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No. 36974-9-III

THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BENTON COUNTY,

Appellant,

v.

TEAMSTERS LOCAL 839,

Respondent.

**BRIEF OF *AMICI CURIAE* WASHINGTON ASSOCIATION OF
COUNTY OFFICIALS, WASHINGTON STATE ASSOCIATION
OF COUNTIES, AND WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS**

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I. INTRODUCTION AND IDENTITY AND INTEREST OF AMICI CURIAE

The Washington Association of County Officials (“WACO”), Washington State Association of Counties (“WSAC”), and Washington State Association of Municipal Attorneys (“WSAMA”), (collectively referred to as “Amici”), join Appellant Benton County in asking this Court to reverse the order of the Washington State Public Employment Relations Commission (PERC) that Benton County must return overpaid wages to employees, and PERC’s decision that a debt collection plan pursuant to RCW 49.48.200 and RCW 49.48.210 is a mandatory subject of bargaining.

WACO is a non-profit, nonpartisan organization that serves all 39 counties throughout the State of Washington.¹ Its members include elected county assessors, auditors, clerks, coroners and medical examiners, prosecuting attorneys, sheriffs, treasurers and comparable appointed officials in charter counties. WACO is comprised of affiliate organizations for every executive level county official in Washington’s 39 counties. WACO members are constitutionally and statutorily charged with administering the executive functions of county government. WACO members do so by through the unique roles and duties of each separately

¹ “About WACO”, WACO, <http://countyofficials.org/27/About-WACO> (last accessed Feb. 27, 2020).

elected executive level county government office.²

WSAC is also a non-profit association that serves all 39 counties throughout the State of Washington.³ Its members include elected county commissioners, council members, and executives. WSAC members are constitutionally and statutorily charged with administering the legislative and executive functions of county government.⁴

WSAMA is a non-profit corporation comprised of attorneys who represent Washington's 281 cities and towns.⁵ WSAMA's members frequently advise their clients on the legislature's statutory framework that governs their obligations as public employers.

As the collective voices for Washington's counties, cities, and towns, Amici have an interest in this appeal because the issues presented are not limited to Benton County, and will ultimately negatively impact counties, cities, and towns throughout the state.

Specifically, PERC's ruling expands PERC's role beyond employment relations and into the separate arena of debtor/creditor relations,

² "What is WACO", <http://countyofficials.org/DocumentCenter/View/435> (last accessed Feb. 27, 2020).

³ "About Us", WSAC, <https://wsac.org/about-us/> (last accessed Feb. 27, 2020).

⁴ "The Closest Governments to the People: A complete Reference Guide to Local Government in Washington State," <http://mrsc.org/getmedia/1c25ae05-968c-4edd-8039-af0cf958baa7/Closest-Governments-To-The-People.pdf.aspx?ext=.pdf> (last accessed Feb. 27, 2020).

⁵ "About WSAMA", WSAMA, <http://wsama.org/> (last accessed March 4, 2020).

and allows PERC and interest arbitrators to dictate the performance of discretionary acts by an independently elected official who was not a signing party to the relevant Collective Bargaining Agreement (CBA). PERC's ruling is contrary to the legislative and constitutional authority for local government officials to exercise discretion when collecting public debt, such as overpaid wages. Local government officials may decide whether to collect overpaid wages directly from employees through deductions from subsequent wage payments; a civil action against the employees; use of collections agencies; and/or cancellation of public debts as may be necessary.

Moreover, PERC exceeded its authority by requiring Benton County to provide certain employees with overpaid wages. The overpayment of wages is *ultra vires* and void, and would constitute an unconstitutional gifting of public funds. A local government official is unable to lawfully abide by a PERC order requiring commission of an *ultra vires*, void, and unconstitutional act. Amici's members have an interest in ensuring PERC only orders local government officials to commit lawful acts.

