

FILED  
Court of Appeals  
Division II  
State of Washington  
6/5/2019 4:39 PM  
NO. 52673-5-II

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

(Thurston County Superior Court No. 18-2-00464-34)

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PACIFIC NORTHWEST CHILD CARE ASSOCIATION,

Appellant,

v.

ATTORNEY GENERAL'S OFFICE, a state agency, JAY INSLEE,  
Governor of the State of Washington, and STATE OF WASHINGTON  
DEPARTMENT OF EARLY LEARNING, a state agency,

Respondents,

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

This case raises the question whether the Washington's public employee bargaining law compels the Washington Department of Early Learning (DEL) to provide an uncertified employee association a bargaining unit list on demand. The Public Employment Relations Commission (PERC) decided that it does not.

Appellant Pacific Northwest Child Care Association (PNWCCA) makes a complex blend of arguments mixing collective bargaining statutes, public records statutes, and constitutional claims to assert that it has a general right to lists of names and addresses for the bargaining unit of home child care workers. The Court should affirm PERC's decision dismissing the Complaint for failure to state a claim for relief under the Public Employees Collective Bargaining Act (PECBA).

PNWCCA argues this Court should forgo PERC's traditional test for employee interference and adopt a new test based upon hypothetical facts asserted on appeal. But under the agency rules and the Administrative Procedures Act, PERC's decision and appellate review is based upon the facts as alleged in the Complaint before the agency. PERC correctly found the Complaint deficient because it failed to: (1) identify how DEL's actions constitute a threat of reprisal or promise of benefit related to the exercise of protected rights; and (2) failed to allege specific

facts sufficient to support its claims that it cannot organize employees without the list it demands.

PERC lacks jurisdiction to enforce the state Public Records Act (PRA) or to determine the constitutionality of that Act as recently amended by Initiative 1501 (I-1501).<sup>1</sup> However, PERC submits this Response Brief to address Appellant's claims that the PECBA, RCW 41.56, creates a general right to employee contact information for organizing purposes.

PERC recognizes that as the adjudicatory agency below, its role on appeal is limited. *See Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993). However, where the claims on appeal raise challenges to PERC's jurisdiction, procedures, or rules, it is appropriate for the agency to respond. *Id.* at 782.

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<sup>1</sup> In April 2017, the Freedom Foundation and Deborah Thurber, among others, filed suit in federal court against Governor Jay Inslee, Department of Social and Health Services (DSHS) and Department of Early Learning (DEL), alleging that I-1501 violates plaintiff's free speech and association rights under the First Amendment and Equal Protection under the Fourteenth Amendment. Administrative Record (AR) 42. On January 10, 2019, the federal court granted the State's summary judgment rejecting plaintiff's claims, and a petition by plaintiffs to the Ninth Circuit is pending. *Boardman v. Inslee*, 354 F. Supp. 3d 1232 (W.D. Wash. 2019), appeal filed (9th Cir. February 11, 2019) The District Court held that I-1501 does not violate First Amendment rights to free speech or association, entail unlawful viewpoint discrimination, is not unconstitutionally overbroad, and does not violate equal protection. The issues rejected by the court in *Boardman* are virtually identical to the constitutional issues raised by Thurber and PNWCCA in this appeal.

## II. STATEMENT OF FACTS

### A. Background

Public employees enjoy the right to collectively bargain through representatives of their own choosing. RCW 41.56.010, .030(11). In 2007, PECBA was amended to extend this right to family childcare providers for purposes of negotiating wages. RCW 41.56.028. Under this statute, the Governor or designee is the public employer of family childcare providers solely for the purpose of collective bargaining.<sup>2</sup> *Id.* The statute establishes a single bargaining unit. RCW 41.56.028(2)(a). An exclusive bargaining representative (Union) is certified to represent the unit in an election supervised by PERC. RCW 41.56.028(2)(b); WAC 391-25-051. Service Employees International Union (SEIU), Local 925, is the current exclusive bargaining representative. Administrative Record (AR) 40.<sup>3</sup>

Prior to the passage of I-1501, PNWCCA and its sponsor, the Freedom Foundation, successfully used the PRA to obtain childcare

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<sup>2</sup> PNWCCA uses the terms State, DEL and employer indiscriminately. This is incorrect. DEL may be a custodian of the employee lists for purposes of the PRA, but it is the Governor and his designee, the Labor Relations Office, which is the employer for collective bargaining purposes under PECBA. PERC did not address this issue, however, and given the broad scope of the mandatory disclosure prohibition in RCW 43.17.410, this likely does not affect the outcome of the case.

<sup>3</sup> On February 14, 2018, PERC filed with the court an Index and Administrative Record (AR) of the proceedings. Citations to this AR will reference the page number (e.g., AR at 1).

providers' names and addresses for their organizing efforts. AR at 171-172; *see SEIU 775 v. State Dep't of Soc. & Health Servs.*, 198 Wn. App. 745, 750, 396 P.3d 369, 372 (2017), *review denied sub nom. SEIU 775 v. State*, 189 Wn.2d 1011, 402 P.3d 828 (2017); *Serv. Emp. Int'l Union, Local 925 v. Freedom Found.*, 197 Wn. App. 203, 389 P.3d 641 (2016); *also Serv. Emp. Int'l Union, Local 925 v. Dep't of Early Learning*, \_\_\_ Wn. App. \_\_\_, 2018, WL 4455865 (2018) (unpublished),<sup>4</sup> *rev. granted*, 192 Wn.2d 1022, 435 P.3d 270 (2019).

