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Division III
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No. 36974-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BENTON COUNTY,

Appellant

v.

TEAMSTERS LOCAL 839,

Respondent

ON APPEAL FROM THE BENTON COUNTY
SUPERIOR COURT OF THE
STATE OF WASHINGTON
NO. 18-2-00861-9

RESPONDENT TEAMSTERS LOCAL 839's
RESPONSE TO BRIEF OF AMICI CURIAE

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RESPONDENT TEAMSTERS
LOCAL 839's RESPONSE TO
BRIEF OF AMICI CURIAE

I. Introduction

This is Teamsters Local 839's Response to the Amici's brief. Under longstanding state law and PERC precedent, counties—including Benton County—are considered one employer for purposes of collective bargaining under state law. And under this longstanding precedent, elected county officials, and all the various divisions and departments, are also part of the one county employer. And they all must follow state public sector collective bargaining laws.

In their brief, Amici are mistakenly trying to turn this case into a separation of powers issue and/or an internal county governance issue. They are wrong—and they are only confusing the issues.

Teamsters Local 839 and PERC gave Benton County plenty of notice that it had a duty to bargain a repayment plan, but it continues to ignore PERC's order and refuses to bargain—several years later.

PERC's remedy of requiring Benton County to return to the status quo, return the overpayments, and pay interest is a standard unfair labor practice (ULP) remedy under state law. And any claim that PERC's remedy is a gift of public funds is not valid and is simply not supported by any case law or precedent.

Notably, PERC has broad authority to issue remedies where it finds a violation of state labor laws. Therefore, PERC’s decision and remedy in this case—which was a standard return- to-status-quo remedy—should be affirmed by the Court of Appeals.

II. Argument

1. For Purposes of Labor Relations, Benton County is One Employer Under RCW 41.56

Benton County, along with all its different departments and elected officials, is considered one employer for purposes of collective bargaining and labor relations under state law—more specifically, RCW 41.56. This has been the law for decades.¹ Unfortunately, Amici misconstrue *Lewis County* and longstanding PERC precedent.

Under RCW 41.56, the Benton County Sheriff’s office is not a separate employer from Benton County, the Auditor is not a separate employer from Benton County, and/or the Department of Health is not a separate employer from Benton County. They all fall under one employer: Benton County. That is why Teamsters Local 839’s collective bargaining agreement (CBA)—which covers employees in the Sheriff’s Department—

¹ See *WSCCCE, Local 1341C*, Decision 644, 1979 WA PERC Lexis 35, (PECB, 1979), *remedy affirmed*, Decision 644-A, 1979 WA PERC Lexis 36 (PECB, 1979), *affirmed*, *Lewis County*, 31 Wn. App. 853, 855, 862-866 (1982), *review denied*, 97 Wn.2d 1034 (1982); *see also Pierce County*, Decision 10636, 2010 WA PERC Lexis 1 (PECB, 2010); *City of Seattle, Decision 12060-A*, 2014 WA PERC LEXIS 125 *11-12; RCW 41.56.020; RCW 41.56.030(12).

is with the County Commissioners, because the County is the employer.² And the PERC Order that is the subject of this appeal is directed at Benton County—not the Auditor.³

For decades, PERC has been the administrative body that oversees labor relations of public employers—such as Benton County. Notably, PERC has jurisdiction over elected officials, such as the Auditor.⁴ And elected officials can commit an unfair labor practice (ULP) even if they don't sign a CBA. For example, an elected official commits a ULP if he or she says they are going to fire or discipline an employee if an employee joins and/or supports a union—even if the elected official never signed a collective bargaining agreement with a union. RCW 41.56.140.

Further, it doesn't matter that Auditor Chilton didn't sign the CBA with Teamsters Local 839, she must still follow the law and CBA. For example, Auditor Chilton must oversee that the County pays the monthly collective bargaining wage rate, and she must abide by RCW 41.56—which includes the duty to bargain with Teamsters Local 839.

Consequently, Amici's attempt to make this case about the Benton County Auditor and/or a separation of powers issue mis-frames and

² CP 626-664.