II. SPECIFIC ISSUES ADDRESSED

Amici's brief focuses on the reluctance of courts to interfere with the management prerogatives and exercise of discretion by separately elected local government officials, the separation of powers in county government, and the inability of local government officials to comply with

a PERC order to commit an ultra vires, void, and unconstitutional act.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case in Benton County’s Opening Brief, but add the following point:

The Benton County Auditor, Brenda Chilton (“Auditor Chilton”), is an independently elected official.⁶ Auditor Chilton was not a signing party of the 2013-2017 CBA between Benton County and Teamsters Union Local 839 (the “Union”), for eligible Corrections Officers. CP 415. The signing parties for Benton County on the 2013-2017 CBA were the Benton County Commissioners, for wages and wage-related matters, and the Sheriff, for hours and working conditions. CP 541, 542.

Auditor Chilton further stated that she has never been involved, directly or indirectly, in the negotiations for any CBA between Benton County and the Union for eligible Corrections Officers. CP 416.

The 2013-2017 CBA did not address the methods by which Auditor Chilton could collect debts owed by eligible employees. CP 543-579. Nor did the 2013-2017 CBA address Auditor Chilton’s exercise of discretion in carrying out the duties of the Auditor’s Office. CP 543-579.

⁶ The Office of Auditor is a separately elected official in all of Washington’s 39 counties, except in King County, which is a charter county. *See* “County Elected and Appointed Officials,” Municipal Research Services Center, <http://mrsc.org/Home/Explore-Topics/Governance/Offices-and-Officers/County-Elected-and-Appointed-Officials.aspx> (last accessed February 28, 2020).

Despite the fact that Auditor Chilton was not a signing party to the 2013-2017 CBA and did not participate in the negotiations of the CBA, PERC and the Union claim PERC has jurisdiction to regulate debt collection and the performance of Auditor Chilton's statutory duties.

IV. ARGUMENT

As an administrative agency, PERC only has the authority and jurisdiction given to it by the Legislature. *Local 2916, IAFF v. PERC*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995) (citing *Kaiser Aluminum & Chem. Corp. v. Department of Labor & Industries*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993)). Courts will grant relief from an agency order in an adjudicative proceeding if the order violates constitutional provisions; exceeds the agency's authority; or if the agency erroneously interpreted or applied the law. RCW 34.05.570(3)(a)(b) and (d); *Snohomish County Pub. Transp. Benefit Area v. PERC*, 173 Wn. App. 504, 515, 294 P.3d 803 (2013) (citing RCW 34.05.570(3)(b)). With respect to the matter involving Benton County, PERC exceeded its authority, erroneously interpreted and applied the law, and issued an order that violates constitutional provisions. Accordingly, Amici join Benton County in respectfully requesting this Court reverse PERC's order.

A. PERC’s Order Interferes with Management Prerogatives and Exercise of Discretion by Local Government Officials When Collecting Public Debts, Such as Overpaid Wages.

A government “has the right to recover” overpaid wages, and “[i]ndeed, it has a duty to do so.” *State v. Adams*, 107 Wn.2d 611, 614-615, 732 P.2d 149 (1987). “Few principles are so well established as the right of the Government to recover by offset or otherwise sums illegally or erroneously paid.” *International Asso. Of Machinists & Aerospace Workers v. United States*, 215 Ct. Cl. 125, 564 F.2d 66 (1977)(*citations omitted*).

Where the obligations are of equal degree, it is a recognized method of making collections to balance accounts; that is to say, a person having money in his possession belonging to another may retain such money as an offset to any indebtedness of equal degree therewith which such other may be owing to him. ***This rule applies with particular force to the state and its municipal institutions. Indeed it would be such a breach of duty as to amount practically to malfeasance in office for an officer of a municipality to pay moneys from the municipal treasury to an individual when that individual was owing a like sum to the municipality. [emphasis added]***

State ex rel. Pratt v. Seattle, 73 Wash. 396, 401, 132 P. 45 (1913).

