

NO. 44505-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY,
Appellant,

v.

INTERNATIONAL UNION OF POLICE ASSOCIATIONS
LOCAL 748, A/K/A KITSAP COUNTY SHERIFF'S OFFICE
LIEUTENANT'S ASSOCIATION,
Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The superior court erred in awarding attorney fees and costs to the International Union of Police Associations (I.U.P.A.), Local 7408 (Union). The award was improper for the reasons that: (1) the statutory provision relied upon, RCW 49.48.030, does not apply to attorney fees and costs incurred during unfair labor practice proceedings instituted pursuant to chapter 41.56 RCW; (2) the priority of action doctrine bars the claim for relief sought by the Union for the reason that the parties, subject matter, and relief sought in the Union's complaint are identical to the Union's unfair labor practice complaint filed with and disposed of by the Public Employment Relations Commission (PERC); (3) the Union failed to appeal PERC's denial of attorney fees and costs; and (4) the contractual waiver contained in the County and Union's collective bargaining agreement barred the Union from recovering attorney fees and costs.

The superior court's award of attorney fees and costs should be reversed and the action dismissed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in ruling that attorney fees available under RCW 49.48.030 applied to economic relief awarded in

unfair labor practice proceedings instituted pursuant to the Public Employment Collective Bargaining Act, chapter 41.56 RCW (PECBA).

2. The superior court erred in ruling that no attorney fee remedy is available to PERC, and thus the priority of action doctrine did not apply to bar the Union's action here.

3. The superior court erred in failing to rule that the Union's remedy for recovering attorney fees and costs incurred in the unfair labor practice proceedings was limited to appealing PERC's decision.

4. The superior court erred in failing to find that the contractual waiver contained in the County and Union's collective bargaining agreement barred the Union from recovering attorney fees and costs.

B. Issues Pertaining to Assignments of Error

1. Whether attorney fees allowed under RCW 49.48.030 applies to economic relief awarded in unfair labor practice proceedings instituted under the PECBA.

2. Whether the priority of action rule precludes an award of attorney fees and costs where the parties, subject matter, and relief in the instant action were identical to the parties, subject matter, and relief available in the unfair labor practice proceedings before the PERC.

3. Whether the Union's remedy for recovering attorney fees and costs was limited to appealing PERC's decision.

4. Whether the contractual waiver contained in the County and Union's collective bargaining agreement bars the Union from recovering attorney fees and costs here.

III. STATEMENT OF THE CASE

A. Proceedings Instituted with PERC

Kitsap County (County) and the Kitsap County Sheriff's Office Lieutenant's Association (Union) were parties to a collective bargaining agreement (CBA) for the period January 1, 2007 through December 31, 2009. CP 30, 147. The parties were unable to reach agreement on a successor CBA. Health insurance premiums for year 2010 increased over 2009 levels, and a dispute arose as to what constituted status quo for the payment of employer and employee contributions toward 2010 health insurance premiums. CP 32. The employer believed that status quo was the level of contributions the employer was making when the contract expired in 2009, in other words, the employer was obligated to pay the same level of contributions in 2010 that it was paying when the contract expired. CP 33. The Union contended that status quo was the level of contributions employees were paying when the contract expired. *Id.*

In December 2009, the Union filed an unfair labor practice complaint with the Public Employment Relations Commission (PERC) against the County. CP 27; CP 108-112. The Union alleged that the County altered the status quo in violation of collective bargaining obligations under the Public Employment Collective Bargaining Act, chapter 41.56 RCW (PECBA), by increasing employee contributions for 2010 health insurance premiums. CP 33; CP 110-111. The Union claimed that the County was obligated to pay the entire increase in premiums even though the 2009 contract listed the amounts to be paid by the employer and employees. CP 111.

The County answered the complaint, a hearing was held, and a decision issued. See CP 27. PERC did not accept the Union's claim that employee's share of premiums should be limited to what they paid in 2009. The hearing examiner found that the parties' 2007 – 2009 collective bargaining agreement (CBA) listed fixed monthly contribution amounts, or "caps" for both the employer and employee. While the hearing examiner acknowledged that the parties had not contractually agreed to a specific percentage split in premiums, the examiner established a percentage split based on the employer/employee fixed contribution amounts specified in the parties' 2009 CBA. CP 35-36. Thus, neither the

employer nor the employees fully prevailed in the proceedings before PERC. CP 36-37.