**B. Initiative 1501**

On November 8, 2016, Washington voters approved I-1501, which became effective on December 8, 2016. The Initiative's stated intent is to protect the safety and security of seniors and vulnerable individuals by: (1) increasing criminal penalties for identity theft targeting seniors and vulnerable individuals; (2) increasing penalties for consumer fraud targeting seniors and vulnerable individuals; and (3) prohibiting the release of certain public records that could facilitate identity theft and

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<sup>4</sup>Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1.

other financial crimes against seniors and vulnerable individuals. Laws of 2017, Ch. 4 § 2, 7.

The Initiative added new provisions to the statutes governing criminal penalties, agency records administration, and the PRA. One provision, codified as RCW 43.17.410(1), prohibits state agencies from releasing sensitive personal information of vulnerable individuals or in-home caregivers for vulnerable populations. Laws of 2017, Ch. 4 § 10. Another provision, codified at RCW 42.56.640(2), added language to the PRA stating, “Sensitive personal information of in-home caregivers for vulnerable populations is exempt from inspection and copying.” Laws of 2017, Ch. 4 § 8. The initiative also included exceptions to the prohibition from releasing sensitive information, now codified at RCW 42.56.645. Laws of 2017, Ch. 4 § 11. One of these exceptions applies if “information is being released as part of a judicial or quasi-judicial proceeding and subject to a court’s order protecting the confidentiality of the information and allowing it to be used solely in that proceeding.” RCW 42.56.645(1)(c). Other exceptions apply where the information is being provided to an exclusive bargaining representative certified by PERC under RCW 41.56.080, or the information is required by a contract between the state and a third party, provided the recipient agrees to protect the confidentiality of the information. RCW 42.56.645(1)(d), (f).

**C. PNWCCA Requests Bargaining Unit List**

On August 9, 2017, Ms. Deborah Thurber (Thurber), a family childcare provider and one of the directors of the PNWCCA, submitted a public records request under the PRA, RCW 42.56, seeking a list of employees from the DEL.<sup>5</sup> Thurber requested the information on behalf of the PNWCCA to communicate with other “child care providers about their constitutional and statutory rights” under RCW 41.56. AR at 217. DEL denied the request, citing the recently enacted prohibitions (RCW 42.56.640; RCW 43.17.410) under Initiative 1501. AR at 220-221.

**D. Proceedings Before PERC and Dismissal of the Complaint**

On August 14, 2017, the PNWCCA filed an unfair labor practice complaint against DEL and the State of Washington. AR at 169-233. The PNWCCA alleged that DEL’s refusal to provide information under the PRA interfered with employee rights in violation of the PECBA. RCW 41.56.140(1),<sup>6</sup> and RCW 42.56.040.<sup>7</sup>

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<sup>5</sup> In its amended complaint, PNWCCA alleges a number of other events, including an earlier PRA request for employee lists, denied by DEL on January 30, 2017, and an unsuccessful April 2017 representation petition filed with PERC. PERC concluded, and PNWCCA does not dispute, that the earlier request is outside of the six month statute of limitations contained in RCW 41.56.160. AR at 34.

<sup>6</sup> RCW 41.56.140(1) provides:

It shall be an unfair labor practice for a public employer:

(1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

<sup>7</sup> RCW 41.56.040 provides:

No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right

PERC is charged with determining and remedying unfair labor practices. RCW 41.56.140; .160. Under PERC's rules, an unfair labor practice claim is initiated by the filing of a written complaint within six months of the event. RCW 41.56.160; WAC 391-45-030. The complaint must contain, in separate numbered paragraphs, "clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences." WAC 391-45-050. The PERC Executive Director or designee then reviews the complaint to "determine whether the facts alleged in the complaint may constitute an unfair labor practice within the meaning of the applicable statute." WAC 391-45-110. "If the facts alleged do not, as a matter of law, constitute a violation, a deficiency notice shall be issued" identifying the defects and specifying a due date for the filing and service of an amended complaint. WAC 391-45-110(1). If the defects are not cured, the complaint is dismissed. *Id.* A dismissal by the executive director may be appealed to the full Commission. WAC 391-45-350. "If one or more allegations state a cause of action for unfair labor practice proceedings before the commission, a preliminary ruling summarizing the allegation(s) shall be issued and served on all parties." WAC 391-45-110(2).

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to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

The PERC director’s designee issued a deficiency notice to PNWCCA (AR at 106 -110), who filed an Amended Complaint. AR at 39-105. The director’s designee then dismissed the Amended Complaint for failure to state a cause of action. AR at 32; *State – Family Child Care Providers*, Decision 12781 (PECB, 2017).<sup>8</sup> The PNWCCA appealed to the full Commission to consider “whether the complaint and amended complaint allege sufficient facts to proceed to hearing.” AR at 1. PERC ultimately dismissed the Complaint for failing to plead a claim, stating:

The PNWCCA asks the Commission to issue a cause of action for employer interference when the employer complied with RCW 42.56.640, which exempts certain sensitive information, including the names and contact information of in-home caregivers, from disclosure. A cause of action cannot be found for employer interference because the employer was complying with another law.