Local governments have several options available regarding the collection of debt owed to it. Legislative and common law authority authorize county governments to maintain civil actions to recoup overpaid wages. RCW 49.48.200(1); *Adams*, 107 Wn.2d at, 615; RCW 36.32.120(6).

Similarly, RCW 36.22.050 and RCW 49.48.200(1) authorize a county auditor to recover overpaid wages through deductions from

subsequent paychecks. This allows government employers to recoup debt in the same manner as garnishments, child support debt, IRS tax liens, and DOR liens, which the Benton County Auditor's Office routinely deducts from paychecks without any objection from the Union. CP 299.

Third, local governments have the authority to contract with collection agencies to collect "public debts owed by any person." RCW 19.16.500(1). RCW 49.48.200(1) and RCW 19.16.500(1) both use the phrase "may"—a discretionary phrase—rather than a command, when granting the authority to local governments to act, so the government is not required to choose either option.

Finally, a local government retains the option not to collect the debt at all, if it that would be in the public's best interest, such as if the overpaid wage amount was de minimis and the collection costs would outweigh the amount of the debt. RCW 36.22.060; RCW 36.32.120.

Since there is no requirement for local government officials to choose any particular debt collection option, local governments retain significant discretion when deciding how, or whether, to recoup public debt. "It is true the method by which the collection is to be made is not prescribed by the statute; but since the authority is given, the city is permitted to pursue any or all of the methods of making the collection that is recognized by the general laws." *State ex rel. Pratt v. Seattle*, 73 Wash. 396, 401, 132, P.45

(1913). In other words, county officials have the right and the duty⁷ to collect public debt, as well as the option to extinguish the public debt as appropriate, but it is left to the discretion of the government officials on how to proceed.

The exercise of discretion is the responsibility of a separately elected official who is responsible to the voters, and courts are extremely reluctant to interfere with discretionary executive branch actions of county officials. *Smith v. Bd. Of Walla Walla County Comm'Rs*, 48 Wn. App. 303, 308, 738 P.2d 1076 (1987). (citing *State ex rel. Farmer v. Austin*, 186 Wash. 577, 588, 59 P.2d 379 (1936)). Nonetheless, PERC's ruling requiring local governments to bargain the collection of public debt to impasse and interest arbitration interferes with the management prerogative and exercise of discretion by local government officials to collect public debt.

⁷ If an elected official fails to perform a required official act, then a writ of mandamus, which is the jurisdiction of the superior court (*see* Washington Constitution Article IV, Section 6; RCW 2.08.010), may be obtained to compel the performance of that act. "Mandamus is appropriate to compel a government official or entity 'to comply with law when the claim is clear and there is a duty to act.'" *Eugster v. City of Spokane*, 118 Wn. App. 383, 404, 76 P.3d 741 (2003) (citing *In re Per. Restraint of Dyer*, 143 Wn. 2d 384, 398, 20 P.3d 907 (2001)). However, an elected official cannot be compelled to perform a discretionary act, and cannot be compelled to perform a discretionary act in a certain way. "Mandamus can direct an officer to exercise a mandatory discretionary duty, but not the manner of exercising that discretion. Thus, a mandamus applicant cannot exactly shape a mandatory discretionary act." *Eugster*, 118 Wn. App. at 405. In other words, "[a]lthough mandamus will not lie to control exercise of discretion, it will lie to require that discretion be exercised." *Id.* Thus, as the superior court lacks the authority to direct the discretionary acts of a local government official, PERC and an interest arbitrator too lack such authority.

The determination of whether a particular subject is a mandatory subject of bargaining is a mixed question of law and fact to be determined by PERC. WAC 391-45-550. PERC uses the *City of Richland* balancing test on a case-by-case basis to balance “the relationship the subject bears to [the] ‘wages, hours and working conditions’” of employees and “the extent to which the subject lies ‘at the core of entrepreneurial control’ or is a management prerogative.” *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203, 778 P.2d 32 (1989). “[M]anagerial decisions that only remotely affect ‘personnel matters’ and decisions that are predominantly ‘managerial prerogatives,’ are classified as non-mandatory subjects.” *Id.*, at 200.

