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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 SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 18-2-00861-9

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	3
A. Assignments of error.....	3
B. Issues pertaining to assignments of error.....	4
III. STATEMENT OF THE CASE.....	5
A. Procedural statement of the case.....	5
B. Substantive statement of the case	8
IV. ARGUMENT.....	10
A. Standard for judicial review.....	10
B. PERC’s ruling that Chapter 41.56 RCW generally applies to all actions under RCW 49.48.200 (and .210) is erroneous.....	12
1. The Washington Supreme Court issued an opinion regarding public employers’ authority to recover overpayments from employees	12
2. The Legislature did not intend Chapter 41.56 RCW to apply to the recoupment of admitted overpayments	16
3. The language of Chapter 41.56 RCW does not mandate collective bargaining prior to recoupment of admitted debt from subsequent wages.....	20

C.	The rules of statutory construction also dictate that PERC’s legal conclusion is erroneous	22
1.	Effect must be given to every word and sentence.....	22
2.	Statutes dealing with the same subject are to be construed harmoniously	23
3.	A court’s fundamental objective is to ascertain and give effect to legislative intent	24
4.	PERC’s decision that Chapter 41.56 RCW controls over the more specific and more recently enacted RCW 49.48.200 (and .210) is erroneous	26
D.	Direct dealing/circumvention.....	27
E.	Unilateral change	29
F.	PERC’s legal conclusion is contrary to the law, and substantial justice has not been done	31
G.	PERC’s decision ordering Benton County to return the recouped funds, as well as interest, does not serve substantial justice and is arbitrary and capricious.....	33
V.	CONCLUSION.....	35

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Cascade Floral Products v. Labor & Industries</i> , 142 Wn. App 613, 177 P.3d 124 (2008).....	18
<i>City of Pasco v. Public Employment Relations Commission</i> , 119 Wn.2d 504, 833 P.2d 381 (1992).....	11
<i>City of Seattle v. Fuller</i> , 177 Wn.2d 263, 300 P.3d 340 (2013)	22
<i>City of Vancouver v. PERC</i> , 180 Wn. App 333, 325 P.3d 213 (2014)	11
<i>City of Yakima v. Fire Fighters</i> , 117 Wn.2d 655, 818 P.2d 1076 (1991).....	13
<i>Daniels v. Department. of Employment Security</i> , 168 Wn. App. 721, 281 P.3d 310 (2012).....	25-26
<i>Department of Transportation v. Mullen Trucking 2005</i> , No. 96358-2, 2019 WL 5616271, 451 P.3d 312 (Wash. Sup. Ct. October 31, 2019)	22
<i>Hallauer v. Spectrum Props.</i> , 143 Wn.2d 126, 18 P.3d 540 (2001).....	23
<i>International Association of Fire Fighters v. PERC</i> , 113 Wn.2d 197, 778 P.2d 32 (1989).....	20
<i>Lenander v. Department of Retirement Systems</i> , 186 Wn.2d 393, 377 P.3d 199 (2016).....	25-27
<i>Mader v. Health Care Authority</i> , 149 Wn.2d 458, 70 P.3d 931 (2003)	11
<i>Pasco Police Officers’ Association v. City of Pasco</i> , 132 Wn.2d 450, 938 P.2d 827 (1997).....	12
<i>Renton Education Association v. PERC</i> , 101 Wn.2d 435, 680 P.2d 40 (1984).....	18
<i>Renton Education Association v. Public Employment Relations Commission</i> , 101 Wn.2d 435, 680 P.2d 40 (1984)	12
<i>Sanchez v. Department of Labor & Industries</i> , 39 Wn. App. 80, 692 P.2d 192 (1984).....	18
<i>State v. Adams</i> , 107 Wn.2d 611, 732 P.2d 149 (1987)	13-15, 25, 33
<i>Sullivan v. Department of Transportation</i> , 71 Wn. App. 317, 858 P.2d 283 (1993).....	33
<i>Terhar v. Department of Licensing</i> , 54 Wn. App. 28, 771 P.2d 1180, <i>rev. den.</i> , 113 Wn.2d 1008 (1989)	33
<i>Thorpe v. Inslee</i> , 188 Wn.2d 282, 393 P.3d 1231 (2017).....	25
<i>Washington State Communication Access Project v. Regal Cinemas</i> , 173 Wn. App. 174, 293 P.3d 413, <i>rev. den.</i> , 178 Wn.2d 1010, 308 P.3d 643 (2013).....	34
<i>WEDFA v. Grimm</i> , 119 Wn.2d 738, 837 P.2d 606 (1992)	22

<i>Yakima County v. Yakima County Law Enforcement Officers' Guild</i> , 174 Wn. App. 171, 297 P.3d 745 (2013).....	11-12
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WASHINGTON STATUTES

RCW 36.01.010	36
RCW 41.56.030 (4).....	13
RCW 41.80.120	11
RCW 49.48.200 (1).....	10
RCW 49.48.200 (1)(b)	17
RCW 49.48.200	31-32
RCW 49.48.210 (10).....	15, 19, 32
RCW 49.48.210 (6).....	17
RCW 49.48.210 (9).....	17
RCW 49.48.210	36