³ CP 87, 90, 152, 167, 170, and 171

⁴ See *Lewis County*, 31 Wn. App. at 855, 864-865; see also *Pierce County*, Decision 10636 (PECB, 2010); RCW 41.56.020 and 41.56.030(12).

confuses the issues. This case is about one employer's duty—Benton County's duty—to bargain with a Union.

And at the end of the day (as fully discussed in Teamsters Local 839's Opposition Brief filed with the Court of Appeals), Benton County was asked to bargain about a repayment plan, and it refused. This is undisputed and a ULP. Benton County then deducted wages from bargaining unit members without bargaining so employees then made less than the contract requires in the months that the deductions took place. This is also undisputed and a ULP. And the Benton County Auditor, while working with and/or for Benton County and/or the Sheriff's Office, directly contacted bargaining unit members and implemented a repayment plan without going through the Union. This is also undisputed and a ULP.

2. As Any Large Employer, Benton County Has Several Divisions, Officials, Leaders, and Managers—But it is Still One Employer

Not surprisingly, Benton County has several divisions, departments, leaders, managers, and elected officials. But it is still one employer for purposes of state public sector labor relations.⁵ In this case, the County Auditor is one of many elected officials that can act on behalf of Benton County.⁶ Therefore, if Auditor Chilton violates the law, Benton County is

⁵ RCW 41.56.020 and 41.56.030(12).

⁶ RCW 41.56.030(12).

liable for her actions. This also applies to the Benton County Sheriff, Coroner, Assessor, or Health Department manager. Their misconduct will cause Benton County to be liable. In other words, Benton County doesn't escape liability under RCW 41.56 (or any other state law) because a person acting on its behalf is elected. In fact, since at least 1979, counties are considered one public employer for purposes of labor relations under RCW 41.56.⁷

Even though by law Benton County can only be one employer for purposes of labor relations, the undisputed facts also show that the Benton County Auditor was acting in concert with Benton County and the Sheriff's Office anyway—which is not surprising. The Benton County Auditor must work with the various elected officials and departments to do her job.

It's undisputed that Benton County Auditor Chilton was serving as a representative of Benton County and acting in concert with the other County leadership. In a November 2016 correspondence, Auditor Chilton states that the overpayment money is owed to "Benton County" and that she has collaborated with "the Board of Commissioners and the Sheriff" about an additional repayment option.⁸ This is just one example of how Benton

⁷ *WSCCCE, Local 1341C*, Decision 644, *remedy affirmed*, Decision 644-A, 1979 WA PERC Lexis 36 (PECB, 1979), *affirmed*, *Lewis County*, 31 Wn. App. at 855, 862-866, *review denied*, 97 Wn.2d 1034 (1982); *see also Pierce County*, Decision 10636, RCW 41.56.020; RCW 41.56.030(12).

⁸ CP 408-410. This additional repayment option also shows how Benton County and/or Auditor Chilton had discretion—which gave the parties issues to bargain about it.

County Auditor Chilton is part of Benton County. The Auditor’s Office and the Sheriff’s Office were working together on the overpayment issue.⁹ Auditor Chilton fully acknowledged that she worked with the Sheriff’s Office in implementing the unilateral repayment plan.¹⁰

In fact, Auditor Chilton fully admits in her declaration that she, along with Sheriff Keane, asked for approval (and received it) from the “Benton County policy makers” related to cashing out accrued leave for the overpayment of wages.¹¹ Again, Benton County officials were all working together on this unlawful repayment plan.

Notably, the Benton County Auditor working together with the Benton County Sheriff’s Office and the County Commissioners is nothing sinister or wrong—it is to be expected. It is how good County governments work. But it also shows—factually—how Benton County is one Employer for purposes of labor relations under state law.¹² As the Court of Appeals wisely stated decades ago “The burden is on the Commissioners and the independent elected officials to consult with each other as to concerns over employee working conditions so that the collective opinion of county

⁹ CP 442-446, 450-485.

¹⁰ CP 419-422, 427-435.

¹¹ CP 422.

