

FILED
COURT OF APPEALS
DIVISION II

2013 MAR 25 AM 9:23

STATE OF WASHINGTON

NO. 44183-7-II
COURT OF APPEALS, DIVISION OF THE STATE OF
WASHINGTON

Cm
DEPUTY

KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD, INC.,

Appellant,

vs.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents.

RESPONDENTS' OPENING BRIEF

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

DEBORAH A. BOE, WSBA No. 39365
Deputy Prosecuting Attorney

614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iv
I. INTRODUCTION	1
II. COUNTERSTATEMENT OF THE ISSUES.....	2
III. STATEMENT OF THE CASE.....	3
A. Procedural History	3
B. Factual History	4
1. The Board’s Budget Decisions	4
2. The Recession	5
3. 2012 and Ongoing Problems.....	10
4. The Kitsap County Jail.....	12
5. The Demand to Bargain Decision to Reduce Staffing.....	15
6. The Collective Bargaining Agreement and Civil Service Rules	17
IV. SUMMARY OF ARGUMENT	19
V. ARGUMENT.....	20
A. The First National Balancing Test Recognizes that Economic Motivation is a Factor Weighing in Favor of Bargaining Only When Staffing is Reduced in Order to Contract Out the Same Work	20
B. The Superior Court Conducted the Balancing Test When it Reviewed the Extensive Factual Record Regarding the County Budget and Reductions in Budget, Operations, and Staffing	24

C. Due to the Additional and Unique Burdens Placed on Government Agencies, Courts Consistently Conclude that Government Cannot Bargain Budgetary Decisions That Result in Staff Reductions.....	26
1. The County has a right and a duty to establish a budget without bargaining it first with the Guild	26
2. The burden to the Sheriff’s Office and Kitsap County would be intolerable if bargaining were required for budget decisions that resulted in staff reductions	28
D. There Would Not Only Be No Benefit to the Collective Bargaining Process, but Likely Harm to Labor-Management Relations and the Collective Bargaining Process	32
E. Until Recently, PERC’s Decisions on Whether Staff Reductions are a Mandatory Subject of Bargaining Have Been Inconsistent and Contradictory.....	35
F. The Guild’s demand to bargain layoffs is in all relevant aspects, a Demand to Bargain a Reduction in Budget, Operations, and Staffing.....	38
G. The Guild Has Waived Its Right to Bargain Over Layoffs When It Agreed to Adopt Civil Service Rules That Dictate the Layoff Process	40
VI. CONCLUSION.....	41

TABLE OF AUTHORITIES

Table of Cases

<i>Amcar Division, ACF Industries, Inc. v. National Labor Relations Board</i> , 592 F.2d 422 (8 th Cir. 1979)	23
<i>Arrow Automotive Industries v. National Labor Relations Board</i> , 853 F.2d 223 (4 th Cir. 1988).....	24
<i>Bay City Education Ass'n v. Bay City Public Schools</i> , 430 Mich. 370, 382, 422 N.W. 2d 504 (1988)	28
<i>Berkeley Police Association v. City of Berkeley</i> , 76 Cal. App. 3d 931, 143 Cal. Rptr. 255 (1978).....	28
<i>Detroit Police Officers Ass'n v. City of Detroit</i> , 428 Mich. 79, 404 N.W.2d 595 (1987).....	23
<i>Fibreboard Paper Products Corp. v. National Labor Relations Board</i> , 379 U.S. 203, 218 (1964).....	passim
<i>First Nat'l Maintenance v. National Labor Relations Board</i> , 452 U.S. 666, 679 (1981).....	passim
<i>Furniture Renters of America v. National Labor Relations Board</i> , 36 F.3d 1240, 1246 (3 rd Cir. 1994).....	23
<i>I.A.F.F., Local 188, ALF-CIO v. Public Employment Relations Board</i> , 245 P.3d 845 (2011).....	24
<i>International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission</i> , 113 Wn.2d 197, 211, 778 P.2d 32 (1989).....	26, 27
<i>Local 195, IFPTE, ALF-CIO v. State of New Jersey</i> , 88 N.J. 393, 403, 443 A.2d 187 (1982).....	28
<i>Local 2179, United Steelworkers v. National Labor Relations Board</i> , 822 F.2d 559 (5 th Cir. 1987).....	24

<i>Metropolitan Council No. 23 and Local 1277, of the American Federation of State, County and Municipal Employees ALF-CIO v. City of Center Line</i> , 414 Mich. 642, 327 N.W. 2d 822 (1982).....	28
<i>Pasco Police Officers' Assn. v. City of Pasco</i> , 132 Wn.2d 450, 462-63, 938 P.2d 827 (1997).....	41
<i>Rialto Police Benefits Ass'n v. City of Rialto</i> , 155 Cal.App. 4 th 1295, 66 Ca. Rptr. 3d 714 (2007).....	23
<i>Spokane Education Ass'n v. Barnes</i> , 83 Wn.2d 366, 377, 376 (1974)	27, 32, 35, 39

Administrative Decisions

<i>Assonet Trucking Co., Inc.</i> , 156 NLRB No. 35 (1965).....	23
<i>City of Anacortes</i> , Decision 6830-A (PECB, 2000)	36, 37
<i>City of Bellevue</i> , Decision 10830-A (PECB, 2012).....	36, 37, 38
<i>City of Centralia</i> , Decision 5282-A (PECB, 1996)	36, 37
<i>City of Kirkland</i> , Decision 10883-A (PECB, 2012)	36, 37, 38
<i>City of Richland</i> , Decision 6120 (PECB, 1997)	39
<i>Griffin School District</i> , Decision 10489-A (PECB, 2010)	36
<i>In re Danvers</i> , Labor Relations Comm'n Cases MUP-2292, MUP-2299 (Mass. 1977)	27
<i>North Franklin School District</i> , Decision 5945-A (PECB, 1998).....	36
<i>State Corrections</i> , Decision 11060 (PSRA, 2011).....	36, 37
<i>State Attorney General</i> , Decision 10733 (PSRA, 2010).....	36

<i>Tacoma-Pierce County Health Dept.</i> , Decision 6929-A (PECB, 2001).....	36
<i>Technical Employees Association v. King County</i> , Decisions 10576-A, 10577-A, 10578-A (PECB, 2009) (currently on appeal before Div. 2).....	36, 37
<i>Torrington Construction Company, Inc.</i> , 198 NLRB No. 170 (1972)	23
<i>University of Washington</i> , Decision 11075-A (PSRA, 2012).....	37
<i>Wenatchee School District</i> , Decision 3240-A (PECB, 1990).....	36, 37
<i>Yakima v. Yakima Police Ass'n.</i> , Dec. 1130, at 4 (PECB 1981).....	27

Statutes

RCW 2.28.139	12, 29
RCW 2.28.140	29
RCW 9.94.049	12
RCW 36.01.060	29
RCW 36.16.090	29
RCW 36.17.010	29
RCW 36.32.120	29
RCW 36.40	29
RCW 36.40.130	30
RCW 36.40.240	30

I. INTRODUCTION

The County, like its employees and their bargaining representatives, is unhappy that the County's decreasing revenues dictate reductions in services, programs, and staff in the jail as well as in many other County departments. However, collective bargaining over the budget and how it is allocated will not change the County's revenue picture. Requiring the County to bargain its decision of how to allocate revenues and expenditures, or even staffing levels, would constitute an unlawful delegation of the statutory duty to adopt a balanced budget each December, interfere with statutory budget deadlines, cause officials to violate appropriation levels giving rise to personal liability, and create strife between bargaining units each of which will want a larger share of County revenue.