The government has a right and duty to recoup overpaid wages. Indeed the overpayment of wages is inherently an ultra vires and void act. *Adams*, 107 Wn.2d, at 614-615. As stated by Benton County, the overpayment of wages occurs on a monthly basis. CP 294. Under the directive from PERC, Benton County could potentially bargain the recoupment of overpaid wages to impasse and interest arbitration every month. Not only would this be burdensome for taxpayer resources and local governments, it would also remove the exercise of discretion from elected and appointed local government officials and place it into the hands of PERC and interest

arbitrators. This belies the role of the voters: the public has a right to have elected and appointed local officials exercise discretion in how, or whether, that money gets recouped.

Moreover, the Union and the employees do not have any right to the money it wishes to negotiate and bargain the release of. “PERC has been given authority by the Legislature to only determine whether an alleged unfair labor practice affects a right protected by statute.” *Local 2916, IAFF*, 128 Wn.2d at 376. Employees have the right to earned wages. Employees do not have right to overpaid wages, which are ultra vires and void. *Adams*, 107 Wn.2d, at 614-615. Thus, not only is the recoupment of overpaid wages a management prerogative, PERC lacks jurisdiction and authority over the method of collecting of overpaid wages because employees have no right to overpaid wages.

The primary and exclusive right employees have with respect to overpaid wages is due process—notice and a hearing—before future wages are garnished. *Adams*, 107 Wn.2d at 616-618. While it seems unlikely that PERC has jurisdiction to determine constitutional due process questions, that question is beyond the scope of this case because it is undisputed that Benton County provided the employees with notice and the opportunity for a hearing, and no employees timely requested a hearing. CP 375-376. Due

process was satisfied in this case, and the employees had no further rights with respect to the money Benton County erroneously paid.

The government's right and duty to collect public debt, as well as the public's right to have decisions made by elected and appointed officials must be given priority, as a management prerogative, over the desire of the Union to negotiate the release of money which does not belong to it or its employees.

B. PERC's Order Violated Constitutional and Statutory Provisions for Separation of Powers in County Government Because the Benton County Auditor is a Separately Elected Official Performing an Auditor's Statutory Duty to Issue Warrants.

PERC's order for Auditor Chilton, who was not a signing party of the CBA, to negotiate to impasse and interest arbitration, the recoupment of overpaid wages through withholding of future paychecks, violates the constitutional and legislative separation of powers for county government.

The Washington Constitution divides the powers of county government between a number of offices— county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other officers. Each of these officials is directly elected by the people. *See* Washington Constitution Article XI, Section 5. The legislature created additional

elected officials, including the offices of county auditor and county coroner.
See RCW 36.16.030.⁸

The core duties of each separately elected county official are those assigned to the office at the time the Washington Constitution was adopted, or as subsequently provided by the legislature. *State ex rel. Johnston v. Melton*, 192 Wash. 379, 388, 73 P.2d 1334 (1937). The core duties of one separately elected official may not be transferred to another elected official or to a private person. *See, e.g. State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 181-83, 385 P.3d 769 (2016); *State ex rel. Johnston v. Melton, supra*; *Northwestern Improvement Co. v. McNeil*, 100 Wash. 22, 33, 170 Pac.338 (1918).

...[T]he powers thus granted are powers which the people of the state expressly provided in the constitution should be executed only by persons elected by themselves. The people are the source of all governmental power, and, in setting up a constitutional government, they provided that certain of their powers should be exercised through county governments, governments close to the people; and they further provided, in § 5 of Art. 11 of the constitution, that the powers to be thus exercised through county governments should be exercised only through officials elected by themselves.

⁸RCW 36.16.030 states “[e]xcept as provided elsewhere in this section, in every county there shall be elected from among the qualified voters of the county a county assessor, a county auditor, a county clerk, a county coroner, three county commissioners, a county prosecuting attorney, a county sheriff and a county treasurer....”