¹² It has already been described and argued above that Benton County can only be one employer legally under longstanding PERC precedent and state law.

management can be effectively formulated and then communicated to the employees' representatives at the bargaining table."¹³

Here, Benton County leaders, elected officials, and managers came together as one employer, and obviously worked together to come up with a plan for recouping the overpayment of wages. The problem, however, was the plan that Benton County came up with violated state labor laws by directly dealing with employees (through Auditor Chilton) instead of going through their Union, and unilaterally implementing a repayment plan without bargaining with the Union.

Any claim that Chilton is an elected official and therefore not under the jurisdiction of PERC is without merit and made in bad faith. Chilton is Auditor for Benton County—the Employer of the Corrections Officers and signature to the CBA.¹⁴ These bargaining unit employees are employees of Benton County and are paid by Benton County.¹⁵ This is not in dispute. When Chilton contacts bargaining unit employees and orders/arranges for pay to be deducted from employee paychecks, she is doing this on behalf of the County and/or in conjunction with the County and/or as an agent of the County. Plus—most importantly—it happened: Pay was unilaterally

¹³ *Lewis County*, 31 Wn.App. at 865.

¹⁴ CP 528, 540-535 (Shjerven Decl. ¶ 14, Ex. E).

¹⁵ CP 503-505, 510-513, 514-516, 521-524 (Williams Decl. ¶¶ 2, 6-8, Exs. C and D; Grimm Decl. ¶¶ 2, 6-8, Exs. C and D).

deducted from employee paychecks without employee or Union approval.¹⁶ And the deductions caused bargaining unit employees to make less than is required under the CBA.¹⁷ Therefore, Benton County—the Employer—deducted pay without employee and/or Union agreement.¹⁸

Moreover, Benton County has ratified Chilton’s conduct by deducting the wages that she has ordered deducted.¹⁹ And Benton County has never disavowed or claimed that Chilton does not act on its behalf. Therefore, Chilton is clearly an agent and/or official of Benton County when she speaks directly to bargaining unit employees about the overpayments and potential repayment plans. Consequently, Benton County is liable for its own conduct—and Chilton’s conduct.

3. Benton County—And Auditor Chilton—Cannot Override RCW 41.56

In addition, Amici’s attempt to cite other state statutes related to the repayment of the overpayment of wages to justify Benton County’s refusal to bargain must fail. PERC laws and regulations, including the duty for

¹⁶ CP 526-528, 530-535, 503-505,506-513, 514-516, 517-524 (Shjerven Decl. ¶¶ 5-14, Exs. A through E; Williams Decl. ¶¶ 3-8, Exs. A through D; Grimm Decl. ¶¶ 3-8, Exs. A through D).

¹⁷ CP 528, 540-535, 504-505,506-513, 515-516, 517-524 (Shjerven Decl. ¶ 14, Ex. E; Williams Decl. ¶¶ 6-8, Exs. A through D; Grimm Decl. ¶¶ 6-8, Exs. A through D).

¹⁸ CP 526-528, 530-535, 503-505,506-513, 514-516, 517-524 (Shjerven Decl. ¶¶ 5-14, Exs. A through E; Williams Decl. ¶¶ 2-8, Exs. A through D; Grimm Decl. ¶¶ 2-8, Exs. A through D).

¹⁹ CP 526-528, 530-535, 504-505,510-513, 515-516, 521-524 (Shjerven Decl. ¶¶ 5-14, Exs. A through E; Williams Decl. ¶¶ 6-8, Exs. C and D; Grimm Decl. ¶¶ 6-8, Exs. C and D).

public employers to bargain with Unions, supersede any other state laws.

RCW 41.56.905 states that:

The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.

Therefore, any claim by Amici that some other state statute governs or trumps Benton County's duty to bargain under RCW 41.56 is invalid. Benton County has unilaterally deducted money from employee wages and/or hours from leave banks—without bargaining—and without Union approval or agreement. This too, is undisputed.²⁰

Benton County committed unfair labor practices in this case because it only considered RCW 49.48, and wrongfully ignored that the employees in question are represented by Teamsters Local 839, and therefore the Employer, Benton County, had to take additional steps in recovering the overpayment of wages—and follow RCW 41.56. For example, it had to give proper notice to the Teamsters Local 839 and give them a chance to bargain. This never happened.