In its unfair labor practice complaint, the Union sought an award of attorney fees, costs, and interest. CP 112. The hearing examiner made no award of attorney fees, costs, or interest. CP 39-40, 55. The County appealed, and the Commission affirmed the hearing examiner's decision. CP 45-55.

In addition to the establishing employer/employee levels of insurance contributions, the parties' 2007 – 2009 CBA specifically provided that as to "grievances or complaints" arising under the CBA, each side shall pay any compensation and expenses relating to its own representatives. The CBA stated:

- d. Costs of Arbitration. Each party shall pay any compensation and expenses relating to its own witnesses or representatives.

CP 151, 153. Thus, by contract, the parties agreed that each side was responsible for their own fees and costs.

B. New Action Filed in Superior Court

Rather than appeal PERC's decision denying attorney fees and costs, the Union filed a new action in Kitsap County Superior Court seeking recovery of attorney fees and costs incurred in the unfair labor practice proceedings. CP 3-7. The Union then filed a summary judgment

motion contending that an assessment of fees and costs are mandatory under RCW 49.48.030. CP 57-67. The County responded to the motion. CP 93-112. After oral argument the superior court issued a ruling granting the Union's requests for fees and costs. RP 22:8-23:16 (Sept. 17, 2012).

The Court's ruling was as follows:

I'm going to enter a summary judgment in favor of the Lieutenant's Association. And I'm going to give you just five reasons.

First, the material facts in this case are undisputed. The first point I want to make, however, is that the PERC has statutory limitations in its ability to impose attorneys fees. And that's pursuant to RCW 41.56.160 and as explained in the Washington Federation of State Employees v. Central Washington University case. I think that was reported at 93 Wn.2d 60. It's a 1980 case.

The criteria that the statute imposes under PERC that limits their ability to impose attorneys fees does not apply in this particular case. And there are no extraordinary circumstances, and I didn't outline -- we've been through those in oral argument. None of those criteria apply here. It wasn't a frivolous defense. Attorneys fees aren't needed to effectuate the orders the Commission.

Which brings me to the third point and that is that 49.48.30 is a remedial statute and is to be liberally construed. And that's pursuant to Firefighters v. City of Everett.

The fourth point is that in a case like this, where there is no attorney fee remedy otherwise available, that 49.48.30 does apply, as in a case like this, since no attorney fee remedy is available under PERC.

Finally, the priority of action doctrine does not apply, in this case, as the remedies available under PERC and under -- relative to the remedies available under RCW 49.48.30, those are -- they're not identical. They're different remedies. And the 49.48.30 remedy needed to be pursued

in superior court and not under the -- not through the Commission.

RP 22:8-23-16 (Sept. 17, 2012). An order on the ruling was issued on December 14, 2012. CP 136-138.

The County filed a motion for reconsideration, CP 139-188, but it was denied. RP 10:14-11:3 (Feb. 01, 2013); CP 197-200.

IV. ARGUMENT

The County has sought review of the superior court's grant of summary judgment and interpretation of RCW 49.48.030. Review of summary judgment and statutory interpretation are de novo. *Cashmere Valley Bank v. State Dept. of Revenue*, __ Wn.App. ___, No. 42514-9-II (July 9, 2013), citing *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010); and *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

A. RCW 49.48.030 Does Not Apply to Unfair Labor Practices Proceedings Under the PECBA

The superior court concluded that an assessment of attorney fees and cost is mandatory “[i]n any action” where wages are recovered. The statute at issue, RCW 49.48.030, reads as follows:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said

employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

Id.

The above-quoted statute does not apply to actions brought under the PECBA. In *City of Moses Lake v. International Assoc. of Firefighters, Local 2052*, 68 Wn.App. 742, 748-749, 847 P.2d 16 (1993), a firefighters union sought review of an interest arbitration award in superior court, as provided in RCW 41.56.450, and an award of attorney fees under RCW 49.48.030. The court of appeals held that RCW 49.48.030 does not apply to interest arbitration proceedings brought under RCW 41.56.450, and thus the superior court did not err when it denied the firefighter union's request for attorney fees. *City of Moses Lake*, 68 Wn.App. at 748-749.

Likewise, RCW 49.48.030 should not be construed to apply to unfair labor practice proceedings brought under RCW 41.56.160. Despite literally hundreds of unfair labor practice proceedings concerning wages and benefits, the Union cited to no action in which a court or PERC awarded attorney fees pursuant to RCW 49.48.030 to employees or bargaining representatives successful in recovering wages or salary in unfair labor practice actions instituted under PECBA.