State ex rel. Johnston, 192 Wash. 379 at 385. A quorum of the county commissioners, referred to as the “Board” or the “Legislative Authority,” is assigned a wide variety of duties. RCW 36.32.010 and 36.32.120. However, as powerful as the Board appears to be, the legislative authority lacks the power to determine how a separately elected official selects his or her employees, what tasks or titles are assigned to the employees of a separately elected official, and the priorities of the separately elected officials. *See, e.g., In re Recall of Sandhaus*, 134 Wn.2d 662, 670, 953 P.2d 82 (1998); *Osborn v. Grant County*, 130 Wn.2d 615, 624, 926 P.2d 911 (1996); *Herron v. McClanahan*, 28 Wn. App. 552, 625 P.2d 707 (1981); AGO 2017 No. 3 (Mar. 20, 2017). The Board may not remove a separately elected official and may not reduce the core functions of a separately elected official. *See generally State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 177-78, 385 P.3d 769 (2016); *In re Recall of Sandhaus*, 134 Wn.2d 662, 670, 953 P.2d 82 (1998); *Osborn v. Grant County*, 130 Wn.2d 615, 624, 926 P.2d 911 (1996). The Board may not usurp any statutorily defined duties of the county auditor. *Smith*, 48 Wn. App., at 309.

In other words, as a fundamental constitutional matter of separation of powers, the county auditor is not an agent of or subservient to the county

commissioners⁹, and any powers and duties granted to the county auditor by the legislature must be exercised by the county auditor.

The issuance of employee wages, through the warrant process, is a statutorily defined duty of the county auditor. RCW 36.22.050. A county can disburse its funds, such as paying wages to employees, only by issuing a warrant, and a warrant can only be issued by the county auditor. *State ex rel. Thurston County v. Dep't of Labor & Indus.*, 167 Wash. 629, 630, 9 P.2d 1085 (1932); RCW 36.22.050. For this reason, the statutory authority contained in RCW 49.48.200(1) for a county to recover overpaid wages through deductions from subsequent warrants (paychecks), can only be exercised by the county auditor in a non-charter county.

Auditor Chilton was not a signing party of the 2013-2017 CBA between Benton County and Teamsters Union Local 839. CP 415. Auditor Chilton was not involved, directly or indirectly, in the negotiations for any CBA between Benton County and the Union for eligible Corrections Officers. CP 416. The CBA did not address the methods by which Benton County or Auditor Chilton could collect debts owed by eligible employees. CP 543-579. Nor did the 2013-2017 CBA address Auditor Chilton's exercise of discretion in carrying out the duties and responsibilities of the

⁹Thus, the Union's argument that Auditor Chilton is "the agent" of the Benton County Commissioners (*See* Br. Respondent, 33) is contrary to well established constitutional law and principles and must be rejected.

Auditor's Office. CP 543-579. Even if, hypothetically speaking, the Benton County Commissioners and Benton County Sheriff, who were the signing parties to the CBA (CP 541-542) had wanted to bargain with the Union over repayment of wages, as a matter of separation of powers, the Commissioners and the Sheriff lacked any legal authority to prohibit Auditor Chilton from recouping overpaid wages through withholding from future paychecks.

This separation of powers issue was indirectly raised but not decided in *Lewis County v. Public Employment Relations Com*, 31 Wn. App. 853, 864, 644 P.2d 1231 (1982). In *Lewis County*, the specific issue discussed was whether one bargaining unit could contain employees from six independently elected county officials, or whether six separate bargaining units were necessary. *Id.* The Court held one bargaining unit was sufficient, particularly since the county failed to properly pursue judicial review of PERC's bargaining unit certification. *Id.*, at 864. *Lewis County* is readily distinguishable from the case at hand because the issue here is not whether PERC has jurisdiction over independently elected county officials with respect to bargaining unit certification decisions. The issue is whether PERC has jurisdiction over an independently elected county official who was not a signing party to a CBA, and who was exercising discretion in the

performance of official acts (ie, collecting public debt) in the debtor/creditor context.