A thorough review of case law including decisions of the National Labor Relations Board (NLRB) and the Public Employment Relations Commission (PERC) does not support the Guild's contention that there is a mandatory duty to bargain the decision to reduce the number of positions and staff. On the other hand, layoffs caused by contracting out unit work, or skimming, usually require bargaining. However, in a situation such as the present one, where jobs are eliminated due to reductions in the budget and services, there is no duty to bargain.

The County offered to bargain the *impacts* of the decision to eliminate positions and layoff employees, but requiring the County to bargain high level policy decisions such as budget appropriations or service, program, and staffing levels would be an intolerable burden on the County and its taxpayers and frustrate the collective bargaining process.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Superior Court err by granting declaratory judgment that Kitsap County and the Kitsap County Sheriff have no legal duty to bargain the decision to reduce the jail budget, operations, or staffing level?

2. Did the Superior Court err by granting declaratory judgment that the Kitsap County Correctional Officers Guild's demand to bargain to impasse the decision to reduce the jail budget, operations, or staffing levels is a violation of RCW 41.56?

3. Did the Superior Court err by granting declaratory judgment that the Guild's demand to bargain to impasse the decision to reduce the jail budget, operations, or staffing level constitutes a breach of the parties' collective bargaining agreement?

4. Did the Superior Court err by granting declaratory judgment that through its negotiation, agreement, and execution of the parties' collective bargaining agreement and acceptance of the Civil Service Rules,

the Guild Waived its right to bargain layoffs resulting from reductions in the jail's budget, operations, or staffing levels?

III. STATEMENT OF THE CASE

A. Procedural History

On December 21, 2011, Kitsap County filed a Complaint for Declaratory Judgment in Mason County Superior Court. The Guild answered and filed a Counterclaim requesting declaratory relief. The parties filed Motions and Cross Motions and a hearing was scheduled in Mason County Superior Court for July 9, 2012.¹

The Mason County Superior Court Judge declined to hear the case on the basis of a conflict, so the case was assigned to a visiting judge from Thurston County, the Honorable Lisa Sutton. On September 21, 2012, the parties argued their case in front of Judge Sutton.

Judge Sutton asked the parties to further brief an additional issue of whether the court should exercise its discretion to send the case to the Public Employees Relation Commission. The parties complied with additional briefing.² On October 11, 2012, the parties again appeared before Judge Sutton who then granted the County's Motion for Declaratory Judgment.

¹ CP 76-117

² CP 11-47

B. Factual History

1. The Board's Budget Decisions.

Kitsap County's budget is adopted annually by the Board of County Commissioners. In July of each year, the County's chief financial officer issues a "call letter" notifying officials and departments to file detailed and itemized estimates of probable revenues and expenditures for the ensuing fiscal year.³ The call letter includes a forecast of revenues and projection of expenditures and guidelines based on budget assumptions as directed by the Board of County Commissioners.⁴ Officials and departments file their estimates of revenues and expenditures in August, and these estimates are used by the chief financial officer to prepare a preliminary budget.⁵ Public meetings on the preliminary budget are held in the fall, and at a hearing on the first Monday in December the Board adopts a budget fixing each item in detail.⁶ The adopted budget constitutes the appropriations for the ensuing year, and County officials are limited to the expenditures and liabilities as fixed for that office or department.⁷

³ CP 276-77

⁴ CP 281

⁵ CP 277

⁶ CP 277

⁷ CP 282

Kitsap County's largest sources of revenue for funding the majority of traditional government services are property and sales taxes.⁸ Property and sales tax revenues, together with admissions and cable television taxes, fees for services, intergovernmental revenue, licensing and permitting fees, and fines, are all deposited into the general fund.⁹

Revenues in the general fund pay for operating the courts, general government, the sheriff and jail, juvenile services, parks, the coroner, and facilities.¹⁰ By far the largest expenditure from the general fund is salaries and benefits, totaling about 67 percent of the general fund.¹¹

2. The Recession.

The recession hit Kitsap County's finances in 2008. By the fall of that year, revenues were less than budgeted by more than \$2 million, requiring the Board to make mid-year cuts to meet anticipated deficits.¹² The Board borrowed \$2.5 million from the Public Works fund to meet payroll, and made the hard decision to layoff 11 employees.¹³ By September, the Board realized that further cuts were needed, and another

⁸ CP 287-88

⁹ *Id.*

¹⁰ Aufderheide Declaration, Attachment 6 (2012 General Fund Expenditures by Function); TR 581:9-15.

¹¹ CP 285

¹² *Id.*, CP 214

¹³ CP 141, 143-45

11 employees were laid off.¹⁴ Ultimately, actual revenues received in 2008 were \$4 million below what was budgeted and more than \$6 million less than what was actually received in 2007.¹⁵

Recognizing that 2009 finances looked even more daunting, in late 2008 several unprecedented measures were taken. The Board established a voluntary reduced work hours program for employees to reduce full-time hours by up to eight hours every two weeks while maintaining the County's full-time contributions to health care premiums and full time leave accruals.¹⁶ Supervisory employees represented by the Washington State Council of County and City Employees, AFSCME, Local 1308-S, agreed to a 2 percent reduction in a bargained for 4 percent wage adjustment.¹⁷ Thirteen employees were slated to be laid off.¹⁸ The voluntary reduced hours program was expanded to allow voluntary furloughs of up to 20 days of leave without pay.¹⁹ Interfund loans in the amount of \$2 million were made to cover expenses, primarily payroll, and to cover revenue deficits in the Department of Community Development

¹⁴ CP 143-45, 294-95

¹⁵ CP 135

¹⁶ CP 215-17, 300

¹⁷ CP 298

¹⁸ CP 143, 294-95

¹⁹ CP 222

resulting from decreases in building permitting fees.²⁰ Then, just four months after its 2009 budget went into effect, the Board had to amend the budget making cuts that dwarfed those made in preparing it.²¹ Expenditures were reduced further by more than \$4.2 million. The Board closed the County's Administration and Public Works buildings on Fridays, reducing operations, employee work hours, and services to the public. An additional 15 employees were laid off between January and May 2009.²² The Board took action to cushion the economic impact that reducing hours had on those employees who were not laid off by maintaining benefits at full time levels for employees who were reduced to seventy-five percent of a full-time employee.²³

Those efforts were not enough. The Board had to again borrow from Public Works just to meet payroll, this time an unprecedented \$4 million.²⁴ Between November and December 2009, 17 employees were laid off. Actual expenditures were almost \$6 million less than what was budgeted, but revenues actually received in 2009 were almost \$5 million

²⁰ CP 147

²¹ CP 219-21

²² CP 294-95

²³ CP 217-31

²⁴ CP 214

less than what was budgeted, and \$1 million less than what was received in 2008.²⁵