The Union relied heavily on the Supreme Court's opinion in *International Assoc. of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), to support its claim that an award of attorney fees is mandatory under RCW 49.48.030. But the decision in that case is not dispositive here for the reason that the holding in *City of Everett* was limited to grievance arbitration proceedings. The *City of Everett* case did not involve unfair labor practice proceedings instituted under the PECBA. *City of Everett*, 146 Wn.2d at 32-33.

The Union conceded below that the action here is not a labor arbitration proceeding and that the underlying action before the Public Employment Relations Commission (PERC) was not a labor arbitration proceeding. RP 7:24-25. If the present case is not a labor arbitration proceeding as Plaintiff concedes, then the *City of Everett* case does not support Plaintiff's claim of attorney fees. Indeed, the court in *City of Everett* distinguished between an appeal from an interest arbitration award under the PECBA and grievance arbitration proceedings, concluding that they serve different purposes:

Interest arbitration "is used to determine the terms of the contract between the parties when they cannot negotiate an agreement and results in a new agreement. Grievance arbitration is used to resolve labor disputes through the interpretation and application of an already existing collective bargaining agreement."

City of Everett, 146 Wn.2d at 46; quoting *City of Bellevue v. Int'l Assoc. of Fire Fighters, Local 1604*, 119 Wn.2d 373, 376, 831 P.2d 738 (1992).

Unfair labor practice proceedings under the PECBA and grievance arbitration proceedings also serve different purposes. The PECBA expressly preserves the employer's right to bargain wages and benefits.

The PECBA defines "collective bargaining" as follows:

(4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.030(4).

After a collective bargaining agreement has expired, the parties are required to maintain the status quo. The requirement of status quo is prescribed in RCW 41.56.123, which provides in relevant part:

(1) After the termination date of a collective bargaining agreement, all of the terms and conditions specified in the collective bargaining agreement shall remain in effect until the effective date of a subsequent agreement, not to exceed one year from the termination date stated in the agreement. Thereafter, the employer may unilaterally implement according to law.

Id.

The general policy underlying the PECBA is in favor of negotiated agreements. *City of Bellevue v. International Assoc. of Fire Fighters, Local 1604*, 119 Wn.2d 373, 384, 831 P.2d 738 (1992); citing RCW 41.56.030(4); and *International Assoc. of Fire Fighters, Local 1445 v. Kelso*, 57 Wn.App. 721, 732, 790 P.2d 185, review denied, 115 Wn.2d 1010 (1990) (“It is axiomatic that, in bargaining, the parties retain the power of decision and are not required to agree. . .”); citing RCW 41.56.030(4); and citing *N.L.R.B. v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2nd Cir.1952) (within collective bargaining, employer is free to make economic decisions and free to agree only insofar as he is willing in light of all circumstances).

If a public employer and employees’ bargaining representative are unable to conclude a collective bargaining agreement, then any matter in dispute may be submitted by either party to the commission. RCW 41.56.100(2) (“Upon the failure of the public employer and the exclusive bargaining representative to conclude a collective bargaining agreement, any matter in dispute may be submitted by either party to the commission. . .”).¹

¹ “If parties to a CBA are unable to agree on the terms of a subject of bargaining, they are said to have reached an ‘impasse.’” *Yakima County v. Yakima County Law Enforcement Officers’ Guild*, 174 Wn.App. 171, 176 n. 2, 297 P.3d 745, 747 (2013).

Washington Courts have held that “a liberal construction should be given to all of chapter 41.56 RCW and conflicts resolved in favor of the dominance of that chapter.” *Municipality of Metropolitan Seattle v. Division 587, Amalgamated Transit Union*, 118 Wn.2d 639, 644, 826 P.2d 167 (1992); quoting *Rose v. Erickson*, 106 Wn.2d 420, 424, 721 P.2d 969 (1986).

Thus, the PECBA governs an employer’s collective bargaining obligations, and an employer is not compelled to make a concession on wages or benefits until or unless a court or PERC provide that such concession is required under the PECBA.

Another important distinguishing factor between the *City of Everett* case and the case here is that *City of Everett* involved the employer’s breach of an “existing right” under a collective bargaining agreement. *City of Everett*, 146 Wn.2d at 46-47. Here, the Union’s unfair labor practice complaint did not concern breach of an existing employment contract, but concerned the determination of status quo following expiration of the parties’ collective bargaining agreement. CP 33, 36-37.