AR at 4; *State – Family Child Care Providers*, Decision 12781-A (PECB, 2017).

**E. PNWCCA Petitions for Review Under the Administrative Procedures Act (APA)**

PNWCCA petitioned for review under the Administrative Procedures Act, asking the superior court to find: (1) the Commission erred when it ruled that no unfair labor practice occurred under RCW 41.56.140(1); (2) that RCW 42.56.645(1)(c) applies to the facts of this

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<sup>8</sup> PERC decisions are published on the PERC website. <https://decisions.perc.wa.gov/waperc/en/nav.do>

case; and (3) for the release the records requested. Petition for Review at 9. [CP at 3.]

The superior court denied PNWCCA's appeal and PNWCCA petitioned for review. Before the Court of Appeals, PNWCCA no longer demands that PERC peremptorily direct release of the employee list and instead seeks a declaration that the Complaint states a cause of action and remand to PERC to conduct a hearing on the merits.<sup>9</sup> Pet. Br. at 15.

### **III. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does PECBA create a right for home childcare workers to obtain a list of bargaining unit members for purposes of organizing a rival union despite a statutory prohibition on release of the list?

2. Does PNWCCA's unfair labor practice Complaint allege a claim for employer interference with employee rights in violation of PECBA?

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<sup>9</sup> PERC agrees that if the court finds that the complaint filed by Petitioner PNWCCA states a potential cause of action, the court should remand the case as required by RCW 34.05.574(1) so that PERC may create a record, enter findings of fact and conclusions of law, and exercise its discretion to issue an appropriate remedial order under RCW 41.56.160. PERC requested this alternative relief before the superior court. This is appropriate both to allow PERC to consider the similarities and differences between federal and state law, and to create a factual record, findings of fact, and conclusions of law that can be reviewed by a court. In addition, PERC has special authority to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of PECBA and that are necessary to make its orders effective unless such orders are otherwise unlawful. *Mun. of Metro. Seattle v. Pub. Emp't Relations Comm'n*, 118 Wn.2d 621, 634–35, 826 P.2d 158, 164–65 (1992). If necessary, PERC should be given an opportunity to exercise this expertise on remand.

3. Did PERC have authority to order release of the list under an exception to I-1501 (RCW 42.56.645)?

#### IV. ARGUMENT

##### A. Scope and Standard of Review

The Washington Administrative Procedure Act governs judicial review of a final administrative decision of PERC. RCW 41.56.165; RCW 34.05.030(5); *Univ. of Wash. v. Wash. Fed'n of State Employees*, 175 Wn. App. 251, 258, 303 P.3d 1101 (2013). “The burden of demonstrating invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a). The relevant standards for court review of an adjudicatory order in this case are set out in RCW 34.05.570(3)(a), (d), (e).<sup>10</sup> Review is limited to the record below. RCW 34.05.558.

In this case, PERC found that the Complaint failed to plead “interference” of protected rights and dismissed the Complaint on the basis that it failed to state a claim upon which relief could be granted. AR at 4.

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<sup>10</sup> “(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied; . . .

(d) The agency has erroneously interpreted or applied the law; . . .

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; . . .”

**1. Review is under the APA error of law standard with due deference to PERC expertise**

“When reviewing questions of law, an appellate court may substitute its determination for that of the agency, although PERC’s interpretation of the collective bargaining statutes is entitled to substantial weight and great deference.” *City of Bellevue v. Int’l Ass’n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382, 831 P.2d 738 (1992); *City of Pasco v Pub. Emp’t Relations Comm’n*, 119 Wn.2d 504, 507-508, 833 P.2d 381 (1992) (agency charged with the administration and enforcement of a statute is accorded great weight in determining legislative intent when a statute is ambiguous). “Due deference” means that PERC’s specialized knowledge and expertise is to be given “great weight” when interpreting statutes that the agency is charged to administer, unless there is a compelling indication that the agency’s regulatory interpretation conflicts with the Legislature’s intent or exceeds the agency’s authority. *See Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 43, 202 P.3d 334 (2009).

PERC is the agency charged with enforcement of the PECBA. RCW 41.56, .100, .160; RCW 41.58.015(2). PERC is recognized by both statute and case law as possessing expertise in the labor relations area. *City of Yakima v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 469*,

*Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 674–675, 818 P.2d 1076 (1991). An important function of the public bargaining law and PERC is to ensure uniformity in the “adjustment and settlement of complaints, grievances, and disputes arising out of employer-employee relations.” RCW 41.58.005(1); *see* RCW 41.56.010. To this end, PERC is granted specific authority to enter remedial orders and to seek court action to enforce the purposes of the public employee bargaining law. RCW 41.56.160, 480; RCW 41.58.015(2); WAC 391-45-430. “The Legislature has delegated to PERC the delicate task of accommodating the diverse public, employer and union interests at stake in public employment relations.” *Int’l Ass’n of Fire Fighters, Local Union 1052 v. Pub. Emp’t Relations Comm’n*, 113 Wn.2d 197, 203, 778 P.2d 32, 35 (1989).