OTHER AUTHORITIES

2B NORMAN SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION §46.6 (5th ed. 1992).....	22
2B SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION §51.2 (7th ed. 2019).....	23
<i>Benton County</i> , Decision 12790 (PECB, 2017).....	6
<i>Benton County</i> , Decision 12790-A (PECB, 2018).....	12, 15
<i>City of Renton</i> , Decision 12536 (PECB, 2016).....	27
<i>Kitsap County</i> , Decision 8292-B (PECB, 2007).....	30

I. INTRODUCTION

The plain language of Chapter 49.48 RCW authorizes the State, cities, and counties to correct erroneous overpayments to employees. These government employers are statutorily empowered to make deductions from future wage payments for recovery of debts due via recoupment of overpayments received by employees, after the employer provides written notice of the overpayments and any dispute as to the amount or occurrence of the overpayment is resolved.

Benton County employees do not dispute the existence or extent of the multiple overpayments at issue. It is also undisputed that Benton County strictly followed statutory notice requirements prior to recouping the erroneous overpayments, including personal service on each employee.

Benton County appeals a summary judgment decision from the Public Employment Relations Commission (PERC), affirmed by Superior Court, effectively requiring that Benton County return admittedly owed public funds, with interest, to certain employees, that without dispute do not now, nor have they ever had, any right, title, interest in, or right to possess or control. PERC's decision further requires Benton County to then immediately commence union negotiations through an interest arbitration process for a repayment plan, to once again recoup the erroneously paid

public funds. PERC's decision is clearly inconsistent with the letter, as well as the spirit, of the law.

Overpayments to public employees frequently occur. In fact, they occur with sufficient frequency that the Legislature felt compelled to pass legislation amending Chapter 49.48 RCW (Wages-Payment-Collection). The legislation was in direct response to a Washington Supreme Court ruling that such legislation was needed to address due process rights of union employees overpaid by the State. The legislative enactments create a statutory mechanism for public employers to recoup overpayments in a more efficient and less costly process than civil litigation, while at the same time providing public employees due process rights.

PERC erroneously interpreted Chapter 41.56 RCW and its collective bargaining provisions regarding terms and conditions of employment, wages, and benefits, and held that a debt collection plan pursuant to RCW 49.48.200 (and .210) is a mandatory subject of bargaining under Chapter 41.56 RCW. PERC's decision erroneously requires compliance with Chapter 41.56 RCW when recovering debts admittedly owed to government employers, and significantly undermines the intent of RCW 49.48.200 (and .210).

PERC's erroneous legal conclusion is further confirmed by the rules of statutory construction and renders provisions of the more specific and

more recently enacted RCW 49.48.200 (and .210) superfluous. PERC also failed to harmonize its application of Chapter 41.56 RCW with RCW 49.48.200 (and .210), ignoring the primary objective in interpreting statutes, *i.e.*, to ascertain and give effect to the intent of the Legislature in enacting a more recent and a more specific statute.

This Court should reverse PERC's decision granting the Union summary judgment, direct PERC to enter summary judgment for Benton County, and dismiss the Union's ULPs.

II. ASSIGNMENTS OF ERROR

A. Assignments of error

1. PERC erred in entering its decision on March 6, 2018, when it held that recovery of an admitted overpayment to union employees through deductions from future wage payments in accordance with the express terms of RCW 49.48.200 (and .210) is not allowed and is instead a mandatory subject of bargaining pursuant to Chapter 41.56 RCW.
2. PERC erred by holding Chapter 41.56 RCW requires bargaining with a union prior to the recovery of overpaid public funds from government employees, even though deductions from subsequent wages is expressly authorized by RCW 49.48.200 (and .210).

3. PERC erred in finding Benton County violated Chapter 41.56 RCW and circumvented the Union by dealing directly with employees, even though Benton County was expressly directed to communicate with such employees pursuant to RCW 49.48.200 (and .210) when recovering funds owed to the County as a result of erroneous overpayments to employees.
4. PERC arbitrarily and capriciously ordered Benton County to repay admittedly owed public funds back to affected employees, with interest, and then negotiate a repayment plan with the Union to again recoup the admittedly owed funds from employees.

B. Issues pertaining to assignments of error

1. Did PERC's decision erroneously conclude that Chapter 41.56 RCW effectively supersedes RCW 49.48.200 (and .210), mischaracterize a repayment plan for admitted amounts owed as a "wage" issue, thereby concluding Benton County had a mandatory duty to bargain with government employees instead of pursuing a statutory authorized process for the recoupment of erroneous overpayments? Yes.

2. Did PERC erroneously ignore rules of statutory construction when it imposed a mandatory obligation to bargain a repayment plan under Chapter 41.56 RCW, essentially overruling the more recent and specific statutory directives and process enacted by the legislature in RCW 49.48.200 (and .210), for government employers to recover amounts they are owed through recoupment of the erroneous overpayments from employees? Yes.
3. Is PERC's decision arbitrary or capricious and/or an error of law, in light of the above stated issues? Yes.