No contract was in place guaranteeing employees that insurance contributions in 2010 would remain at levels listed in the CBA for 2009. The 2010 contributions were the subject of bargaining. In the unfair labor

practice proceedings, the employer's contention that the County was prohibited from paying *any* increases in insurance premiums until the parties had negotiated a successor CBA was supported by PERC's decision in *Snohomish County*, Decision 1868 (PECB, 1984) (Medical and dental insurance was a part of total compensation. Accordingly, employer was not obligated to pay additional costs while bargaining was underway for a complete agreement for a uniformed personnel bargaining unit, and implementation of an increase (albeit, most likely looked upon with favor by the union) could well be an unlawful unilateral change in violation of RCW 41.56.030(4) and RCW 41.56.470).

As noted earlier, in enacting the PECBA, the Legislature intended to provide a uniform process for resolving collective bargaining disputes between employers and employees. RCW 41.56.030(4); see also RCW 41.56.010 ("The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees . . .") The right to recover attorney fees under RCW 49.48.030 does not extend to employers. Allowing employees' bargaining representatives, but not employers, to recover attorney fees will not promote continued improvement of the relationship between public employers and their employees. The potential that employee organizations can recover attorney's fees and costs will likely create a

disincentive to resolving disputes short of ULP complaints, and increase the number of ULP complaints filed against employers.

Allowing employee bargaining representatives to recover attorney fees outside of the PECBA will interfere with the uniform process for resolving disputes and with PERC's remedial authority, and will promote litigation at public expense and disrupt the balanced relationship between employers and employee bargaining representatives. A holding that RCW 49.48.030 applies to unfair labor practice proceedings instituted under chapter 41.56 RCW will increase the likelihood that public employers in the State of Washington will be liable for attorney's fees and costs whenever PERC issues a remedy that includes retroactive employee compensation. If it had intended that parties prevailing in actions brought pursuant to the PECBA would always be allowed to recover attorney fees, the Legislature surely could have provided so.

B. Under the Priority of Action Doctrine, the Union was precluded from Pursuing Attorney Fees in Superior Court

The PECBA provides a cause of action for unfair labor practices; an action that a party can file with either PERC or a superior court.

Washington State Council of County and City Employees, Council 2, AFSCME, AFL-CIO, Local 87 v. Hahn, 151 Wn.2d 163, 167, 86 P.3d 774 (2004); citing *City of Yakima v. International Assoc. of Fire Fighters*,

AFL-CIO, Local 469, Yakima Fire Fighters Assoc., 117 Wn.2d 655, 673, 818 P.2d 1076 (1991). Where a controversy between a public employer and a union has been submitted to PERC the priority of action rule requires the superior court to decline to decide the controversy. *City of Yakima v. International Assoc. of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Assoc.*, 117 Wn.2d at 673. The priority of action rule applies to administrative agencies and the courts. *Id.* at 675. The priority of action rule applies where the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief. *Id.* “The identity must be such that a decision of the controversy by one tribunal would, as res judicata, bar further proceedings in the other tribunal.” *Id.*

It was undisputed that the action the Union filed in superior court involved the same subject matter and parties that covered by PERC’s unfair labor practice decisions. CP 3, 37. The trial court erred in concluding that attorney fees and costs available in unfair labor practice proceedings are not the same as the relief available under RCW 49.48.030.

PERC is “empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders.” RCW 41.56.160(1). “PERC’s decisions are accorded extraordinary judicial deference, especially in the matter of remedies.” *Pasco Housing Authority v. State, Public Employment Relations Com’n*, 98 Wn.App. 809, 812, 991 P.2d

1177 (2000). In *Pasco Housing Authority*, the Court of Appeals explained the basis for extending judicial deference to remedies awarded by PERC:

Both the Washington Legislature and Supreme Court have recognized that public employee labor relations policy is best managed by creating an expert administration, giving it extensive jurisdiction to fashion equitable remedies, and severely limiting judicial review. That is the scheme in Washington. RCW 41.58.005(1), (3); *In re Case E-368*, 65 Wash.2d 22, 28, 395 P.2d 503 (1964) (citing *Phelps Dodge Corp. v. National Labor Relations Bd.*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271, 133 A.L.R. 1217 (1941)).