Budget year 2010 did not look better. Reserves had been reduced to perilously low levels, and the County's five-year financial forecast indicated that the County could not sustain even minimal growth without reducing expenditures further. Elected officials and department heads were instructed that 2010 expenditure budget submissions could not exceed 2009 actual expenditures. The voluntary reduced work hours and furlough programs were extended into 2010, and again expanded to allow reduction of regular hours by up to 10 hours every week and up to five furlough days per month.²⁶ Elected officials, prevented by state law from mid-term reductions in salary, were allowed to self-pay the County's portion of their health care contributions. The Board rescinded a 2008 resolution that would have allowed 2 percent wage increases for elected officials and non-represented employees in 2010, and authorized non-represented employees as well as elected officials to self pay any or all of the County's portion of health care premiums to aid in balancing the office's or department's budget.²⁷ The Department of Community Development, unable to meet its budget because of declining permitting

²⁵ *Id.*

²⁶ CP 232-33

²⁷ CP 232-34

fees, had to borrow \$1.25 million from the general fund to meet payroll.²⁸ Another 11 employees were laid off in 2010. The Board adopted a balanced budget for 2010, but budgeted revenues were almost \$2 million less than in 2009, and budgeted expenditures were more than \$3 million less. The Board resorted to borrowing again, \$5 million in January 2010 and another \$1 million in September.²⁹

The ratcheting down of revenues and expenditures continued with the 2011 budget. While sales tax revenues began to stabilize, the State of Washington was cutting funding.³⁰ Revenues were forecast to be 3.7 percent less than in 2010, necessitating a reduction of \$4.7 million below 2010 expenditure levels. Added to that was a recommendation that an additional \$1 million reduction in expenditures was necessary to address concerns about declining reserves. More loans to the general fund were authorized, and the salaries of non-represented employees and elected officials were again frozen at 2009 levels. The Board authorized a voluntary employee separation program to give elected officials and department heads yet another tool to use in reducing their budgets.³¹

²⁸ CP 234-36

²⁹ CP 236-39

³⁰ CP 240

³¹ CP 243-44

Closures of the Administrative and Public Works buildings and cessation of operations on Fridays was continued, and three more layoffs occurred.³²

On February 22, 2011, in a memorandum to all employees, the Board reported on the sad state of the County's finances:

. . . As we enter 2011, we are without enough resources to maintain the status quo and we cannot afford the service levels our citizens have come to expect. Since 2008, we have unfunded and eliminated approximately 150 positions, and reduced the hours for an additional 183. Critical overhead and regional services such as the Assessor, Treasurer, Auditor, and Personnel have been reduced to virtually unsustainable levels. Many factors contribute to our declining revenues. Fewer sales tax dollars are coming in than for previous years and forecasts show no growth in this revenue stream for 2011. The 1 percent cap on property taxes presents an even bigger long-term challenge, adding a mere \$280,000 to the general fund this year. This amount does not even cover routine cost increases for which we have virtually no control, including for fuels, utilities, and the negotiated employee costs of step increases, longevity payments, and medical premiums. This means that every budget cycle from now on will require cuts because our on-going revenue growth can never keep up with our growth for on-going expenses. Further, these revenue and expenditure slope issues do not take into account future losses of revenue through recent annexations and those that are on the horizon through 2015. . .³³

3. 2012 and Ongoing Problems

The need for conservative budgeting continued with adoption of the 2012 budget.³⁴ The Board anticipated the elimination of one-time

³² CP 239-44

³³ CP 149-52, 241

³⁴ CP 164-75

revenue sources and additional cuts in State funding.³⁵ Although property and sales tax revenue were no longer dropping like a knife, the Board anticipated an almost 2 percent reduction in general fund revenues.³⁶ In addition, the 2012 budget proposal included a recommendation to catch-up on several years of not funding depreciation of county vehicles.³⁷ In addition, the cost to fund increases in health care premiums in 2011 and 2012 comprised more than 24 percent of the one percent increase in property tax revenue.³⁸

Other factors the Board faces are that sales tax revenues continue to be lost to cities through annexations. Between 2009 and 2011, the County lost close to \$655,000 in sales tax revenues to cities.³⁹ The County projects that it will lose close to \$357,000 in sales tax revenue in 2012 with an annexation by the City of Port Orchard, and in 2013 the revenue loss is projected to increase to more than \$1 million with annexations by the cities of Port Orchard and Bremerton.⁴⁰

³⁵ CP 244-45

³⁶ CP 245-46

³⁷ CP 247-49

³⁸ CP 244-47

³⁹ CP 270

⁴⁰ CP 271-74

4. The Kitsap County Jail.

By law, the County's annual budget must include appropriations for a jail for confining prisoners.⁴¹ Kitsap County's jail is operated and supervised by the Sheriff, who employs correctional officers whose duties include booking, searching, transporting, and releasing prisoners, maintaining security in all areas of the jail, supervising inmate meals, visitation time, recreation, employment, and monitoring access and egress to the jail.⁴²

About 37 percent of the County's general fund is used to fund the operating costs of the Sheriff (22 percent) and jail (15 percent).⁴³ The Sheriff and jail's portion of the general fund has increased by almost 10 percent since 2000, largely due to increases in the costs of wages and benefits.⁴⁴

Ned Newlin is the Chief of Corrections, and appointed by and reports to the Sheriff.⁴⁵ The average daily population in the jail is about 370 inmates, which has not changed significantly over the last few years

⁴¹ RCW 2.28.139 (county "shall furnish a jail or suitable place for confining prisoners . . ."). Kitsap County's jail is often referred to as a "correctional facility." RCW 9.94.049 ("Correctional institution" means any place designated by law for the keeping of persons held in custody . . . including . . . county . . . jails, and other facilities operated by . . . local government units primarily for the purposes of punishment, correction, or rehabilitation following conviction of a criminal offense").

⁴² CP 328

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ CP 327-330

except, as explained below, for a nine month period of time in 2011 when the County was operating under a contract with SCORE.⁴⁶

Chief Newlin faces many challenges in running a jail, not the least of which is managing the budget. For the 2010 budget year, reductions in correctional officer positions were unavoidable and four corrections officers were laid off. The impacts of these layoffs were negotiated with the Kitsap County Correctional Officers Guild (Guild), the exclusive bargaining representative for all Kitsap County correctional officers.⁴⁷ Members of the Guild met with Chief Newlin and Fernando Conill, the County's labor representative to bargain the impacts of the layoffs. An agreement was reached that allowed officers to volunteer for layoff; one officer volunteered and three of the least senior officers were laid off.⁴⁸

While the County's overall budget was cut another \$2 million in 2011, the jail was able to offset the cuts it would have faced due to a \$1 million revenue contract with South Correctional Entity (SCORE) for temporary housing of inmates at the Kitsap County jail. Together with contracts with cities, tribes, and the Department of Corrections ("DOC"), the jail had approximately \$4 million in off-setting revenue in 2011,

⁴⁶ CP 327-30

⁴⁷ *Id.*

⁴⁸ *Id.*; CP 307-313

enough to allow the County to rehire two of the officers who were laid off in 2010.⁴⁹

During bargaining sessions in 2010 and 2011, numerous discussions were had between the Guild and the County about the likelihood of layoffs when the SCORE contract terminated in the fall of 2011. In fact, officers were encouraged to apply to SCORE and one officer who would have been laid off was hired by SCORE.⁵⁰

For budget year 2012, the jail projected a reduction of more than \$935,000 in revenue.⁵¹ There was the loss of revenue from the SCORE contract, plus declining revenue for housing inmates from the Washington Department of Corrections, continuing increases in inmate food services and health care costs, and the costs associated with unfunded mandates for DUI and DWLS enhanced sentences, sex offender registration, and DNA sample collections. Consequently, in late October 2011, the County's correctional officers were notified that the budget proposed for 2012 would result in the need to reduce operations and again eliminate positions in the jail.⁵²

