agreement, while obligations concerning a permissive subject expire with the contract in which they were contained.”²⁷ “One of the

²² *Id.* (citing *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514 (1965) (cited in *Chelan County*, Decision 5469-A (PECB, 1996)).

²³ *Id.* (citing *Everett v. Estate of Sumstad*, 95 Wn.2d 853 (1981)).

²⁴ *City of Yakima*, Decision 3564-A (PECB, 1991).

²⁵ *Id.*; see, e.g., WAC 391-45-550.

²⁶ *Id.*

²⁷ *Id.*

inherent forces which motivate employers to sign contracts (or contract extensions) with unions is the preservation of contractual waivers of union bargaining rights.”²⁸

“The ‘waiver by contract’ defense is apt during the term of a valid collective bargaining agreement, where the parties have negotiated a subject matter and have incorporated controlling provisions on that subject matter into their contract.”²⁹ “The duty to bargain on that subject matter is thus suspended for the term of that contract.” The “waiver by contract” defense is, therefore, inapposite when the alleged unfair labor practice clearly did not occur until after the parties’ “collective bargaining agreement had expired.”³⁰ Under both state and federal precedent, waivers in a contract “expire with the collective bargaining agreement.”³¹

Additionally, RCW 41.56.470 states, in part:

During the pendency of the proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other...

Based on this provision, “[f]or a unit of uniformed personnel, such as the employees involved in this case, the parties need to proceed through the negotiation, mediation, arbitration procedure of RCW 41.56.440 and

²⁸ *Id.*

²⁹ *Whatcom County*, Decision 7643 (PECB, 2002).

³⁰ *Id.*

³¹ *City of Pasco*, Decisions 4694, 4695 (PECB, 1994).

41.56.450, and the employer may only implement such changes as agreed to by the parties or imposed upon by an interest arbitration panel.”³²

2. The Contract Was Expired at the Time of the Layoffs and there is No Clear and Unmistakable Language in the Contract that Could Constitute a Waiver.

The County mistakenly argues that alleged waivers in the parties’ prior collective bargaining agreement excuse it from any bargaining obligation concerning the layoffs, failing to note that contractual waivers expire with the termination of a collective bargaining agreement. Several key facts relate to this portion of the County’s argument. First, notice of the potential layoff occurred in October of 2011. [CP 365 ¶8] Likewise, the County’s refusal to bargain over the decision to engage in layoffs occurred shortly thereafter, with finality over this position becoming clear by December 2011. [CP 367-368 ¶15-18] Third, the previous collective bargaining agreement between the parties was for the period of January 1, 2007 through December 31, 2009. [CP 364 ¶6] Finally, at the time of the events at issue herein, the collective bargaining agreement was, in fact, expired, and a successor agreement between the parties had not yet been reached. [CP 364 ¶7]

Given this set of facts, the alleged contractual waivers existing in the 2007-2009 collective bargaining agreement concerning the County’s

³² *Island County Fire District 1*, Decision 9867 (PECB, 2007).

bargaining obligations over layoffs are inapposite in this matter. Even if these provisions could fairly be construed as a waiver of the Guild's right to bargain the layoff decision (which the Guild does not concede), any such waivers expired as of December 31, 2009 with the prior collective bargaining agreement. Since the events at issue in these proceedings all occurred during late 2011, during this hiatus period between contracts and certainly well after the expiration of the 2007-2009 agreement, the County cannot now rely on any alleged waivers from the prior agreement in defense of its refusal to bargain.

The rationale behind the principle that waivers expire with the contract has been explained repeatedly by PERC, where they have discussed the fact that in the world of collective bargaining, waivers are typically the by-product of a *quid pro quo* between the parties where the employer has conceded certain issues important to the union in exchange for being released from any bargaining obligations over other subjects during the course of the agreement. The waivers in the contract, however, must expire with the agreement because the desire of an employer to continuously be relieved of its bargaining obligations over certain subjects is what motivates employers to seek extensions or entirely new collective bargaining agreements with the unions in order to extend the life of any waivers. In the absence of such a motivation, many employers may be

content to not reach an agreed upon contract with their union(s), which would be destabilizing to the entire notion of collective bargaining.

In the interest arbitration setting, as is the case here, this principle is even more emphatic and expressly prohibited under RCW 41.56.470. That provision of PECBA prohibits changes in mandatory subjects of bargaining during the pendency of interest arbitration proceedings absent express agreement by both sides or as eventually ordered by an interest arbitration panel following negotiations, mediation, and arbitration.

Finally, even setting aside the well-established principle that waivers expire with the agreement, the County cannot prove that any waivers actually existed in the prior 2007-2009 agreement. Relying on the objective manifestation theory employed by the Washington courts, PERC has long held that contractual waivers have to be clear, consciously made, and unmistakable. The County has *failed to cite to a single provision* in the 2007-2009 agreement that could be objectively construed as a waiver of the Guild's rights to bargain over layoffs.

It is important to note that in asserting this claim of a contractual waiver, the County does not cite to a single provision or section on the 2007-2009 collective bargaining agreement between the parties. Instead, it relies exclusively on the language of the County's Civil Service Rules, which are not incorporated into the collective bargaining agreement.

between the parties or the product of bilateral negotiations. Irrespective of what the Civil Service Rules state, for the County to prevail on any waiver defense, it has the burden of showing that the express terms of the *collective bargaining agreement* evidence a clear and unmistakable waiver by the Guild over a particular subject of bargaining—in this case the County’s obligation to negotiate over layoffs. The County’s inability to cite to any pertinent sections in the 2007-2009 labor agreement that could constitute a waiver, principally because no such provisions exist, choosing instead to rely on the Civil Service Rules, negates any application of the contractual waiver defense in this case.

III. CONCLUSION

For the foregoing reasons, the Guild respectfully requests that the Order of the Mason County Superior Court be reversed, that this Court enter an order that the layoffs in this case constitute a mandatory subject of bargaining and that Kitsap County committed an unfair labor practice by refusing to bargain in good faith with the Guild and interfering with the rights of the Guild and its members.

Respectfully submitted this 22nd day of April, 2013.

CLINE & ASSOCIATES



Christopher J. Casillas, WSBA No. 34394
Attorneys for Appellant

DECLARATION OF SERVICE

I certify that on April 22, 2013, I caused to be served via electronic mail and U.S. Mail a true and accurate copy of the foregoing *APPELLANT'S REPLY BRIEF* and this *DECLARATION OF SERVICE* in the above-captioned matter on the party listed below:

Ms. Jacquelyn M. Aufderheide
Ms. Deborah A. Boe
Kitsap County Prosecuting Attorney's Office
614 Division St., MS-35
Port Orchard, WA 98366
jaufderh@co.kitsap.wa.us; dboe@co.kitsap.wa.us
Attorneys for Respondent

Dated this 22nd day of April, 2013, at Seattle, Washington.



Joy Beckerman Maher, Paralegal