. . . The judicial deference accorded all PERC decisions is especially great in the matter of remedies. *State ex rel. Washington Fed'n of State Employees v. Board of Trustees*, 93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980). The reviewing court may not substitute its judgment for PERC's, contrary to the general rule. *Metro. Seattle*, 118 Wn.2d at 634, 826 P.2d 158. When discretion is conferred on an agency by statute for the express purpose of accomplishing the goals of particular legislation, the matter is "peculiarly" for the agency to decide. *Id.* This is the case in labor relations. *Id.*

In the matter of remedies, therefore, intervention is appropriate only if the remedy exceeds the mandate of RCW 41.56.160. *Lewis County*, 31 Wn.App. at 865-66, 644 P.2d 1231. PERC's orders will be upheld so long as they are consistent with the purposes of the Act and not otherwise unlawful. *Metro. Seattle*, 118 Wn.2d at 634-35, 826 P.2d 158.

Id., 98 Wn.App. at 813-814.

The Supreme Court has held that an award of attorney fees in unfair labor practices under the PECBA is not automatic but should be reserved for frivolous or meritless defenses. *State ex rel. Washington*

Federation of State Emp., AFL-CIO v. Board of Trustees of Central Washington University, 93 Wn.2d 60, 69, 605 P.2d 1252 (1980). In so holding, the court stated:

We hold that RCW 41.56.160 is broad enough to permit a remedial order containing an award of litigation expenses when that is necessary to make the order effective. Such an allowance is not automatic, but should be reserved for cases in which a defense to the unfair labor practice charge can be characterized as frivolous or meritless. The term “meritless” has been defined as meaning groundless or without foundation. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). Awards should not be permitted routinely, simply because the charging party prevails.

Id., at 69.

Consequently, PERC has held that an award of attorney fees in unfair practice proceedings is an extraordinary remedy, and the extraordinary remedy of attorney fees is used sparingly. *State - Corrections*, Decision 11060-A (PRSA, 2012); *citing Western Washington University*, Decision 9309-A (PSRA, 2008); *City of Bremerton*, Decision 6006-A (PECB, 1998); *Seattle School District*, Decision 5733-B (PECB, 1998); and *Mansfield School District*, Decision 5238-A (EDUC, 1996).

In *State - Corrections*, Decision 11060-A (PRSA, 2012), PERC explained when attorney fees are awarded:

The extraordinary remedy can be granted in special cases: (1) if such an award is necessary to make the order effective, and (2) if the defense to the unfair labor practice is frivolous or meritless, or if there has been a pattern of conduct showing a patent disregard of the party's collective bargaining obligations.

Id., citing *Municipality of Metropolitan Seattle (METRO) v. Public Employment Relations Commission*, 118 Wn.2d 621, 826 P.2d 158 (1992). See also *State ex. rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60, 605 P.2d 1252 (1980); *Yakima County*, Decision 11621 (PECB, 2013); *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *rev. denied*, 97 Wn.2d 1034 (1982).

The Union requested attorney fees in its unfair labor practice complaint, but PERC did not award fees. There was no evidence presented in the unfair labor practice proceedings that an award of attorney fees was necessary to make PERC's order effective, that the County's defense to the unfair labor practice was frivolous or meritless, or that there had been a pattern of conduct showing a patent disregard of the County's collective bargaining obligations.

Indeed, the hearing examiner found that determining the status quo presented a "unique problem" for the parties because their 2009 contract fixed contribution amount for both the employer's and employer's share of health care premiums. The following year the cost of premiums increased.

PERC concluded that maintaining the cap as the status quo for both the employer and employees could not coexist, as someone would have to bear the cost of the increased premium. Although the parties had not contractually agreed to a percentage split in premiums, the hearing examiner converted the fixed contribution amounts to percentages and applied the percentages to the 2010 premium to determine the status quo. CP 37.

The Union was not awarded its full request for relief, either in attorney fees or in premiums. While the hearing examiner found that the County had changed the status quo after the contract expired by requiring employees pay the increase in premiums, the examiner did not find that the County's conduct warranted the extraordinary remedy of an award of attorney fees. The superior court effectively modified PERC's award in awarding the Union fees and costs incurred in the proceedings before PERC.

C. Plaintiff Could Have, But Did Not Appeal PERC'S Decision

The Union could have appealed PERC's award. RCW 41.56.165 states:

Actions taken by or on behalf of the commission shall be pursuant to chapter 34.05 RCW, or rules adopted in accordance with chapter 34.05 RCW, and the right of

judicial review provided by chapter 34.05 RCW shall be applicable to all such actions and rules.