⁴⁹ CP 327-30

⁵⁰ *Id.*

⁵¹ *Id.*; CP 164-75

⁵² CP 327-334

5. The Demand to Bargain Decision to Reduce Staffing

By the fall of 2011, the Guild was quite aware of cuts proposed to the jail's 2012 budget. As explained more fully below, the parties had been unable to conclude negotiations for a successor collective bargaining agreement and were exchanging budget records as part of discovery. During bargaining sessions in 2011, discussions occurred about the potential for layoffs.⁵³ The Guild was aware of the loss of the SCORE contract, and the County's overall budget as well as the jail's budget because they were advertised and discussed in meetings open to the public. Specific notice was provided to each employee on October 24, 2011, when Chief Newlin sent an email entitled "2012 Budget Update" in which he described how the Sheriff's Office and jail were absorbing a half million dollars in cuts that would result in layoffs. That same day, the Chief met with the officers slated for layoff.⁵⁴

The next day the County received a demand from the Guild to "bargain the decision to conduct any layoffs plus any associated effects/impacts."⁵⁵ Responding to the demand, Chief Newlin agreed to bargain the impacts of the layoffs as they had done in the past, but not the

⁵³ CP 307-309

⁵⁴ *Id.*

⁵⁵ CP 327-30, 336

decision.⁵⁶ A meeting was held in November 2011 between representatives of the Guild and the County to discuss the Guild demand to bargain layoffs.⁵⁷ The discussion focused primarily on the effects of the layoffs, particularly in regards to safety issues. That meeting ended with an understanding that the parties would look at the agreement reached in 2010 as a possible solution to the dispute.⁵⁸

As promised, the Guild was sent a proposed agreement “drafted based on our impacts negotiations on the current (and potentially additional) 2012 reductions in force in the Corrections Division.”⁵⁹ The Guild’s principal negotiator and attorney, Chris Casillas, responded the next day contending that “the decision to reduce the jail budget and do these layoffs” is a mandatory subject of bargaining.⁶⁰ Mr. Casillas argued that the County had not fulfilled its obligation to bargain the decision to layoff employees, and demanded that the County maintain the status quo; i.e., make no layoffs.⁶¹

The County responded to the Guild’s demand to bargain, offering: “will be glad to continue to bargain the effects of the layoffs,” but not the

⁵⁶ CP 327-30

⁵⁷ *Id.*; CP 307-09

⁵⁸ *Id.*

⁵⁹ CP 315-17

⁶⁰ CP 319-21

⁶¹ *Id.*

decision to reduce the jail's budget and staffing. In support of its position the County cited to language in the applicable collective bargaining agreement which adopts the Civil Service Rules which in turn allow layoff "whenever such action is made necessary by reason of a shortage of work or funds..."⁶²

6. The Collective Bargaining Agreement and Civil Service Rules

The Guild and the County are parties to a collective bargaining agreement (CBA) which expired in 2009.⁶³ The parties engaged in negotiations for a successor contract, but were unsuccessful in reaching an agreement. By law, when impasse is reached between a county and its uniformed employees, unresolved issues are submitted for determination by an independent arbitrator. Consequently, when the County and the Guild reached impasse in negotiations for their successor CBA, unresolved issues were certified for interest arbitration. A hearing was held in February, 2012, and an award was issued in June. This award will form the basis for a new agreement between the parties for 2010 through 2012.⁶⁴ The provisions of the CBA relevant to this action were not at

⁶² CP 323-26

⁶³ CP 154-59

⁶⁴ CP 177-206

issue in the interest arbitration; and the following CBA language is applicable to the issues presented.⁶⁵

1. Article I, Section I Management Rights

It is expressly recognized that such [management] rights, powers, authority and functions include, but are by no means whatever limited to . . . the right to establish, change, combine or eliminate jobs, positions, job classifications and descriptions . . . the number of employees..

2. Article J, Section I – Relationship to Civil Service Rules

Except as expressly limited by its terms, nothing in this Agreement shall supersede any matter delegated to the Kitsap County Civil Service Commission by State law or by ordinance, resolution or laws of or pertaining to the County of Kitsap and such Commission shall continue to have primary authority over subjects within the scope of its jurisdiction and authority. If there then should be a conflict between any provisions of this Agreement and Civil Service, then the provisions of this Agreement shall govern.

Also relevant to the issues presented here are the Kitsap County Civil Service Rules. In 1994, the Kitsap County Civil Service Commission established the following rules for layoff:⁶⁶

Section 10.3.01 The Appointing Authority may lay off any employee in the Classified Service whenever such action is made necessary by reason of a shortage or work or funds, the abolition of a position because of changes in organization or other reasons outside the employee's control which do not reflect discredit on the services of the employee; however, no regular or probationary employee shall be laid off while there are provisional employees serving in the same class of position for which the regular or probationary employee is eligible and available.

⁶⁵ CP 154-59

⁶⁶ CP 161-62

Section 10.3.02 Layoff of probationary or regular employees shall be made in inverse order of seniority in the class involved. . .

In February 2010, the Civil Service Commission amended Civil Service Rule 10.3.03 so that employees laid off would remain on the reinstatement list for two years instead of one. None of the relevant language quoted above was changed.

IV. SUMMARY OF ARGUMENT

The Kitsap County Board of County Commissioners reduced the jail's 2012 budget from its 2011 budget as they did for every other County department. Whether the Guild prefers to call this a budget decision or a policy decision, it was a necessary decision. Moreover, it was a decision made by the elected officials with the right and statutory duty to set the budget. The Chief of Corrections reduced his budget by \$1 million by saving in every area possible but unfortunately had to reduce his staffing by two corrections officers as well.

Since 1969, courts and the Public Employees Relations Commission have not found that a reduction in budget, operations, or staffing is a mandatory subject of bargaining except in two discrete instances: 1) where the reduction in staffing is for the purpose of contracting out the same work; and 2) where the reduction is due to a retaliatory or discriminatory motive. Consequently, the analysis requires a

well developed factual record of the entire context of the reductions in order to balance the benefit to collective bargaining process with the burdens on the employer. Here there is such a record so there can be no dispute that the sole reason for the reduction in staffing was a reduction in the budget set by the Board of County Commissioners. Therefore, there is no duty to bargain the decision to reduce staffing levels as the burden on the employer to bargain staffing levels far outweighs any perceived benefit to the collective bargaining process.

V. ARGUMENT

A. The *First National* Balancing Test Recognizes That Economic Motivation is a Factor Weighing in Favor of Bargaining Only When Staffing is Reduced in Order to Contract Out the Same Work.

Contrary to the Guild's argument that all economic decisions to reduce staffing are subject to mandatory bargaining, Justice Stewart stated in his concurrence in *Fibreboard*: "The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain."⁶⁷ The *Fibreboard* Court further emphasized that every case must be considered on its own facts.⁶⁸ Although the motivation to reduce staffing is one of the

⁶⁷ *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 218 (1964).

⁶⁸ *Id.*

factors considered, it cannot be considered apart from the entire context of the staff reduction.