And one example of how the repayment of wages is a mandatory subject of bargaining is because reducing employee paychecks each

²⁰ CP 526-528, 530-535, 503-505, 506-513, 514-516, 517-524 (Shjerven Decl. ¶¶ 5-14, Exs. A through E; Grimm Decl. ¶¶ 2-8, Exs. A through D; Williams Decl. ¶¶ 2-8, Exs. A through D).

month—to below what the contract called for—creates personal budgeting issues for employees. It creates cash flow problems since employees are getting less than they expected each month. That is, reducing the monthly pay of employees—not surprisingly—affects the wages, hours, and working conditions of these employees.

Therefore, Benton County is violating RCW 41.56 and PERC regulations. Even if the Benton County Auditor instructs Benton County to deduct these monies or hours without bargaining (or vice-versa), that does not erase the bargaining requirement. Benton County still deducted money from paychecks and/or hours from employee leave banks without bargaining.²¹ If it got bad advice from the County Auditor, that is between Benton County and its Auditor (an internal county matter). But that is not a valid defense in this case.

It is undisputed that Benton County refused to bargain about a mandatory subject of bargaining—the repayment of wages—and unilaterally implemented a repayment plan that the Union and employees did not agree to.²² Consequently, Benton County cannot claim immunity because they may have been instructed to do this by their County Auditor.

²¹ CP 526-528, 530-535, 503-505, 506-513, 514-516, 517-524 (Shjerven Decl. ¶¶ 5-14, Exs. A through E; Grimm Decl. ¶¶ 2-8, Exs. A through D; Williams Decl. ¶¶ 2-8, Exs. A through D).

²² *Id.*

Nothing gives Benton County the right to violate the contract and state collective bargaining laws.

Therefore, the Amici's attempt to separate the Benton County Auditor from Benton County must fail because it goes against longstanding PERC precedent and longstanding state law. For purposes of collective bargaining, Benton County is one employer—and it had a duty to bargain.

But unfortunately, bargaining never happened. Benton County, and Amici, continue to argue that RCW 41.56 did not apply to this situation and therefore Benton County had no duty to bargain with the Union. They are wrong.

4. PERC's Remedy Is Not a Gift of Public Funds

Teamsters Local 839 made a demand to bargain about a repayment plan in late November 2016/early December 2016, before Benton County unilaterally started to deduct the overpaid wages, but Benton County refused.²³ Teamsters Local 839 then filed a ULP in early December 2016 before Benton County unilaterally deducted the overpaid wages, but Benton County still refused to bargain.²⁴ And then PERC issued its preliminary ruling on or around January 3, 2017—right before and/or around the time

²³ CP 671-676.

²⁴ CP 665.

that Benton County was starting to unilaterally deduct the overpaid wages—and Benton County still refused to bargain.²⁵

PERC's preliminary ruling in early January 2017 gave clear guidance to Benton County that it was violating the law by not bargaining and unilaterally deducting the overpaid wages. Yet, Benton County still refused to bargain. Notably, bargaining a repayment plan would have only taken a few hours, but Benton County still refused to bargain. And now, over three years later, and after being put on notice by both the Union and PERC in December 2016 and early January 2017 that refusing to bargain violated state law, Benton County is objecting to paying the interest as a result of its refusal to bargain. It has kept appealing and delaying bargaining, which has increased the interest it must pay, and now it is objecting to the increasing interest that it is solely responsible for. This argument should be rejected.

Moreover, the Amici's gift of public funds argument cites no case law. That's because there is none to support their arguments in this case. Benton County bargaining a repayment plan is not a gift of public funds. It's following state law. And more importantly, Benton County following a PERC remedial Order—after PERC determined that Benton County violated state law—is not a gift of public funds. It is again, complying with

²⁵ CP 623-625. The first deduction took place on or around January 5, 2017 (CP 514-516, 521-522)

state law. PERC's remedial order merely requires Benton County to return to the status quo because it violated state law.