III. STATEMENT OF THE CASE

A. Procedural statement of the case

Teamsters Local 839 (Union) filed the first Unfair Labor Practice (ULP) complaint against Benton County (County) with PERC on December 5, 2016, alleging that the County refused to bargain and derivatively interfered with unit members, in violation of RCW 41.56.140 (4) and (1). The ULP complaint also alleged the County improperly circumvented the Union and dealt directly with represented employees, when the County presented repayment options to employees to recover erroneously paid public funds and refused to bargain with the Union over a repayment plan.

CP 622-23. The Union and the County filed cross-motions and supporting declarations for summary judgment. CP 152.

The Union filed a second ULP complaint against the County on April 13, 2017, similarly alleging the County refused to bargain and derivatively interfered, in violation of RCW 41.56.140 (4) and (1). CP 218-19. The second ULP complaint again alleged the County refused to bargain with the Union and improperly recouped public funds erroneously delivered to employees by utilizing the process in RCW 49.48.200 (and .210), without providing the Union an opportunity to bargain the terms of a repayment plan.¹ *Id.*

The Union's two ULP complaints were consolidated by the PERC Examiner. CP 153. The Examiner issued Order on Motions For Summary Judgment, Findings Of Fact, Conclusions Of Law, And Order, on November 3, 2017. *Benton County*, Decision 12790 (PECB, 2017); CP 152-76.

The Examiner found no genuine issue of material fact existed and concluded that the County refused to bargain and derivatively interfered in

¹ The Union's first ULP claimed the County declined to bargain a repayment plan for recoupment of public funds erroneously delivered to Corrections Officers (COs) and dealt directly with COs during the recoupment process pursuant to express statutory authority in RCW 49.48.200 (and .210). The Union filed a second ULP claiming the County unilaterally commenced the recoupment process through payroll deductions without negotiations.

violation of RCW 41.56.140 (1) and (4). The Examiner also found the County refused to bargain and derivatively interfered in violation of RCW 41.56.140 (1) and (4) by unilaterally applying wage deductions to recoup the overpayments. CP 170-71.

In addition to finding that a repayment plan was a mandatory subject of bargaining, the Examiner further concluded that the County was not relieved of its duty to bargain even when following statutory RCW 49.48.200 (and .210) criteria and process authorizing recoupment of the undisputed overpayments from future employee wage payments (CP 166), essentially ruling that Chapter 41.56 RCW “trumped” Chapter 49.48 RCW.

The County timely appealed the Examiner’s decision to PERC on November 27, 2017. CP 100-07. On March 6, 2018, PERC issued its decision affirming the Examiner’s Findings of Fact, Conclusions of Law, and Order and adopted them as PERC’s own. CP 87-90.

PERC affirmed the Examiner’s decision. It too concluded there was no genuine issue of material fact (*Id.*) and ruled the Union was entitled to Summary Judgment. PERC affirmed the Examiner’s conclusion that a government employer’s decision to recoup admittedly owed funds from employees is a mandatory subject of bargaining, despite the express statutory authorization in RCW 49.48.200 (and .210). CP 89.

The County filed a Petition for Review on April 4, 2018, timely appealing PERC's decision to Superior Court. CP 1-39. The Superior Court denied the petition on April 9, 2019, adopting all findings of fact and legal conclusions of PERC and affirming PERC's decision. CP 917-19.

The County moved for reconsideration on April 19, 2019. CP 824-26. On July 1, 2019, the Superior Court denied the Motion for Reconsideration. CP 920-25. The Superior Court upheld PERC's ruling that the application of Chapter 41.56 RCW does not render any part of RCW 49.48.200 (and .210) ineffective, and PERC's remedy requiring repayment of public funds erroneously paid to employees, plus interest, was both appropriate and logical. CP 914-25.

The County timely appealed to this Court.

B. Substantive statement of the case

"Overpayments" (when employers erroneously overpay an employee more money than they are entitled) are not a rare occurrence for public employers, including Benton County. CP 338-39. On or about November 1, 2016, the Benton County Auditor's Office (Auditor) discovered an accounting software error had caused erroneous overpayments to Corrections Officers (CO) and Patrol Deputies in the Benton County Sheriff's Office (Sheriff's Office). CP 369.

RCW 49.48.200 expressly provides that funds owed to government employers due to erroneous overpayments to employees may be recovered by either civil action or the statutory recoupment process detailed in RCW 49.48.200 (and .210) through deductions from subsequent wage payments. The Auditor pursued recovery of funds admittedly owed by certain Corrections Officers² via deductions from subsequent wage payments as expressly provided in RCW 49.48.200 (and .210) and timely followed each and every statutory requirement in strict detail. CP 418-24.