Seventeen years after *Fibreboard*, the United States Supreme Court engaged in a more explicit balancing test to determine whether the decision to terminate part of a business operation was a mandatory subject of bargaining.⁶⁹ The Court considered three types of management decisions, determined that the business decision to layoff employees fell into the third category, and as such required a balancing of the employer's need for relatively unfettered business judgment as well as the policies of the National Labor Relations Act (NLRA), holding that:

in view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.⁷⁰

The *First Nat'l* Court extensively cites to its previous decision in *Fibreboard* where it determined that contracting out that resulted in layoffs was a mandatory duty, whereas the present case, "an economically motivated decision to shut down part of a business" did not benefit the collective bargaining process and would be a burden on the employer if

⁶⁹ *First Nat'l Maintenance v. National Labor Relations Board*, 452 U.S. 666, 679 (1981).

⁷⁰ *Id.*

ordered to bargain.⁷¹ Since *First Nat'l*, courts, the National Labor Relations Board (NLRB), and state administrative boards have utilized *First Nat'l's* balancing of employer burdens and collective bargaining benefits. Although the Guild argues that a balancing test should be applied in this case, it neither states what the balancing test is, nor does it apply it. In fact, the Guild argues that the only consideration is the impact on the bargaining unit – hardly a “balancing test.”⁷²

Because the balancing test originated with two U.S. Supreme Court cases, *Fibreboard* and *First Nat'l*, the balance often focuses on the issues specific to private employers when examining the burden placed on an employer. In *First Nat'l*, the Court considered management’s need for “speed, flexibility, and secrecy in meeting business opportunities . . . timing of a plant closure, . . . the publicity . . . may injure the possibility of a successful transition” in holding that the burden of bargaining outweighed any benefit.⁷³ Whereas in *Fibreboard*, the Court held that there is a duty to bargain when the employer replaced existing employees with independent contractors to achieve labor savings.⁷⁴

⁷¹ *Id.* at 680 (quoting *Fibreboard*, 379 U.S. at 213).

⁷² Appellant’s Opening Brief, p. 16.

⁷³ 452 U.S. at 682-83.

⁷⁴ 379 U.S. at 214.

Since these two seminal U.S. Supreme Court cases, it has been well established that replacing bargaining unit employees with independent contractors, as in *Fibreboard*, would likely result in a duty to bargain because it is the type of issue that is amenable to a solution in bargaining.⁷⁵ The Guild mischaracterizes the holding in *First Nat'l* when it asserts that if “the employer’s main motivating factor as[sic] a desire to reduce labor costs or an economic motivation,” then the change in wages, hours or terms of employment must be a mandatory subject of bargaining.⁷⁶ Of course nearly every decision an employer makes probably has some economic motivation, particularly a decision to reduce staffing, so the Guild’s argument borders on the ridiculous. Moreover, this assertion is taken out of context in that the “labor savings” issue comes

⁷⁵ See, *Rialto Police Benefit Ass’n v. City of Rialto*, 155 Cal.App. 4th 1295, 66 Ca. Rptr. 3d 714 (2007) (holding that city’s contracting with county for law enforcement is a mandatory subject of bargaining); *Detroit Police Officers Ass’n v. City of Detroit*, 428 Mich. 79, 404 N.W.2d 595 (1987) (holding that city’s contracting out of courtroom security work was a mandatory subject of bargaining); *Amcar Divison, ACF Industries, Inc. v. National Labor Relations Board*, 592 F.2d 422 (8th Cir. 1979) (holding that the company was required to bargain with the union prior to contracting out trailer hitch work); *Torrington Construction Company, Inc.*, 198 NLRB. No. 170 (1972) (holding that there was discrimination against union because the employer failed to rehire laid off employees unless they rejected the Union); *Assonet Trucking Co., Inc.*, 156 NLRB No. 35 (1965) (holding that contracting out work done by union employees was an unfair labor practice); but see, *Furniture Renters of America v. National Labor Relations Board*, 36 F.3d 1240, 1246 (3rd Cir. 1994) (remanding back to NLRB to use correct standard and noting that “subcontracting may be a mandatory subject of collective bargaining under the Act, but it is not necessarily so”).

⁷⁶ Appellant’s Opening Brief, p. 25.

directly out of a contracting out situation, not any time an employer makes an economically motivated decision.

Moreover, when it is not a contracting out issue and there is no anti-union motivation, as in *First Nat'l*, the courts have generally held that the decision to lay off employees is not a mandatory bargaining issue.⁷⁷ The present case is more similar to the *First Nat'l* line of cases than with the *Fibreboard* cases because corrections officer positions were not replaced with outside contractors or non-union workers. And like in *First Nat'l*, the jail had to eliminate positions because of a reduction in jail revenue from the loss of the SCORE contract. Consequently, the balance here weighs in favor of the County with no duty to bargain the decision to eliminate correctional officer positions.

B. The Superior Court Conducted the Balancing Test When It Reviewed the Extensive Factual Record Regarding the County Budget and Reductions in Budget, Operations, and Staffing.

The Guild correctly asserts that the Superior Court Order did not make any specific findings of fact related to a balancing test; however, the

⁷⁷ See, *I.A.F.F., Local 188, AFL-CIO v. Public Employment Relations Board*, 245 P.3d 845 (2011) (decision to lay off firefighters because of budget cuts is not a mandatory subject of bargaining); *Arrow Automotive Industries v. National Labor Relations Board*, 853 F.2d 223 (4th Cir. 1988) (plant closure not subject to mandatory bargaining); *Local 2179, United Steelworkers v. National Labor Relations Board*, 822 F.2d 559 (5th Cir. 1987) (affirming the NLRB's decision that plant relocation is not a mandatory subject of bargaining).

Court did conduct a balancing test by its extensive review of the underlying facts and motivations of the County to reduce the budget, operations and staffing.⁷⁸ At the October 11, 2012, hearing the Court explained:

We had quite a colloquy about the budget, the reasons why decisions were made, the impact, the bargaining that took place on the impact, and so I re-read all that, and in particular I looked very carefully at the testimony and declarations that were provided regarding the nature of the cuts here and the reasons why.⁷⁹

The Court concluded that the record during the four day interest arbitration was very well developed so that there were no more relevant facts needed to determine the issue.⁸⁰

In fact, the Court specifically asked the Guild attorney, “What kind of evidence is not in the record that you think needs to be?”⁸¹ When the Guild did not answer the question, the Court inquired again, and the Guild attorney responded that “we didn’t see any budget crisis. We didn’t see any budgetary problems that would prevent [them] from continuing to fund all of these positions.”⁸² The Guild never did point to any relevant facts, but did show its hand that it wanted to bargain over the budget.

⁷⁸ CP 8-10, noting that the Court used the Guild’s Proposed Order which did not have specific findings related to a balancing test.

⁷⁹ October 11, 2012 RP 4:3-9.

⁸⁰ October 11, 2012 RP 4-6.

⁸¹ September 21, 2012, RP 32:2-3

⁸² September 21, 2012 RP 35:23; 37:5-7.

In one case, the Washington Supreme Court remanded a case to the PERC to conduct a balancing test using the specific facts of that situation.⁸³ The Court was concerned that “PERC did not determine *from the facts presented to the hearing examiner* that the subject of . . . may be regarded as a nonmandatory subject of bargaining. Rather, it treated the issue as already decided.” (Emphasis in original).⁸⁴

The Court not only considered an extensive factual record, had two hearings on the issues with additional briefing, and even attempted to elicit relevant facts from the Guild. Unlike *International Association of Fire Fighters, Local Union 1052*, the Court did not summarily decide the issue, but considered all relevant facts before issuing a decision.