By the logic used by PERC and the Union - that PERC can direct an independently elected official, who was not a signing party to a CBA, in the exercise of discretion with respect to repayment of overpaid wages- a county prosecutor's decision, hypothetically as these facts are not present in the case at hand, to file criminal charges and seek restitution from an employee for overpaid wages as a result of the employee's fraud or theft, could also be subject to impasse bargaining and interest arbitration. This result would be absurd, but that is precisely what PERC is suggesting by forcing an independently elected official who was not a signing party to the CBA, to negotiate to impasse and interest arbitration, the exercise of discretion in the performance of that official's duty to collect overpaid wages.

C. Local Government Officials Are Unable to Comply with a PERC Order Requiring the Commission of an Ultra Vires, Void, and Unconstitutional Act.

Amici and its members are further concerned by PERC's order requiring Benton County to "restore the status quo ante by returning to bargaining unit employees all wages and accrued leave collected by the employer." *Benton County*, Decision 12790 (PECB, 2017). A Court must grant relief from an order if it violates constitutional provisions; exceeds the agency's authority; and/or it erroneously interprets or applies the law. RCW

34.05.570(3)(a)(b)&(d); *Snohomish County Pub. Transp. Benefit Area*, 173 Wn. App, at 515. PERC’s order must be reversed because it requires Auditor Chilton to commit the ultra vires, void, and unconstitutional act of giving or lending money to certain employees who have no right to possess that money.

The overpayment of wages is ultra vires and void, and the government has a right and a duty to recoup the debt. *Adams*, 107 Wn.2d, at 614-615. A local government’s payment of money to someone who owes a debt to the local government “would be such a breach of duty as to amount practically to malfeasance in office.” *Pratt*, 73 Wash at, 401. Neither PERC nor the Union has cited to any statute giving PERC the authority to require a local government official to commit an ultra vires and void act that practically amounts to malfeasance in office.

Moreover, the intentional payment of public funds to employees who did not earn that money would also violate the constitutional prohibition on the gifting or loaning of public funds:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or **loan its money**, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.
(emphasis added)

Washington Constitution Article VIII, Section 7. The word “loan” is defined as “A lending. Delivery by one party to and receipt of another party

of sum of money upon agreement, express or implied, to repay it with or without interest.” *See Black’s Law Dictionary* 482 (5th ed. 1983). PERC’s order requiring repayment of overpaid wages constitutes an unconstitutional lending of public funds as Benton County would be required to provide money to employees who have no right or interest in the money, and then negotiate with the employees to impasse and interest arbitration on the terms by which this money would be repaid to Benton County.

The dispositive factor is overpaid wages are not money earned by employees in return for services rendered. The only right employees have with respect to overpaid wages is due process (*i.e.*, notice and a hearing) if the owed amounts are to be deducted from future paychecks. Neither PERC nor the Union has cited to any statute giving PERC the authority to supersede the Washington State Constitution. Pursuant to RCW 34.05.570(3)(a), PERC orders which are “in violation of constitutional provisions” like the order on appeal here must be reversed.

V. CONCLUSION

PERC exceeded its authority by interfering with the management prerogatives and exercise of discretion by a local government official who was not a party to the CBA, and by ordering Auditor Chilton to commit an ultra

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PROOF OF SERVICE

I, Emma Holden, do hereby certify under penalty of perjury that on March 25, 2020, I had filed with the Court of Appeals Division III, Via E-filing and mailed to the following by U.S. Postal Service first class mail, postage prepaid, and/or provided email service, a true and correct copy of the Brief of Amici Curiae and a Motion for Leave to File Brief of Amici Curiae.

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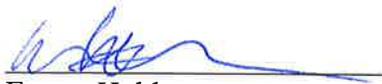
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