A determination as to what evidence constitutes “interference” with protected rights under RCW 41.56.040 and RCW 41.56.140(1) is the kind of decision within PERC’s expertise that should be given due deference.

**2. Review of a preliminary ruling is based on what is contained in the four corners of the Complaint**

PERC’s review of a director’s preliminary ruling is akin to review of a motion to dismiss under CR 12(b)(6), but with much more detailed

pleading requirements. *City of Pasco*, 119 Wn.2d507; *Apostolis v. City of Seattle*, 101 Wn. App. 300, 306-307, 3 P.3d 198 (2000).

PNWCCA argues that because dismissal occurred at the preliminary ruling stage, that it “may assert any hypothetical factual scenario consistent with the Complaint that gives rise to a valid claim, even if the facts are alleged informally, for the first time on appeal.” Pet. Br. at 2, 12<sup>11</sup> (citing *Fondren v. Klickitat Cty.*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995), discussing standard for CR 12(b)(6) Motion to Dismiss). However, this is not a CR 12(b)(6) proceeding and the civil rules do not apply.<sup>12</sup>

PERC rules specifically require that a complaint contain, in separate numbered paragraphs, a clear and concise statement of the facts constituting the alleged unfair labor practices, including times, dates, places, and participants in occurrences. WAC 391-45-050(2); *Apostolis v. City of Seattle*, 101 Wn. App. at 306-307, 308. The facts set forth in the Complaint “must be sufficient to make intelligible findings of fact in a

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<sup>11</sup> PNWCCA does not identify what “hypothetical” facts it asks, or may ask, the court to recognize.

<sup>12</sup> PERC has adopted its own procedural rules for processing unfair labor practices that differ significantly from the Civil Rules for Superior Court, in order to expedite resolution of labor disputes. For example, PERC rules do not provide for broad discovery. WAC 391-08-300. Specific pleadings are thus necessary to give clear notice to PERC and the parties of the issues before the Commission. *DeLacey v. Clover Park Sch. Dist.*, 117 Wn. App. 291, 296, 69 P.3d 877, 879 (2003) (Compliance with this specificity requirement on appeal is necessary to put PERC and the opposing party on notice of the arguments that the appealing party intends to advance.)

‘default’ situation.” *Id. at 306*. A “skeletal charge” will not suffice and will not be fleshed out by PERC personnel. *Jefferson Transit Auth.*, Decision 5928 (PECB, 1997).

In *Apostolis* a city employee sought review of a PERC decision dismissing his unfair labor practice claims for interference. PERC dismissed in part, because the employee’s allegations were insufficient to permit inferences that the City had knowledge of statements made at a union meeting. *Apostolis*, 101 Wn. App., at 302. The court rejected arguments that PERC’s requirements for detailed pleading run counter to the historical trend under the civil rules favoring notice pleading. “The civil rules apply to Superior Court, not to PERC.” *Id. at 308*. “The regulations require full details of the occurrences such that the executive director may make a preliminary ruling based on what is contained in the four corners of the complaint.” *Id.* The legal analysis when reviewing a dismissal on a preliminary ruling before PERC is applied to the specific facts alleged in the Complaint, not other “hypothetical” facts as suggested by PNWCCA.

This approach of limiting review to the facts alleged is consistent with the APA, which provides that issues not raised before the agency may not be raised on appeal and that judicial review is to be confined to the record. RCW 34.05.554, .558. The civil rules do not apply here, and

the Court should decline PNWCCA's invitation to consider unidentified, hypothetical "facts" raised on appeal.

**B. PECBA Does Not Create a General Right of Access to Employee Names and Addresses**

First enacted in 1967, PECBA has never been interpreted to require public employers to hand out lists of employees to any persons or organizations that desire to organize those employees. PNWCCA cites no case authority for this proposition.

Instead, the requirement to provide address lists under the collective bargaining law is limited to specific circumstances where an employee organization has made a sufficient showing of interest to call for an election or to be certified as a bargaining representative. As discussed below, under PECBA and PERC practice, a public employer is compelled to provide employee names and addresses in only two circumstances: (1) to facilitate a representation election following a showing of interest by employees; and (2) when requested by a certified exclusive bargaining representative where the request is reasonably related to the union's duties to represent the employees in the bargaining unit. Neither circumstance is alleged here. AR at 35-36.

## 1. Election lists

Following a thirty percent showing of interest by employees calling for an election under RCW 41.56.070, the public employer is required to submit a list of employees containing the names and last known addresses of all the employees in the bargaining unit described in the petition. WAC 391-25-130. After administrative determination that the petition has met the required showing, PERC furnishes a copy of the list to all parties participating in the election. This list serves a purpose similar to the “Excelsior list” required under the National Labor Relations Act (N.L.R.A.).<sup>13</sup> *Franklin Pierce Sch. Dist.*, Decision 3371-A (PECB, 1991); see *Nucleonics Alliance, Local Union No. 1-369, Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. Wash. Pub. Power Supply Sys. (WPPSS)*, 101 Wn.2d 24, 32, 677 P.2d 108 (1984) (Decisions construing the N.L.R.A., while not controlling, are persuasive in interpreting state labor acts that are similar or based upon the N.L.R.A.)