C. Due To The Additional And Unique Burdens Placed On Government Agencies, Courts Consistently Conclude That Government Cannot Bargain Budgetary Decisions That Result in Staff Reductions.

1. The County has a right and a duty to establish a budget without bargaining it first with the Guild.

Courts and PERC have recognized that the decision to reduce “staffing levels are fundamental prerogatives of management,” and particularly for public agencies where elected representatives have a

⁸³ *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 211, 778 P.2d 32 (1989).

⁸⁴ *Id.* at 202.

statutory duty to set the budget.⁸⁵ PERC has also recognized the prerogatives of management when it held that “whether a community will have a large police force, or a small one, or none at all, is a very basic managerial decision which ultimately must be determined by the voting public through its elected representatives.”⁸⁶

Since *Fibreboard*, the courts have applied the balancing test to public entities, and have, not surprisingly, identified very different “burdens” than exist with private businesses. Unlike private businesses, public agencies do not operate to make a profit. Public agencies are mandated to provide numerous programs, services and activities, where private businesses do not bear such burdens.

In *Spokane Education Ass’n v. Barnes*, 83 Wn.2d 366, 377, 376 (1974), our Supreme Court recognized the burden to a public agency of bargaining a budget with the union. The court held that the union had no right to bargain the budget allocation of the school district:

It is obvious that they cannot be expected to negotiate for an unreasonable length of time or to delay decisions which must be made before statutory or other relevant deadlines. It is the board of

⁸⁵ *Int’l Assn. of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 205 (1989).

⁸⁶ *Yakima v. Yakima Police Ass’n.*, Dec. 1130, at 4 (PECB 1981). See also, *In re Danvers*, Labor Relations Comm’n Cases MUP-2292, MUP-2299 (Mass. 1977) (quoted in *Int’l Ass’n Firefighters*, 113 Wn.2d at 206) (holding that to require bargaining over the amount of fire services “represents an intrusion into that type of governmental decision which should be reserved for the sole discretion of the elected representatives”).

directors upon which the duty is imposed by statute to make decisions in managing the affairs of the district and in each case the final decision rests with the board.

Courts in other states have also considered the burden of bargaining the decision to layoff employees and concluded that the burden to a public agency is intolerable.⁸⁷

2. The burden to the Sheriff's Office and Kitsap County would be intolerable if bargaining were required for budget decisions that resulted in staff reductions.

Every year, the Kitsap County Board of Commissioners must appropriate money sufficient to ensure the furnishing and operating of a courthouse, courtrooms, jail, and the offices of the County auditor, assessor, clerk, sheriff, prosecutor, and treasurer, to pay the salaries of county officers and their employees, to build and repair public buildings and roads, to care for county property and manage county funds, and to

⁸⁷ See, *Bay City Education Ass'n v. Bay City Public Schools*, 430 Mich. 370, 382, 422 N.W. 2d 504 (1988) (school district's decision to transfer its special education services because of budgetary issues is not "the type of situation where labor concessions may have alleviated the employer's economic considerations, a situation providing an incentive for both labor and management to confer voluntarily prior to making a change"); *Local 195, IFPTE, AFL-CIO v. State of New Jersey*, 88 N.J. 393, 404, 443 A.2d 187 (1982) (recognizing that negotiations should occur "unless such negotiated agreement would significantly interfere with the determination of government policy"); *Metropolitan Council No. 23 and Local 1277, of the American Federation of State, County and Municipal Employees ALF-CIO v. City of Center Line*, 414 Mich. 642, 327 N.W. 2d 822 (1982) (holding that a layoff clause "severely restricts the city in its ability to function effectively and poses serious questions with regard to political accountability for such decisions); *Berkeley Police Association v. City of Berkeley*, 76 Cal. App. 3d 931, 143 Cal. Rptr. 255 (1978) (holding that policy change on internal review systems is not negotiable because "to require public officials to meet and confer with their employees regarding fundamental policy decisions . . . would place an intolerable burden upon fair and efficient administration of state and local government).

prosecute and defend actions for and against the county.⁸⁸ When the County is faced with revenue shortages, by law it must reduce expenditures and operate with a balanced budget, which often necessitates reductions in staffing levels.

Because Kitsap County is a government entity facing a shortage of revenue and a statutory mandate to balance the budget, bargaining over budget shortfalls and layoffs would be an intolerable burden on the County and its citizens. The County has 14 bargaining units, all of which have made adjustments which have included layoffs, reduction in hours, increase in benefit costs, and program closings. The impact of the budget cutbacks are negotiated with every represented group including the corrections officers. However, if the County were required to bargain the decision on the allocation of the budget with every represented group, the results would be disastrous for everyone.

First, the County would not be able to implement an annual budget as required by statute.⁸⁹ The budget cycle begins in July with the call letter to each department with the final budget adopted by the second week in December. For six months the County departments, including represented groups and the public, give feedback on the budget until its final adoption.

⁸⁸ RCW 2.28.139-.140; RCW 36.01.060 (county liable for certain court costs); RCW 36.16.090 (offices for county officers); RCW 36.17.010 (salaries of county officers); RCW 36.32.120 (enumerating the mandatory duties of county legislative authorities).

⁸⁹ RCW 36.40.

After the County budget is adopted, each department submits its final budget. There is no place for collective bargaining concerning the budgetary decisions, only for the impact of those decisions.

If the Sheriff had to bargain with the corrections officers concerning the allocation of the budget within the Sheriff's Office and jail, it could not begin bargaining until there is a budget which is only two weeks before its implementation. Bargaining then would have to go to impasse or to interest arbitration for the law enforcement guilds, anywhere from one to four years.⁹⁰ Consequently, the Sheriff would not be able to operate within the budget allocated by the Board because it would have to operate at status quo during bargaining. By the time an arbitrator ruled on the issue, the budget year would be long past and the Sheriff and County would have incurred huge deficits for which the Sheriff would be personally civilly and criminally liable.⁹¹

Second, the budget allocation is not amenable to bargaining. In this case, the Sheriff had to cut approximately one million from the 2012 jail budget. Every possible cost savings was already implemented before layoffs had to occur. In fact, the two layoffs saved about \$100,000 of the one million in reductions needed. For example, the officers cannot

⁹⁰ The recent interest arbitration award for Corrections Officers was for the contract 2010-2012; almost four years after bargaining began for that contract. CP 177-206.

⁹¹ RCW 36.40.130, .240.

demand that the Sheriff provide cheaper food or medical care to the inmates. Moreover, what would be the issue before the interest arbitrator? Whether the Board should have given the jail more money? Whether the jail should have allocated the money differently within the jail? The remedy would also be problematic. If the County prevails, then how can a budget be retroactive? If the Guild prevails, then how can the County retroactively change the allocation of funds? Obviously, budgetary decisions are not amenable to bargaining and arbitration.