Pursuant to RCW 49.48.210, Corrections Officers were personally served with written statutory notice that included: the amount of the overpayment, the basis for the claim, a demand for repayment, a requirement of payment through deduction of five percent of disposable wages per pay period or such greater amount that the employee chooses, and employee statutory rights. CP 419-20. Neither the Union nor Corrections Officers ultimately challenged either the *occurrence* or the *amount* of the erroneous overpayments.³ CP 420-21. In fact, PERC

² No Sheriff deputies challenged the occurrence or the amount of overpayments through grievance procedures in the CBA, or filed a ULP, and the same statutory process for a government employer to recoup erroneously paid funds to government employees was used with them without objection. CP 342-43, 421. Patrol Deputies voluntarily repaid the County these erroneous overpayments, two through deductions. CP 298.

³ Thus, employees acknowledged the funds are owed to the County pursuant to RCW 49.48.210 (6), (9). CP 787. The Union did file a general grievance with the Sheriff pursuant to the CBA *prior* to the Auditor's service on Corrections Officers of the required RCW 49.48.200 (and .210) statutory notice, although the Union did *not* challenge the *occurrence*

expressly found the Union does not dispute that overpayments occurred, the amounts of the overpayments, or that the employees are required to repay the overpayments. CP 89.

The Auditor did not negotiate repayment plans with *any* employee. Instead, the Auditor simply notified affected employees pursuant to RCW 49.48.210 of the County's intended course of action (CP 429) under RCW 49.48.200, which reads in part:

[I]f the overpayment is recovered by deduction from the employee's subsequent wages, each deduction shall not exceed: (a) Five percent of the employee's disposable earnings in a pay period other than the final pay period; or (b) the amount still outstanding from the employee's disposable earnings in the final pay period. The deduction from wages shall continue until the overpayment is fully recouped.

RCW 49.48.200 (1).

The Auditor also communicated other acceptable methods for employees to discharge their debt as authorized by RCW 49.48.200 (2). CP 422-24. Some employees voluntarily opted to have more than the five percent of their disposable wages deducted. CP 419-20, 429.

IV. ARGUMENT

A. Standard for judicial review

or the *amount*, of the erroneous overpayments, nor did the grievance demand to negotiate a repayment plan. The Union ultimately abandoned that grievance. CP 380-83.

PERC is the agency charged with administering and ruling on ULP complaints. RCW 41.80.120. This appeal is therefore governed by the standard of review of decisions of adjudicative agencies. The Washington Administrative Procedures Act (APA), Chapter 34.05 RCW, governs review of a PERC decision in a ULP case. *Yakima County v. Yakima County Law Enforcement Officers' Guild*, 174 Wn. App. 171, 180, 297 P.3d 745 (2013).

Appellate courts review PERC's decision, not the Examiner's decision or the Superior Court decision. *Id.* Appellate courts sit in the same position as a Superior Court and apply to the record before the administrative agency the standards of review under the APA. *Mader v. Health Care Authority*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003).

Questions of law, including whether PERC acted outside of its authority or erroneously interpreted or applied the law, are reviewed de novo. *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). "We review any questions of law, such as the Commission's interpretation of a statute or judicial precedent, de novo." *City of Vancouver v. PERC*, 180 Wn. App 333, 347, 325 P.3d 213 (2014). When mixed questions of law and fact are reviewed, the court does not try the facts de novo, but determines the law independently and

applies the law to the facts as found by the agency.⁴ *Renton Education Association v. Public Employment Relations Commission*, 101 Wn.2d 435, 441, 680 P.2d 40 (1984).

When review is sought on the basis of incorrect application of the law, the court may substitute its interpretation of the law for that of PERC. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

PERC's decision shall be reversed if the reviewing court determines PERC erroneously interpreted or applied the law. *Yakima County v. Yakima County Law Enforcement Officers' Guild*, 174 Wn. App. 171, 180, 297 P.3d 745 (2013). The reviewing court will "review an order granting summary judgment de novo, engaging in the same inquiry as the body that decided it, here the PERC." *Id.* at 181.

B. PERC's ruling that Chapter 41.56 RCW generally applies to all actions under RCW 49.48.200 (and .210) is erroneous.

1. The Washington Supreme Court issued an opinion regarding public employers' authority to recover overpayments from employees.

⁴ The Union did not challenge PERC's determination that: "the union did not dispute that the overpayments occurred, the amounts of the overpayments, or that the employees are to pay back overpayments." *Benton County*, Decision 12790-A (PECB, 2018), at 3; CP 89.

In 1987, the Washington Supreme Court opined as to the authority of a public employer to recover excess funds held by union employees as the result of erroneous overpayments.⁵ In the early 1980s, the Washington State Department of Transportation (WSDOT) erroneously paid over 1,000 of its union employees at a higher rate than they were entitled, resulting in an overpayment of over \$120,000. *State v. Adams*, 107 Wn.2d 611, 613, 732 P.2d 149 (1987). Over 400 employees did not voluntarily repay the funds, and the collective debt owed to the State remained at over \$50,000. *Id.* Obviously, 400 lawsuits or even one lawsuit against 400 individuals, would have been unwieldy for the State.