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<sup>13</sup> While the purposes of WAC 391-25-130 are similar to the *Excelsior* rule, there are significant differences in the Washington and federal practice. *City of Selah*, Decision 1931 (PECB, 1984). For example, under PERC procedures the petitioning labor union is entitled to the list as soon as the Commission has validated the sufficiency of the showing of interest. In 2008, PERC rejected a proposal to amend WAC 391-25-130 to conform it more closely to N.L.R.B.N.L.R.B practice. The Commission noted the long history of PERC’s independent practice and the significant differences between the representation provisions of PECBA and the NLRA as justification for PERC “to adopt its own path.” *In re: WAC 391-25-130*, Decision 10153 (2008).

In *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966), the National Labor Relations Board established the requirement that seven days after approval of an election agreement or issuance of a decision and direction of election, the employer must file an election eligibility list—containing the names and home addresses of all eligible voters—with the regional director, who in turn makes the list available to all parties. Failure to comply with the requirement constitutes grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 N.L.R.B. at 1240. The rule is part of the special conditions surrounding a representation election and is designed, in part, to ensure fairness by maximizing the likelihood that all voters will be exposed to the nonemployer party arguments concerning the representation election after the election is called. The risk that the list may be misused is mitigated by the 30percent showing of interest to call for the election. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1244 n.20.

PNWCCA does not claim that a representation petition was pending at the time it made its request to DEL under the PRA, and its previous effort to seek an election fell short. PNWCCA fails to plead a claim for an election list.

## **2. Lists for a certified bargaining representative**

Once a Union is certified in an election as the exclusive bargaining representative, the public employer's obligation to bargain in good faith includes an obligation to provide the Union relevant information about the bargaining unit, including names and home addresses of bargaining unit employees. AR at 34-35; *See City of Bellevue*, 119 Wn.2d 373. Claims by bargaining representatives that the residence addresses are needed in order to administer the collective bargaining agreements and perform the responsibilities of exclusive representative have repeatedly been upheld. *King County*, Decision 3030 (PECB 1988). But here, PNWCCA is not the certified exclusive bargaining representative.

## **C. PECBA and I-1501 Are Separate Statutes and Do Not Conflict**

PNWCCA assumes that PECBA should compel the state to continue to provide the employee list that it was accustomed to receive under the PRA prior to I-1501. This attempt to graft PECBA onto the PRA must fail because the two acts serve separate functions and do not conflict.

The PRA mandates the broad disclosure of public records. *Resident Action Coun. v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). Under RCW 42.56.070(1), a government agency must disclose public records upon request unless an exemption applies. *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 177 Wn.2d 467, 485-86,

300 P.3d 799 (2013). The identity of the requester is generally irrelevant, as is the purpose of the requester for making the request. An agency cannot require the requestor to disclose the purpose of the request, apart from limited exceptions permitted by law. RCW 42.56.080; WAC 44-14-03006.

PECBA serves an entirely different purpose—to promote continued improvement in the relationship between public employers and their employees through collective bargaining with labor organizations of the employees’ choosing. RCW 41.56.010. PECBA does not address when specific public records may or may not be released. “Significantly, no PECBA provision prohibits a public employer from releasing records or even addresses the release of records. And no PECBA provision addresses the privacy or confidentiality of information.” *SEIU 775*, 198 Wn. App. at 754. Rather, under PECBA the question is whether release of specific information directly relates to important purposes under the Act. Unlike the PRA, release of information under PECBA is all about the identity and status of requester and the purpose of the request.

Courts treat requests for information under the PRA and requests for information under PECBA under separate statutory standards. Under the PRA, records are either subject to a disclosure exemption or they are

not. If they are not, the record must be disclosed. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 778, 418 P.3d 102, 106–07 (2018).

Under PECBA, the question is whether information requested is relevant to the exclusive bargaining relationship, using a discovery-type standard. *City of Bellevue*, 119 Wn.2d at 383 (“As interpreted by PERC, collective bargaining includes the duty to provide relevant information the other party needs to carry out its collective bargaining responsibilities.”); see *N. L. R. B. v. Acme Indus. Co.*, 385 U.S. 432, 437, 87 S. Ct. 565, 568, 17 L. Ed. 2d 495 (1967).

For example, in *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998), a union representative made a request under the PRA for employee names and “identification numbers.” Even though the requester was a union representative, the court analyzed the request under the PRA, and found release of the names with identification numbers exempt. *Tacoma Pub. Library*, 90 Wn. App. at 210.