See also City of Seattle v. Public Employment Relations Commission, 160 Wn.App. 382, 387-388, 249 P.3d 650 (2011) (“We review PERC’s decision under the standards set forth in chapter 34.05 RCW, the Washington Administrative Procedures Act. RCW 34.05.570(3) requires reversal of an agency order when the decision is based on an error of law, is not based on substantial evidence, or is arbitrary or capricious”) (Cases and statutes cited by the court omitted).

The Union’s lawsuit here is for all intents and purposes an appeal of PERC’s award. The Union failed to timely appeal PERC’s decision. Consequently, the Union should be precluded from effectively seeking review of PERC’s decision in this new action.

D. Plaintiff Waived Right to Attorney Fees in Collective Bargaining Agreement

Awarding Plaintiff’s fees and costs in this case is contrary to specifically bargained collective bargaining rights. PERC concluded that that the terms of the parties’ 2007 – 2009 CBA determined the parties’ status quo obligations with respect to health insurance contributions. CP 34. Likewise, the terms of the CBA should be considered in determining whether attorney fees and costs are recoverable by the Union. The CBA read as follows:

Section F – Grievance and Arbitration Procedure.

1. Scope of Procedure: Except as provided herein, grievances or complaints arising between the Employer and the I.U.P.A. on behalf of employees or on its own behalf with regard to matters effecting the I.U.P.A. as an entity or any employee subject to this Agreement, with regard to the interpretation or application of this Agreement, may be resolved through the following procedure. No complaint or grievance involving the same incident, problem, or other matter may be filed under this grievance procedure and the Civil Service Commission. If such a concurrent filing occurs, the complaint or grievance filed under this grievance procedure shall be immediately dismissed.

CP 151.

. . . 3. Grievance Procedure

d. Costs of Arbitration. Each party shall pay any compensation and expenses relating to its own witnesses or representatives.

CP 153.

In International Assoc. of Fire Fighters, Local 46 v. City of Everett, supra, the court held that an employer can avoid the effect of RCW 49.48.030 by contract. The court stated:

An employer could still avoid an award of attorney fees by specifically providing in the collective bargaining agreement that each side pay their own fees and costs.

International Assoc. of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d at 49; *citing Hitter v. Bellevue School District No. 405*, 66 Wn.App. 391, 397-399, 832 P.2d 130 (1992) (holding that plaintiff had

waived right to attorney fees because his collective bargaining agreement specifically provided that each side would pay its own fees and costs).

The Union argued before the superior court that the CBA language providing that each side would pay its own fees and costs was limited to grievance arbitration. The Union should not be allowed to have it both ways: rely on the CBA for determining compensation, but argue that the CBA should be ignored with regard to disputes arising over compensation. If the source of the compensation owed is the CBA, then terms in the CBA that regulate payment of fees and costs should also apply. The Union should not be permitted to profit, particularly at public expense, when to do so is expressly contrary to mutually negotiated contract terms.

VI. CONCLUSION

The superior court's award of attorney fees and costs should be reversed and the action dismissed. The superior court erred in ruling that RCW 49.48.030 applies to attorney fees and costs incurred during unfair labor practice proceedings instituted with and decided by PERC pursuant to chapter 41.56 RCW. The court erred in ruling that no attorney fee remedy is available to PERC and the priority of action doctrine did not apply. The court erred in failing to rule that the Union could have, but did

not appeal PERC's decision denying attorney fees and costs. Finally, the court erred in ruling that the contractual waiver contained in the parties' collective bargaining agreement did not bar the Union from recovering attorney fees and costs.

DATED this 22ND day of August, 2013.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



JACQUELYN M. AUFDERHEIDE
WSBA No. 17374
Chief Deputy Prosecuting Attorney
Attorneys for Respondent

CERTIFICATE OF SERVICE

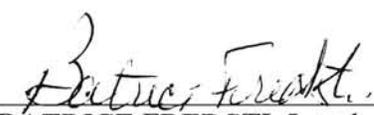
I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness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

On the date given below I caused to be served the above document in the manner noted upon the following:

Stephen M. Hansen Law Offices of Stephen M. Hansen, PS 1703A Dock Street Tacoma, WA 98402	
<input type="checkbox"/>	Via U.S. Mail
<input type="checkbox"/>	Via Fax:
<input type="checkbox"/>	Via E-mail:
<input checked="" type="checkbox"/>	Via Hand Delivery

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DIVISION III
2013 AUG 22 PM 3:39
STATE OF WASHINGTON
BY DEPUTY

SIGNED in Port Orchard, Washington this 20th day of August, 2013.


 BATRICE FREDSTI, Legal
 Assistant
 Kitsap County Prosecuting Attorney
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