Presumably for that reason, the Attorney General informed the WSDOT employees' union representative that unless the employees voluntarily paid the amounts owed, the State would begin deducting \$50 per month from the paycheck of each employee that owed the State funds. *Id.* However, instead of implementing this recoupment plan that was not expressly authorized by statute, the State subsequently sent letters directly to each employee that still had not paid the debt and demanded voluntary

⁵ At the time, Chapter 41.56 RCW had been in effect for over 15 years, but RCW 49.48.200 (and .210) did not exist. *City of Yakima v. Fire Fighters*, 117 Wn.2d 655, 667, 818 P.2d 1076 (1991). As of the date of the decision and continuing through today, the Legislature has required public employers to collectively bargain "on personnel matters, including wages . . . which may be peculiar to an appropriate bargaining unit of such public employer . . ." RCW 41.56.030(4).

payment. *Id.* By the following year, nearly half of the debt was still owed, so the State elected to sue the employees that had not paid, seeking a declaratory judgment that it had unilateral authority to deduct a “reasonable amount” from each employee’s paycheck until the debts were paid. *Id.* at 613-15.

The *Adams* Court posed the question as “whether the summary withholding of future wages to recover overpayments comports with due process, *where the employees dispute the existence or amount of overpayments.*” *Id.* at 616 (emphasis added). The *Adams* Court held: 1) because no statutory procedures governing the recovery of alleged overpayments to state employees existed, the summary recoupment of the debt from future wage payments did not comport with due process; and 2) because of the lack of statutory procedures to protect employees from erroneous claims, “the State’s only means of recovery [was] by filing a civil action” *Id.* at 619.

Despite the fact that Chapter 41.56 RCW had been in place nearly 20 years before these events occurred, the *Adams* Court did *not* state or even imply that *any* collective bargaining was undertaken or required under Chapter 41.56 RCW, nor did the *Adams* Court indicate *any* concern with the State’s direct correspondence with the debtor employees. The *Adams* Court made absolutely no statement indicating that the mandates of Chapter

41.56 RCW applied.⁶ In fact, the *Adams* Court expressly authorized the State to proceed to sue its employees, although there was no prior collective bargaining.⁷

Without any indication that the union was or needed to be involved, the *Adams* Court held that public employers may recoup funds from employees, including those in a union, so long as there is a statutory scheme to protect the employees' due process rights.⁸ As discussed below, in direct response to *Adams*, the Legislature enacted RCW 49.48.200 (and .210) to provide that precise due process. The Legislature knew that many public employees were union members when it enacted that legislation, and it chose to invoke the protections offered under Chapter 41.56 RCW *only if an employee disputed the existence of, or amount of, the debt.* RCW 49.48.210 (10). The Legislature's actions evidence a very *clear* intent that

⁶ The sole reference to the defendants' union in *Adams* is that the AG initially sent the union a letter advising it that a recoupment would occur if voluntary repayments were not made. *Adams*, 107 Wn.2d at 613. Given the detailed recitation of facts and the lack of any reference to chapter 41.56 RCW, it is clear that no "collective bargaining" ensued.

⁷ PERC, on the other hand, ruled here that the County's contact with employees as required by Chapter 49.48 RCW was "direct dealing", and that Chapter 41.56 RCW requires collective bargaining regarding the County's recoupment of the overpayments. *Benton County, supra.*, at 3. CP 89.

⁸ If the Supreme Court believed that Chapter 41.56 RCW had applied to the public employer's actions in *Adams*, then would not the collective bargaining requirement imposed by PERC in the case at bar have satisfied the employees' due process rights *without* the need for further legislation? And why did the Court in *Adams* hold that the State could proceed to sue its employees for the funds owed despite a lack of prior collective bargaining?

Chapter 41.56 RCW *does not* apply to require collective bargaining in situations where the debt is not disputed.

In sum, the Supreme Court in *Adams* did not state or even imply that the State's ability to unilaterally recoup its funds or proceed to sue union employees was predicated on first collectively bargaining with the union on the issue.

2. The Legislature did not intend Chapter 41.56 RCW to apply to the recoupment of admitted overpayments.

In 2003, the Legislature filled the void that existed when the Supreme Court decided *Adams* and enacted legislation authorizing the State to recoup funds owed to it by State employees, but only after adhering to certain safeguards affording the public employees due process. Although unclear why it took 15 years to address the recoupment issue, the Legislature expressly acknowledged the *Adams* case and that in 2002 there were over 1,200 overpayments made to State employees. CP 869. Presumably, the State grew weary of the dilemma of letting employees either keep funds to which they were not entitled or having to sue hundreds or even potentially thousands of its employees each year to recover public funds owed to the State due to the erroneous overpayment of funds.

Empathizing with the State's plight, Substitute House Bill 1738 was passed to provide relief. CP 855-57. That bill was codified as RCW

49.48.200 (and .210), and it *expressly* granted the State the right to recoup funds from State employees' wages to satisfy debts owed to the State. Specifically authorized was withholding of up to five percent of disposable earnings per paycheck, or the *full amount* owed from the employee's disposable earning if the deduction was from an employee's final paycheck. CP 855; RCW 49.48.200 (1) (b).