Third, if bargaining layoffs due to budget cuts were mandatory, the County would have to choose between its duties to the citizens and to the unions. As explained above, the Sheriff would have to bargain a mandatory subject to interest arbitration which will always take more than a year, long past the budget implementation. If the Sheriff implements the budget short of interest arbitration, then the Sheriff would be subject to an unfair labor practice for its *fait accompli* in implementing the budget.⁹² Conversely, if the Sheriff bargains with the Guild to interest arbitration, then he will be in violation of his statutory duties and be civilly and criminally liable for the deficit. The County would be forced to make up

⁹² The Guild contends that it would be open to bargaining over layoffs, including taking furlough days, yet never made any such offer during impact bargaining. Moreover, the Guild's proposal going into interest arbitration was for more than \$1 million. Appellant's Opening Brief, p. 35.

the difference which would also be in violation of its duties to the taxpayers to operate with a balanced budget.

This insurmountable burden on the employer has been recognized by the courts since *First Nat'l* when the Court stated that “the union’s practical purpose in participating . . . will be to seek to delay or halt the closing.”⁹³ Our Supreme Court also recognized the consequences of delaying a statutory budget cycle in *Spokane Education Ass’n, supra*. The Guild would hold all the cards in this situation because implementation of status quo would mean no layoffs or budget adjustments during bargaining. Therefore, as the *First Nat'l* and *Spokane* Courts anticipated, the Guild’s goal would be to bargain in order to delay the inevitable layoffs, and in this case, for several years.

D. There Would Not Only Be No Benefit to the Collective Bargaining Process, But Likely Harm to Labor-Management Relations and the Collective Bargaining Process.

The other half of the balancing test is to weigh the benefit to labor-management relations and the collective bargaining process. There can be no benefit if the subject of the bargaining is not amenable to resolution through the collective bargaining process.⁹⁴ Reductions in budget and staffing levels is not a subject amenable to bargaining. However, the

⁹³ 452 U.S. at 681.

⁹⁴ *Id.* at 678.

impact of the reductions is amenable to bargaining was bargained by the parties.

Although the Guild contends that the balancing test is the impact on employees, it is not. The benefit clearly stated by the U.S. Supreme Court is to the collective bargaining process and labor-management relations, not to the individual Guild members.⁹⁵ There is no doubt that two Guild members would have benefitted by keeping their jobs a little longer, but that is not the issue before this Court, otherwise, every job loss would have to be bargained. Justice Stewart anticipated this argument when he stated that “[t]he Court most assuredly does not decide that every managerial decision which necessarily terminates an individual’s employment is subject to the duty to bargain.”⁹⁶

First, all the unions and guilds in the County would be fighting over a bigger piece of the decreasing County pie. There are five guilds and unions within the Sheriff’s Office alone that would be contending that each one deserves more of the Sheriff’s budget. Four of those are interest arbitration groups and one is not. Certainly, this type of bargaining will not promote labor–labor relations, let alone labor-management relations.

⁹⁵ *First Nat’l*, 452 U.S. at 667.

⁹⁶ *Fibreboard*, 379 U.S. at 218.

Second, as has already been demonstrated, the budget allocation is not amenable to collective bargaining and ultimately to interest arbitration. The Sheriff and Board would be put in an impossible situation between the taxpayers and the unions which would actually frustrate the collective bargaining process. Moreover, collective bargaining over budgetary decisions “could be a powerful tool for achieving delay, a power that might be used to thwart management’s intentions in a manner unrelated to any feasible solution the union might propose.”⁹⁷ The likely result in this case would be just as the Supreme Court predicted: there would be up to 14 unfair labor practice claims against the County for implementing the budget it is statutorily required to implement, and a new one with each budget cycle, thereby delaying any implementation of the budget.

Finally, the Guild has made clear in their emails and briefing that they are not interested in making economic concessions in bargaining, instead, they argue that the jail should not have had a budget cut. If the Guild wanted to make economic concessions, then it could have under permissive bargaining. This is all about the budget cutbacks in the jail imposed by the Board and no amount of collective bargaining will solve the County’s decreasing revenue problem. Moreover, bargaining over

⁹⁷ *First Nat’l*, 452 U.S.at 683.

matters that have no solution will not promote labor-management relations or the collective bargaining process.

In sum, the balance between the burden to the County and the benefit to the collective bargaining process weighs heavily in favor of the County's position that it is only obligated to bargain the impact of the budget and layoffs, not the decision. This is well supported by the facts of this case as well as the U.S. Supreme Court case of *First Nat'l* and our own Supreme Court case of *Spokane Education Ass'n*.

E. Until Recently, PERC's Decisions on Whether Staff Reductions are a Mandatory Subject of Bargaining Have Been Inconsistent and Contradictory.

Unlike the decisions from the United States and Washington Supreme Courts which have consistently held that decisions to reduce the budget, operations, or staffing are not a mandatory duty of bargaining, PERC has issued a number of inconsistent decisions on whether there is a mandatory duty to bargain. This uncertainty facing employers and employees was predicted in *First Nat'l* when the Court stated that a "labor cost" analysis is too ambiguous and would result in employers having "difficulty determining beforehand whether it was faced with a

situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain.”⁹⁸

Examining 11 PERC decisions from 1990 to the present, in eight cases PERC ruled that a reduction in staffing were not a mandatory duty of bargaining,⁹⁹ and in three cases ruled that there was a duty to bargain.¹⁰⁰ In 2010, hearing examiners for PERC heard nearly identical cases and ruled exactly opposite on the duty to bargain issue. The cities of Bellevue and Kirkland laid off their dispatchers because of the formation of NORCOM for centralized dispatching services and the guild argued that the decision to layoff dispatchers was a mandatory duty. In *City of Bellevue*, the hearing examiner ruled that the decision to layoff dispatchers “had a major impact on employees’ terms and conditions of employment” and therefore was a mandatory subject of bargaining. However, in *City of Kirkland*, the hearing examiner ruled that the decisions concerning staffing are within the managerial prerogatives of public employers and as such, it

⁹⁸ *Id.* at 684.

⁹⁹ PERC ruled there was no duty to bargain layoffs in the following decisions: *Wenatchee School District*, Decision 3240-A (PECB, 1990); *North Franklin School District*, Decision 5945-A (PECB, 1998); *City of Anacortes*, Decision 6830-A (PECB, 2000); *Tacoma-Pierce County Health Dept.*, Decision 6929-A (PECB, 2001); *State Attorney General*, Decision 10733 (PSRA, 2010); *State Corrections*, Decision 11060 (PSRA, 2011); *City of Kirkland*, Decision 10883-A (PECB, 2012); *City of Bellevue*, Decision 10830-A (PECB, 2012).

¹⁰⁰ In the following cases, PERC ruled that there was a duty to bargain layoffs: *City of Centralia*, Decision 5282-A (PECB, 1996); *Technical Employees Association v King County*, Decisions 10576-A, 10577-A, 10578-A (PECB, 2009) (currently on appeal before Div. 2); *Griffin School District*, Decision 10489-A (PECB, 2010).

was a permissive issue. In 2012, PERC reversed the hearing examiner in *City of Bellevue* and affirmed the hearing examiner's decision in *City of Kirkland* in determining that a reduction in staffing is not a mandatory bargaining issue.¹⁰¹

PERC's earlier inconsistent decisions lie in its distinction between "saving labor costs" which comes from *Fibreboard* and "economic shut down" which comes from *First Nat'l*.¹⁰² In addition, eliminating positions must be distinguished from transferring bargaining unit work outside the unit, or "skimming," which is often found to be a mandatory subject of bargaining, as was the case in *Fibreboard*. In skimming cases, PERC uses a similar test which includes whether the employer's motivation was solely economic or for "labor savings."¹⁰³ The Guild also confuses these issues by mis-applying a skimming type of balancing test to a situation which is clearly a reduction in budget where the laid off employees are not replaced inside or outside the bargaining unit.