Requiring an employer that unlawfully refused to bargain, as here, to return to the status quo is a standard ULP remedy. *See, e.g., Lewis County*, Decision 10571-A, 2011 WA PERC Lexis 109 (PECB, 2011) (“The standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change....The purpose of ordering a return to the status quo is to ensure the offending party is precluded from enjoying the benefits of its unlawful act and by gaining an unlawful advantage at the bargaining table.”), *citing Herman Sausage Co.*, 122 NLRB 168, 172 (1958); *see also Kitsap County*, Decision 10836-A, 2011 WA PERC Lexis 116 (PECB, 2011). Otherwise, employers would always refuse to bargain because there would be no financial, equitable, and/or bargaining consequences.

Notably, Courts should give strong deference to PERC because it is an administrative agency that specializes in labor relations—especially true when dealing with and/or reviewing remedies ordered by PERC. For example, as stated in *Pasco Hous. Auth. v. PERC*, 98 Wn. App. 809, 991 P.2d 1177 (2000), the Court of Appeals for Division III stated, “PERC’s decisions are accorded extraordinary judicial deference, especially in the matter of remedies.” *Id.*, at 812. In fact, the Court of Appeals for Division

III also stated that “With respect to PERC decisions, limited review means that, if there was in fact an unfair labor practice, we will affirm unless the remedy is clearly outside the Commission’s power.” *Id.*, citing *Public Employment Relations Comm’n v. City of Kennewick*, 99 Wn.2d 832, 841 (1983). Moreover, “The reviewing court may not substitute its judgment for PERC’s, contrary to the general rule.” *Id.* at 814, citing *Municipality of Metro. Seattle v. Public Employment Relations Comm’n*, 118 Wn.2d 621, 633 (1992), 826 P.2d 158 (1992).

Here, therefore, PERC’s standard return-to-status-quo remedy is well within PERC’s broad discretion to issue remedies and should be affirmed by the Court. And as part of PERC’s order Benton County is required repay the money to the bargaining unit employees and pay interest because it violated the law. And it is not unusual for a public employer to have to pay a fine, money, and/or interest as punishment when it violates the law—as here. Therefore, Benton County should have to pay back the money as ordered by PERC with interest.²⁶ In fact, PERC has absolutely no discretion for waiving the interest. WAC 391-45-410(3) makes clear that unfair labor practice monetary judgments shall be subject to the same interest rates applicable to civil judgements.

²⁶ At the interest rate determined by PERC.

Under the Amici's gift of public funds argument, anytime a court or an agency ordered a public employer to pay interest, damages, sanctions, and/or attorney's fees and costs as a remedy, that would be a gift of public funds. That argument, of course, is absurd. Benton County being ordered to repay the funds with interest is the result of it flagrantly violating the law and delaying bargaining for over two years. Benton County's unlawful conduct must have consequences.

For example, if a court found that Benton County willingly violated state wage and hour laws, the court would most likely order Benton County to pay the employees the wages they were entitled to, and double damages, interest, and attorney's fees and costs—all remedies under the state wage and hour statute. This ordered remedy (in addition to the wages owed) would not be a gift of public funds—it would be a penalty for Benton County violating state wage and hour laws. Again, unlawful actions have consequences.

The Amici are trying to create the ultimate get-out-jail free card for all public employers in this state: when an agency or court orders a public employer to pay any type of money to the plaintiff/union as a punishment for violating the law, the public employer can simply refuse to pay the money/penalty and say that would be a gift of public funds. There is no caselaw to support such argument because it's absurd.

Benton County was warned ahead of time that they would be violating the law if they refused to bargain. They are still refusing, wasting time, and delaying. Benton County must not be rewarded for its refusal to bargain and multiple delays in this process.

Notably, as Teamsters Local 839 has said from the beginning, it realizes that ultimately the overpayment of wages must be returned to the County. This is just another reason why there is no gift of public funds—the overpayments will be returned. But the return method should have been bargained. This entire process could have easily been done in complete compliance with state law and the state constitution. The parties could have bargained a repayment plan, and the money would have been eventually returned, and the Union would have never had to file a ULP.