The bill also explicitly set forth the process for the State and the employee to directly notify each other of their respective positions, providing an employee with the required due process that was lacking when the *Adams* case was decided. Despite the existence of Chapter 41.56 RCW, the Legislature *required* the State to *directly* deal with its employees prior to recouping overpayment funds from its employees. And importantly, the bill passed in 2003 *made absolutely no reference whatsoever to unions or collective bargaining*, which was consistent with the *Adams* opinion. CP 855-58.

In 2004, the Legislature passed SHB 2507 to amend its 2003 legislation in two ways. First, it granted the recoupment authority to cities and counties. CP 875. Second, recognizing that public employees are frequently union members, the Legislature specified that disputes with

union employees over the *existence or amount of a debt* must be resolved through the grievance procedures within any applicable CBA⁹. CP 877-78.

The 2003 and 2004 legislation clearly establish that PERC's ruling in this case is erroneous, and that the Legislature did *not* intend Chapter 41.56 RCW to generally apply to the statutorily authorized recoupment of overpayments from public employees. The Legislature was aware of the existence of Chapter 41.56 RCW when it *unanimously* passed legislation in 2003 and 2004 authorizing public employers to recoup debt owed by public employees. CP 854-58, 874-78. The Legislature is deemed to have full knowledge of existing law (*Sanchez v. Department of Labor & Industries*, 39 Wn. App. 80, 85, 692 P.2d 192 (1984), citing *Renton Education Association v. PERC*, 101 Wn.2d 435, 442, 680 P.2d 40 (1984)), and to have considered its prior enactments when enacting new legislation. *Cascade Floral Products v. Labor & Industries*, 142 Wn. App 613, 621, 177 P.3d 124 (2008).

If, as PERC held, Chapter 41.56 RCW was applicable to *all* public employer actions under RCW 49.48.200 (and .210) that involved union employees, then there would have been *no* reason for the Legislature to adopt RCW 49.48.210 (10) in 2004. If Chapter 41.56 RCW was applicable

⁹ The Bill Analysis and Bill Reports for HB 2507 and SHB 2507 all recognized these were the two points of the bill. CP 874-92.

to *every* step of *every* recoupment process under RCW 49.48.200 (and .210), the grievance procedures set forth in a collective bargaining agreement (CBA) obviously would be the avenue to resolve disputes. PERC's legal ruling in this matter would render RCW 49.48.210 (10) *completely* superfluous.

Instead, the Legislature only mandated the use of grievance procedures for *disputed* debts of union employees. RCW 49.48.210 (10). Furthermore, if collective bargaining *was* required with respect to the *process* of recouping admittedly owed public funds, then why would the Legislature have *expressly* authorized counties "to proceed to recoup the overpayments" under RCW 49.48.200? And why would the Legislature additionally have required that the "debt shall be collected" pursuant to RCW 49.48.200 if an employee does not request a hearing to dispute the "amount" or the "occurrence" of the debt? *See* RCW 49.48.210 (6), (9).

Finally, if the Legislature did not intend that RCW 49.48.200 (and .210) be a "stand-alone" process, and that Chapter 41.56 RCW generally applied to all recoupment of overpayments from union public employees, why would the Legislature have mandated "direct dealing" by *requiring* government employers communicate *directly* with employees and not at least require concurrent notice to the involved union? The answer is simple—the *clear* intent of the Legislature was that Chapter 41.56 RCW

does not generally apply to situations where an employee owes a government employer an *admitted* debt due to the overpayment funds.

3. The language of Chapter 41.56 RCW does not mandate collective bargaining prior to recoupment of admitted debt from subsequent wages.

Chapter 41.56 RCW requires that unions and employers bargain over wages, hours, and other terms and conditions of employment. Areas considered mandatory subjects of bargaining include: wages, health care, holiday pay, sick leave, and the length of the collective bargaining agreement. *International Association of Fire Fighters v. PERC*, 113 Wn.2d 197, 778 P.2d 32 (1989). “Managerial decisions that only remotely affect ‘personnel matters’, and decisions that are predominantly ‘managerial prerogatives’, are classified as non-mandatory subjects.” *Id.* at 200. In the instant case, the decision to recover funds admittedly owed by employees of the Sheriff’s Office through deductions from subsequent wage payments as expressly provided in RCW 49.48.200 (and .210) in lieu of civil action is clearly not a mandatory subject of bargaining. It is *not* a decision impacting the “wages” of affected Corrections Officers, because they undeniably were paid their full wages and then some, due to the overpayment. But rather, the decision pertains to repayment of admitted debt, not unlike garnishments, DOR liens, IRS liens, federal student loans,

child support, etc. Because the debt being recouped is admitted, there is no dispute that the employees were paid the full amount of wages that were owed them and were done so even earlier than which the employees were entitled.