However in 2012, in *City of Bellevue* and *City of Kirkland* PERC sets out a number of factors to consider when determining whether an

¹⁰¹ *City of Kirkland*, Decision 10883-A (PECB, 2012); *City of Bellevue*, Decision 10830-A (PECB, 2012).

¹⁰² Compare *Wenatchee School District*, Decision 3240-A (PECB, 1990); *City of Anacortes*, Decision 6830-A (PECB, 2000); and, *State Corrections*, Decision 11060 (PRSA, 2011); with *City of Centralia*, Decision 5282-A (PECB, 1996); and *Technical Employees Association v King County*, Decisions 10576-A, 10577-A, 10578-A (PECB, 2009).

¹⁰³ See, *University of Washington*, Decision 11075-A (PSRA, 2012)

employer decides to shut down part of its business citing to *First Nat'l*, or whether it is contracting out the work citing to *Fibreboard*.¹⁰⁴ Although PERC's new balancing test does not necessarily apply to the set of facts here, it does at least reiterate the original principles and considers a variety of factors including whether 'bargaining over this sort of decision advance[s] the process of resolving conflicts between labor and management'" and whether the union has control "over the cause of the decision."¹⁰⁵ Even PERC would have to agree that bargaining over a decision in which neither the Guild nor the Employer have control will hardly advance the collective bargaining process.

F. The Guild's Demand to Bargain Layoffs is in all Relevant Aspects, a Demand to Bargain a Reduction in Budget, Operations and Staffing.

Not only does the Guild disagree with the Superior Court's Order, it disagrees with the way the issue is presented as a reduction in staffing instead of "layoffs." But there can be no disagreement that there is an actual controversy before the Court, however it is worded.

The Guild claims again and again that it is not demanding to bargain budgetary decisions and that layoffs are a "discrete" issue from the budget yet contradicts itself when it also claims that the County's

¹⁰⁴ *City of Kirkland*, Decision 10883-A (PECB, 2012); *City of Bellevue*, Decision 10830-A (PECB, 2012).

¹⁰⁵ *City of Bellevue*, Decision 10830-A (PECB, 2012) at p. 6-7.

motivation for budget cuts are relevant.¹⁰⁶ Because the balancing test is case by case and fact specific, the Court must go “beyond characterizations and labels to analyze the facts demonstrated by a full evidentiary record.”¹⁰⁷ The Superior Court here did analyze a full evidentiary record and found that there was no bargaining obligation, regardless of what label either side placed on the issue.

The Guild has also tried to label a budget decision a “policy decision” by the Board with the implication that the budget cuts were not necessary.¹⁰⁸ This same budget/policy argument was considered and rejected by our Supreme Court in *Spokane Education Ass’n*.¹⁰⁹ In *Spokane Education*, the voters rejected two school levies and as a consequence, the district laid off 214 certificated staff.¹¹⁰ The teachers argued that cuts should be made elsewhere in the district including buildings, maintenance, and transportation. The Court held that the district had not only a right to implement the budget cuts how it saw fit, but that it had a duty under statute to do so.¹¹¹ In addition, the Court explained the overlap of policy and budgets: “[w]e do not think that the

¹⁰⁶ CP 319-20

¹⁰⁷ *City of Richland*, Decision 6120 (PECB, 1997) (noting that the employer’s assertion that an issue of “staffing” was really skimming of bargaining work.)

¹⁰⁸ Appellant’s Opening Brief, p. 6

¹⁰⁹ 83 Wn.2d 366.

¹¹⁰ *Id.* at 369-371.

¹¹¹ *Id.* at 376.

budget of a school district can properly be considered a statement of policy, although many if not all of the items going into a budget reflect policy decisions.”¹¹² Ultimately, the Court stated clearly that “such an organization has no right to demand that the budget itself be negotiated.”

Likewise, in our case, the Board’s decision to reduce the budget in order to balance expenditures with revenues, is both a policy and a budget decision, and by whatever terms it is couched, it is not subject to mandatory bargaining. Moreover, elected officials have both a right and a duty to set the budget, so it is clearly a managerial prerogative not subject to bargaining.

Finally, if the Guild claims there is no controversy over bargaining a reduction in the budget, operations or staffing then why is it appealing the Declaratory Judgment? The Guild frames the issue as the tail while the County frames the issue as the whole dog, but the analysis and result is the same – no duty to bargain. There is a dispute, not a hypothetical one, and the requirements for justiciability have been met.

G. The Guild Has Waived Its Right to Bargain Over Layoffs When It Agreed to Adopt Civil Service Rules That Dictate the Layoff Process.

The Guild contractually waived any right to bargain over layoffs when it agreed to adopt the civil service rules which detail when and how

¹¹² *Id.*

layoffs happen. PERC, the NLRB, and the courts have recognized that an employer does not have to bargain over a contractual provision which has already been explicitly and knowingly negotiated by the parties.¹¹³ Moreover, because the County must maintain all the terms of the agreement after it expires, the Guild's explicit adoption of the civil service rules regarding layoffs remains in status quo and does not expire with the contract.

The County followed the agreed upon "when and how" of layoffs exactly as detailed in the civil service rules, and two years prior, the County had laid off four corrections officers but bargained the effects and agreed to allow a layoff outside of seniority.¹¹⁴

VI. CONCLUSION

Based on a well developed factual record, the Superior Court correctly found that the layoffs here resulted from a reduction in budget and operations, not from any retaliatory motive nor with the plan of replacing workers with nonunion workers. The Sheriff's Office must balance its budget according to the directive from the Board of County Commissioners and no collective bargaining process is going to be able to change that except to frustrate or delay the budgeting process. The County

¹¹³ See, *Pasco Police Officers' Assn. v. City of Pasco*, 132 Wn.2d 450, 462-63, 938 P.2d 827 (1997) (extensive discussion by the Washington Supreme Court of the history of contract waivers in collective bargaining).

¹¹⁴ CP 69-75, 328.

respectfully requests that the Court affirm the Superior Court Order in its entirety.

RESPECTFULLY SUBMITTED this 22nd day of March, 2013.

RUSSELL D. HAUGE
Kitsap County Prosecutor



DEBORAH A. BOE
WSBA No. 39365
Attorney for Respondents

2013 MAR 25 AM 9:23

CERTIFICATE OF SERVICE

STATE OF WASHINGTON

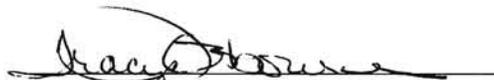
I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times hereinafter mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On March 22, 2013, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Christopher J. Casillas Cline & Associates 2003 Western Avenue, Suite 550 Seattle, WA 98121
<input checked="" type="checkbox"/> Via U.S. Mail
<input type="checkbox"/> Via Fax:
<input checked="" type="checkbox"/> Via E-mail: ccasillas@clinelawfirm.com
<input type="checkbox"/> Via Hand Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 22, 2013, at Port Orchard, Washington.


Tracy L. Osbourne, Legal Assistant
Kitsap County Prosecutor's Office
614 Division Street, MS 35-A
Port Orchard, WA 98366
(360) 337-5776
tosbourn@co.kitsap.wa.us