In *SEIU Healthcare 775NW*, the court rejected a claim by the union that PECBA was an “other statute” creating a PRA exemption; “PECBA is not concerned with the privacy or confidentiality of specific records or information.” *SEIU 775*, 198 Wn. App. at 754. The court went on to note:

Even if we held that the PECBA provides an “other statute” exemption to the PRA, SEIU would have to show that DSHS’s release of the requested records here would constitute an unfair labor practice. It is difficult to conceive of a situation where complying with a PRA request would constitute an unfair labor practice.

*SEIU 775*, 198 Wn. App. at 750, n.1.

PNWCCA argues that PECBA has strong preemptive reach where it comes into conflict with other statutes like the PRA and that this should prevail over the changes enacted by I-1501. Pet. Br. at 20-21. PERC agrees that PECBA contains a clear direction that PECBA should prevail when in conflict with other statutes. RCW 41.56.905; *Rose v. Erickson*, 106 Wn.2d 420, 721 P.2d 969 (1986). In this case, however, PNWCCA fails to establish how I-1501 and PECBA conflict. Nothing in PECBA guarantees PNWCCA employee lists for the asking. Without such an underlying, pre-existing right to employee lists under PECBA, there is no conflict with I-1501 and thus, no need to find that PECBA supersedes I-1501.

**D. PNWCCA Fails to Allege the Elements for a Claim for Interference Under PECBA**

PNWCCA argues that despite I-1501, it is entitled to the childcare provider lists under PECBA because failure to provide these lists “impedes” its efforts to decertify the incumbent certified exclusive bargaining representative. AR at 39. The PNWCCA asserts that without

the requested information it is unable to effectively communicate with bargaining unit members and to obtain a 30 percent showing of interest for an election. PERC correctly found the Complaint deficient because it failed to: (1) identify how DEL's actions constitute a threat of reprisal or promise of benefit related to the exercise of protected rights; and (2) failed to allege specific facts sufficient to support its claims that it cannot organize employees without the list it demands.

**1. PNWCCA failed to allege a threat or promise**

It is an unfair labor practice for a public employer to “interfere with, restrain, or coerce employees” in the exercise of their statutory rights. RCW 41.56.140(1). Washington courts and PERC have well-established case law about the elements of an interference charge. AR at 2, 34.

An employer commits an ‘interference’ violation under RCW 41.56.140(1) if it engages in conduct which can *reasonably be perceived by employees as a threat of reprisal or force or a promise of benefit deterring them from pursuit of lawful union activity*. A finding of ‘intent’ is not necessary to find a violation. The test is whether the employer conduct reasonably tended to interfere with the free exercise by employees of their rights under the collective bargaining statute.

*Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 565, 222 P.3d 1217, 1230 (2009)(emphasis added; citations omitted);

In this case, DEL passively complied with I-1501. This cannot reasonably be interpreted as a threat or promise by the employer directed at employees. PNWCCA remains free to communicate and broadcast its Union organizing message in any manner it sees fit. Neither I-1501 nor the actions of DEL in withholding the list burden any method of communication. *Accord, Boardman v. Inslee*, 354 F. Supp. 3d 1232, 1240 (W.D. Wash. 2019) (plaintiffs failed to establish any unconstitutional restriction under I-1501 on a method of communication). The Initiative does not burden any methods of communication PNWCCA may use to speak to caregivers once they have identified them; plaintiffs may canvass, hire paid canvassers, distribute pamphlets, make speeches, advertise and hold meetings, picket, or send mailers to distribute their speech. *Id.* There is a big difference between actively deterring employees from communicating with each other (by threat or promise) and merely declining to assist with the communication.

Most Union organizing under PECBA occurs without PRA access to employee address lists. And such employee address lists have long been exempt from public disclosure. RCW 42.56.230(3); RCW 42.56.250; *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 216-217. In this regard, I-1501 merely conforms the treatment of childcare providers to the treatment of other public employees.

**2. PNWCCA failed to allege other specific facts supporting its claims that the DEL's passive compliance with 1-1501 interfered with employee rights**

PNWCCA argues for a new rule that employee organizing rights under RCW 41.56.040 and RCW 41.56.140(1) require the State to continue to provide lists of childcare workers. Failure to provide a current list of names and addresses, PNWCCA asserts, interferes with its rights to organize because without a list “it is logistically impossible for family child care providers to communicate with each other and gather enough signatures.” AR at 174. This is because, according to PNWCCA, the lists it acquired through the PRA prior to enactment of I-1501 have become out of date, the bargaining unit is large and spread across the state, and no other method of communication besides direct mail is “effective.” AR at 44-45. According to PNWCCA, no reasonable alternative means of communication exist.

At first blush, PNWCCA's argument echoes a stubby line of N.L.R.B. guidance suggesting, at least in theory, that a private employer may have an affirmative obligation to provide an organizing Union a list of employees and addresses where the size and makeup of the unit make organizing impossible without it. *Technology Serv. Sol.*, 324 N.L.R.B. 298, 156 LRRM (BNA) 1065, 1997 WL 525247 (1997), decision supplemented, 332 N.L.R.B. 1096, 72 LRRM 1014, 2000 WL 1663428

(N.L.R.B. 2000), *order mod. on reconsideration*, 334 N.L.R.B. 116, 172 LRRM 1053, 2001 WL 578202 (N.L.R.B. 2001). However, no party raised *Technology Service Solutions* before the Commission, and the Commission did not consider it. PERC first raised this case in its briefing before the superior court as a possible relevant authority. On appeal, PNWCCA notes PERC's briefing on this issue but fails to cite the authority, discuss why it should apply under PECBA, or allege facts sufficient to support its legal theory. Pet. Br. at 20, n.15.