No party with standing to challenge the “occurrence” or the “amount” of the overpayments, *i.e.*, Corrections Officers, challenged either the occurrence or the amounts of overpayments using the grievance procedures in the CBA. The statutory scheme provided by the Legislature in RCW 49.48.200 (and .210) provides a detailed procedure for government employers to follow for the recovery of overpayments, which the Auditor followed. No authority exists for the proposition the Auditor was required to bargain the amount of the deductions from subsequent wage payments.

PERC does not cite to any specific authority directly supporting its conclusion that deductions from subsequent wages by a government employer to recover funds admittedly owed due to erroneous payments is a “wage” issue within the contemplation of applicable authority, including RCW 41.56.140 (1) and (4), and therefore, a mandatory subject of bargaining. Wages are earned. Here, the Auditor was recovering public funds erroneously misdelivered to Sheriff’s Office employees—*not* wages earned. The employees admittedly had no right, title, ownership interest

and/or right to possess the erroneously misdelivered public funds, which PERC acknowledged still belonged to Benton County. CP 89.

C. The rules of statutory construction also dictate that PERC’s legal conclusion is erroneous.

The Court’s “role in interpreting statutes is to ‘discern and implement the legislature’s intent.’” *Department of Transportation v. Mullen Trucking 2005*, No. 96358-2, 2019 WL 5616271, 451 P.3d 312, at **7 (Wash. Sup. Ct. October 31, 2019). The rules of statutory construction all indicate that PERC’s legal conclusion is erroneous.

1. Effect must be given to every word and sentence.

The elementary rule of statutory construction is that effect must be given, if possible, to every word and sentence. A statute should be not construed so that a provision is rendered superfluous. 2B NORMAN SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION §46.6 (5th ed. 1992); *see, e.g., WEDFA v. Grimm*, 119 Wn.2d 738, 746, 837 P.2d 606 (1992). “We have, however, consistently stated that statutes or constitutional provisions should be construed so that no clause, sentence or word shall be superfluous, void, or insignificant.” *Grimm*, 119 Wn.2d at 746. Statutory constructions that yield unlikely, absurd, or constrained consequences must be avoided. *City of Seattle v. Fuller*, 177 Wn.2d 263, 270, 300 P.3d 340 (2013).

funds by a public employer from a union employee under RCW 49.48.200 (and .210), then RCW 49.48.210 (10) would be entirely superfluous. Yet, the Legislature *explicitly* added that provision as part of its 2004 legislative amendments. CP 877-78. There would be *no* reason for the Legislature to have added that provision in 2004 if Chapter 41.56 RCW already generally applied in all instances of recoupments of overpayments made under RCW 49.48.200 (and .210).

2. Statutes dealing with the same subject are to be construed harmoniously.

Statutes dealing with the same subject, *i.e., in pari materia*, are to be construed harmoniously if reasonably possible. 2B SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION §51.2 (7th ed. 2019); *see, e.g., Hallauer v. Spectrum Props.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). PERC’s interpretation of Chapter 41.56 RCW and RCW 49.48.200 (and .210) does not harmonize the statutes. Rather, PERC simply asserts that Chapter 41.56 RCW “trumps” the new and more specific recoupment statutes in RCW 49.48.200 (and .210), negating several provisions of the carefully laid out process unanimously approved by the Legislature in 2003 and 2004.¹⁰

¹⁰ PERC’s decision is inconsistent with: (a) RCW 49.48.210 (1)’s requirement of direct interaction with employees; (b) the requirement of recoupment under RCW 49.48.210 (9) if the debt is admitted; and (c) the reference to CBA procedure under RCW 49.48.210 (10) *only* if the debt is disputed.

PERC's interpretation that collective bargaining must occur with respect to how much to deduct from each paycheck is particularly inconsistent with the express language of RCW 49.48.200 (1), which *unequivocally* authorizes an employer to deduct the *entire* amount of the outstanding debt from an employee's disposable earnings if the deduction was from the *final* paycheck. Under PERC's interpretation, that language does not mean what it *clearly* states, and instead, the public employer needs to bargain with the union as to how much to deduct from an employee's *final* paycheck, bargaining to impasse and then engage in interest arbitration if necessary. The departing employee would be long gone with their last paycheck before the union and the employer collectively bargained issues related to a repayment plan for the recoupment of the overpayment(s), effectively leaving the employer with only one viable option—civil action and rendering the authorization in RCW 49.48.200 (1) meaningless.

3. A court's fundamental objective is to ascertain and give effect to legislative intent.

When engaging in statutory interpretation, a court's fundamental objective is to ascertain and give effect to legislative intent. It must begin with the plain meaning of the statutes at issue, and in doing so consider the text in question, the context of the statutes, related provisions, amendments

to the provision, and the statutory scheme as a whole. If there is uncertainty, it may resort to aids of construction and legislative history. *See, e.g., Lenander v. Department of Retirement Systems*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016).