Significantly, employers, such as Benton County, have additional duties when a Union makes a demand to bargain. Good faith bargaining must take place. Benton County and Amici are both arguing for a process that does not involve a Union demanding to bargain—which is not the case here. If Benton County would have merely bargained with Teamsters Local 839 as requested, a repayment plan could have been easily bargained within hours and the money would have been returned without incident. And because the County Auditor has discretion in how the overpayment of wages can be returned, this only confirms that the employer had discretion

and a duty to bargain about the repayment. For example, the parties could have bargained about what percentage of the wages would be returned from each pay period.

Amici’s claim on page nine of its brief that Benton County “could potentially bargain the recoupment of overpaid wages to impasse and interest arbitration every month” is not correct. The monthly adjustments to wages that Amici describes in its brief are different from the facts and the case before this Court. The issue before this Court is the overpayment of wages that went on for months, and that resulted in Benton County deducting wages from employees so that they would make *less* than the contractual minimums for the month when the deductions were made. The situation described on page nine of the Amici brief involves monthly reconciling of payroll, where employees are not being paid less than what the contract calls for. So the Amici parade-of-horribles is not an issue before this Court and is not relevant.

That is, prior instances of Benton County making end of the month payroll adjustments, garnishments, support payments, payment agreement, IRS tax liens, and DOR liens are much different from Benton County collecting overpayments it mistakenly paid from the wages of the entire bargaining unit—several months after the fact—based on its own error. These adjustments are different from the current situation and not

equivalent—or even similar, as described in the *Tacoma Police Union Local 6*.²⁷

In addition, as described in prior briefing, the current case is different from *State v. Adams*²⁸, because the Union in *Adams* did not make a demand to bargain—and therefore the Employer had no duty to bargain, as it does in this case. Therefore, the issue before the court in *Adams* had nothing to do with a public Employer’s duty to bargain under state law.

III. Conclusion

In sum, under longstanding state law and PERC precedent, Benton County, its elected officials, and all its various departments and divisions are one employer for purposes of collective bargaining under state public sector labor laws. PERC’s Order applies to all of Benton County as the employer, which includes all its elected officials. And notably, this case has nothing to do with any separation of powers of county government. Amici is only raising that argument to confuse the fundamental issues in this case—which relate to a county’s duty to collectively bargain.

Benton County had plenty of notice that it was violating state labor laws by refusing to bargain a repayment plan with Teamsters Local 839, but it still refused.

²⁷ Decision 11097, 2011 WA PERC Lexis 89 (PECB, 2011).

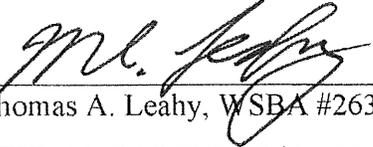
²⁸ 107 Wn.2d 611, 732 P.2d 149 (1987).

PERC issued a standard return to status quo remedy in this case, which was well within its authority and broad discretion to issue remedies where it finds violations of state law. Finally, there is no valid argument or case law to support Amici's claim that repaying the overpayments back to the bargaining unit employees—in compliance with the return to status quo order—is a gift of public funds. All of the overpayments will eventually be returned to the County—so there is no gift. Benton County must also pay interest as a remedy because it violated the law and delayed complying with PERC's initial order for over two years.

At the end of the day, Benton County only has itself to blame for not bargaining with Teamsters Local 839 and delaying complying with PERC's 2017 initial order—which only caused more interest to accrue against it.

Therefore, the Court of Appeals should affirm PERC's decision and Order.

DATED this 12th day of June, 2020.


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CASE No. 36974-9-III

**CERTIFICATE OF
SERVICE FOR
TEAMSTERS LOCAL 839'S
RESPONSE TO AMICI
CURIAE BRIEF**

DECLARATION OF SERVICE

The undersigned hereby certifies that on the 12th day of June, 2020, he caused the foregoing **Teamsters Local 839 Response to Amici Curiae Brief** to be filed via the electronic e-file system. A true and correct copy has also been served by electronic mail (pursuant to the parties' agreement for service by electronic mail) to:

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