In *Technology Service Solutions*, the N.L.R.B. ultimately concluded (following remand) that the General Counsel and the Union failed to make the factual case that a list was required.<sup>14</sup> While there are no other N.L.R.B. decisions on this issue, there are several General Counsel advisory opinions explaining application of the rule.<sup>15</sup> *See, e.g., N.L.R.B. Gen. Couns. Advice Mem. (Teamsters Local Union No. 261)*,

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<sup>14</sup>*Technology Service Solutions* builds upon federal precedent primarily relating to when outside organizers may have access to an employer's property. *See, e.g., Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 539, 112 S. Ct. 841, 849, 117 L.Ed.2d 79 (1992) (holding that where other alternative means are available, trespassory access to employees may not be compelled simply because other nontrespassory access may be cumbersome or less-than-ideally effective).

<sup>15</sup> N.L.R.B. General Counsel memoranda are issued to field offices and/or Washington offices by the General Counsel to provide policy guidance to Board staff. <https://www.N.L.R.B..gov/news-publications/N.L.R.B.-memoranda/general-counsel-memos>. The General Counsel, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the N.L.R.B. field offices in the processing of cases. <https://www.N.L.R.B..gov/about-N.L.R.B./who-we-are/general-counsel>

Case No. 06-CB-097248 (Jun. 28, 2013), at \*1; *Always Care Home Health Serv.*, Case 14-CA-24788, 1998 WL 2001253, at \*3 (Mar. 26, 1998).

Under the *Technology Service Solutions* rule, an employer is not required to provide the union with a list of employee names and addresses unless the union can demonstrate that it has no reasonable alternative means of communicating with the employees. The N.L.R.B. noted that a high standard is appropriate because release of employee names and addresses by the employer implicated “significant” employee privacy rights.

*Technology Serv. Sol.*, 332 N.L.R.B. at 1099. The “no reasonable alternative” standard requires that the Union demonstrate that it has made reasonable efforts to utilize other channels of communications, including those available as part of the ordinary flow of information that characterizes our society. This includes the use of mass media, including newspapers, radio, and television and in the modern era, use of social media. *See Oakland Mall*, 316 N.L.R.B. 1160, 1163 (1995) (“[W]e need not exhaustively analyze the feasibility of every conceivable means by which a union might communicate its message to an audience, so long as there is a least one possible means, and the General Counsel . . . has failed to show that various means of mass communication were not an available means of presenting the Union’s message.”).

It is far from clear that the reasoning of *Technology Service Solutions* should apply in Washington public sector labor relations because PECBA differs from the N.L.R.A. First, in *Technology Service Solutions*, there was no express statute prohibiting employer release of the addresses and other contact information for employees. Here, RCW 43.17.410 creates an affirmative prohibition on the release of childcare worker names and addresses. Second, the wording of PECBA with regard to employee rights has some substantial differences from the N.L.R.A. Compare RCW 41.56.040 with 29 U.S.C.A. § 157. For example, while the N.L.R.A. protects the “concerted activities” of employees, PECBA does not. *Teamsters Local Union No. 117 v. State Dep’t of Corr.*, 179 Wn. App. 110, 317 P.3d 511 (2014) (public employee rights statute did not protect concerted activities from employer interference).

In addition, despite raising the possibility in *Technology Service Solutions*, the N.L.R.B. has never actually ordered an employer to produce employee information before a union has made a 30 percent showing of interest. *N.L.R.B. Gen. Couns. Advice Mem. (Teamsters Local Union No. 261)*, Case No. 06-CB-097248 (Jun. 28, 2013) at 4-5.

Finally, PNWCCA’s Complaint failed to allege sufficient facts to invoke the *Technology Service Solutions* analysis. Instead, the Complaint alleged “skeletal” conclusions, including:

1. “An attempt to gather signatures through a public education campaign employing traditional advertising methods would be prohibitively expensive and, no matter how comprehensive, would likely still miss many providers.” AR at 44.
2. “The only feasible method to gather signatures for a showing of interest is to obtain a list of providers from the state and communicate with them directly.” AR at 44.
3. “The state’s refusal to release an accurate and up-to-date list of family child care providers to PNWCCA effectively prevented it from gathering a 30 percent showing of interest.” AR at 45.

Bald assertions like “logistically impossible” and “prohibitively expensive” are not substitutes for specific allegations about what communications methods are available, whether these were tried, and why they were inadequate as a means of access. The facts set forth in the complaint “must be sufficient to make intelligible findings of fact in a ‘default’ situation” and a “skeletal charge” will not suffice. *Apostolis*, 101 Wn. App. at 306; *Jefferson Transit Authority*, Decision 5928, at \*1. This is especially the case where, as here, PNWCCA has apparently been engaged in organizing for years, has had some access to address lists, and succeeded in garnering over 800 authorization cards in its last bid for an election. These facts suggest that PNWCCA had at least some access to employees.

PNWCCA makes much of the fact that its 2017 decertification effort fell short. But this does not establish that PNWCCA was denied access to employees, or that there was no alternative access to communicate with employees. It simply suggests that PNWCCA's communication efforts were ineffective in persuading childcare providers to overthrow their existing bargaining representative in favor of PNWCCA. Access cannot assure that PNWCCA's communications will be effective, and the State has no obligation to assist an insurgent union to make them effective. The fact that PNWCCA's communication efforts were ineffective in persuading employees fails to prove that no reasonable alternative access was available.

**E. The Exceptions to I-1501's Prohibition on Disclosure Contained in RCW 42.56.645 Do Not Apply**

PNWCCA argues that PERC's remedial authority under RCW 41.56.160 and RCW 42.56.645(1)(c) would permit PERC to order release of employee lists. PERC does not dispute this. The problem here is that there is no underlying violation of PECBA to remedy and thus no occasion to issue a remedial order directing the release of the list. As PERC noted in its decision, at the time DEL denied the PRA request, there was no PERC proceeding pending. AR at 3-4. Moreover, since mere compliance by an agency with the requirements of the PRA is not an

unfair labor practice, no remedial order is appropriate. For the same reason, PERC's broad discretion to remedy an unfair labor practice does not apply.

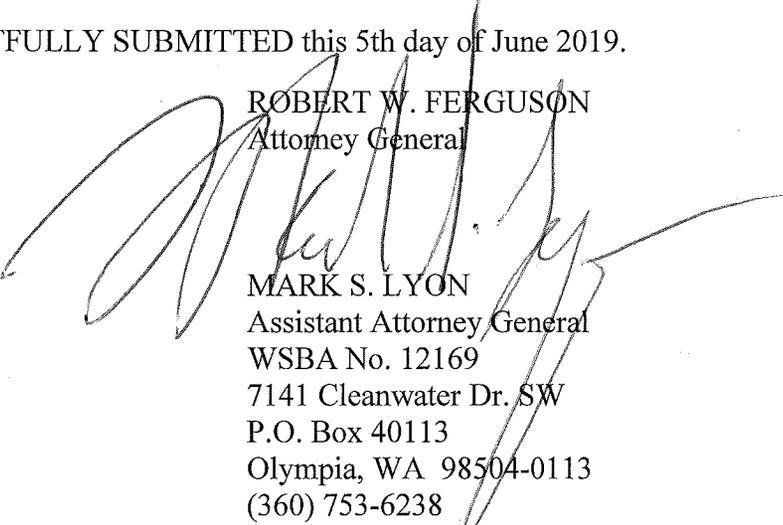
PERC has not yet had an opportunity to address how it will handle an election list for home childcare workers under RCW 42.56.645(1)(c), and this case does not present the issue. The language in the statute is ambiguous as to whether the agency itself can issue a protective order, or whether an order of the superior court is necessary. If an election proceeding is determined to be a "quasi-judicial" proceeding, then presumably PERC would issue its own protective order prior to directing release of the list to the parties. Alternatively, PERC could seek such a protective order from the superior court.

The other exceptions to I-1501 prohibition on disclosure do not apply. PNWCCA is not an exclusive bargaining representative, and therefore, does not qualify for the exception under RCW 42.56.645(1)(d). Likewise, PNWCCA is not a third-party under contract with the state and, therefore, does not meet the requirements of RCW 42.56.645(1)(f). PNWCCA has not identified any other exception under RCW 42.56.645 that would apply here.

**V. CONCLUSION**

PERC's dismissal of the Complaint for failure to state an unfair labor practice claim under PECBA should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of June 2019.



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NO. 52673-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

(Thurston County Superior Court No. 18-2-00464-34)

PACIFIC NORTHWEST CHILD  
CARE ASSOCIATION,

Appellant,

v.

ATTORNEY GENERAL'S OFFICE, a  
state agency, JAY INSLEE, Governor of  
the State of Washington, and STATE OF  
WASHINGTON DEPARTMENT OF  
EARLY LEARNING, a state agency,

Respondents.

CERTIFICATE OF SERVICE

I, Charlotte Armstrong, an employee of the Transportation and  
Public Construction Division of the Office of the Attorney General of  
Washington, certify that on this day true copies of the Brief of Respondent  
and this Certificate of Service were served on the following parties as  
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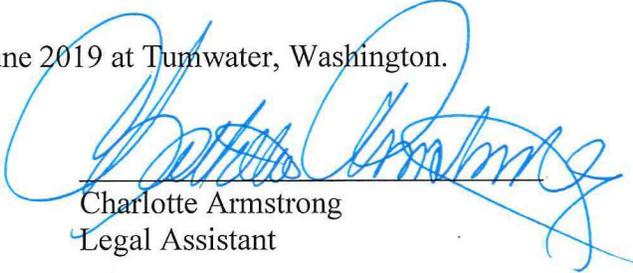
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

Dated this 5th day of June 2019 at Tumwater, Washington.

  
Charlotte Armstrong  
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**ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION**

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