In this case, PERC found that Benton County was obligated to collectively bargain with the Union with respect to *every* aspect of the recoupment of funds admittedly owed to Benton County by Corrections Officer employees. The flaws in PERC’s legal conclusion are that it is inconsistent with the express language of RCW 49.48.200, the clear legislative intent reflected by the language of RCW 49.48.210, as demonstrated by the context of that legislation given the Washington Supreme Court’s decision in *State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987), the legislative history, and the well settled rules of statutory construction.

“In interpreting a statute, our *primary objective is to ascertain and give effect to the intent of the legislature.*” *Thorpe v. Inslee*, 188 Wn.2d 282, 290, 393 P.3d 1231 (2017) (emphasis added). “The APA allows a reviewing court to reverse if, among other things, the [administrative agency] based [its] decision on an error of law, if substantial evidence does not support the decision, or if the decision was arbitrary or capricious.” *Daniels v. Department. of Employment Security*, 168 Wn. App. 721, 727, 281 P.3d 310

(2012).

PERC's decision was not reasonable and was not in accordance with either Chapter 41.56 RCW or RCW 49.48.200 (and .210). Even the Examiner acknowledged that the unusual factual circumstances dictated an order different from the regular status quo due to the fact that affected employees would remain liable for repayment of the wage overpayments if Benton County were to return the public funds. CP 167.

4. PERC's decision that Chapter 41.56 RCW controls over the more specific and more recently enacted RCW 49.48.200 (and .210) is erroneous.

PERC concluded Chapter 41.56 RCW essentially "trumps" RCW 49.48.200 (and .210), without any supporting authority. PERC had a duty to discern and give effect to the legislative intent behind the enactment and amendment of RCW 49.48.200 (and .210) in 2003 and 2004. *See, Lenander*, 186 Wn.2d at 412.

Chapter 41.56 RCW does not reference RCW 49.48.200 (or .210), does not address a government employer recouping overpayments erroneously paid to union employees by deductions from subsequent wage payments, and does not reference civil action authorized by a county's corporate powers. However, to the extent a tribunal with jurisdiction

ultimately finds and determines Chapter 41.56 RCW addresses the same subject as RCW 49.48.200 (and .210), the courts provide guidance.

To the extent there are apparent conflicts between statutes, *courts generally resolve such conflicts by giving 'preference to the more specific and more recently enacted statute.'* Furthermore, in interpreting conflicting statutory language, the court may ascertain legislative intent by examining the legislative history of particular enactments.

Lenander, 186 Wn.2d at 412 (emphasis added).

In the instant case, RCW 49.48.200 (and .210) are clearly more specific and more recently enacted than Chapter 41.56 RCW. To that end, RCW 49.48.200 (and .210) lawfully and appropriately dictated the actions of the Auditor.

D. Direct dealing/circumvention.

PERC erroneously concluded Benton County dealt directly with its employees and circumvented the Union when the Auditor expressly followed the statutory requirements in RCW 49.48.200 (and .210) to recoup funds admittedly owed by employees due to overpayments. “In order for a circumvention violation to be found, the complainant must establish that . . . the employer engaged in direct negotiations with one or more employees concerning a *mandatory subject of bargaining.*” *City of Renton*, Decision 12536 (PECB, 2016) (emphasis added).

The Legislature was very clear in the procedural rights provided to government employees in receipt of misdelivered public funds. RCW 49.48.210 enunciates employees' procedural rights in precise detail. And PERC acknowledged RCW 49.48.210 (10) "required the employer to provide written notice to employees." CP 89. Strictly following express statutory procedures to recoup funds admittedly owed eliminates claims of a ULP as required by the statutory process enunciated by the Legislature for recoupment of overpayments to government employees. It is clearly *not* a mandatory subject of bargaining for a government employer to recover erroneously paid funds from employees through civil action or through deductions from subsequent wage payments, pursuant to express authority in RCW 49.48.200 (and .210).

The facts are not in dispute in this regard. The Auditor provided written notice to affected employees containing specific statutory requirements pursuant to RCW 49.48.200 (and .210). The employees were advised that five percent of their disposable earnings in subsequent pay periods would be deducted until their debt was paid, unless the individual elected a higher deduction. This election was at the sole election of the individual employees. Benton County did not *negotiate* with employees—employees paid the statutory amount of five percent unless they individually authorized a larger amount.

To conclude a ULP was committed in this case, it must be found Benton County directly negotiated with one or more employees regarding a *mandatory* subject of bargaining. The record shows Benton County's contact with its employees was limited to statutory requirements in RCW 49.48.200 (and .210) for the return of admitted employee debts, which is not equivalent to a mandatory subject of bargaining.

Benton County clearly did not improperly engage in direct dealing or circumvention, involving affected Corrections Officers or engage in "negotiations", directly or otherwise, as erroneously determined by PERC.

E. Unilateral change.

PERC also erroneously concluded as a matter of law that Benton County improperly committed a unilateral change when it applied wage deductions or accrued leave cash outs to recover admitted debts, without providing the Union an opportunity to bargain. The evidence in the record does not support PERC's determination that Benton County changed a condition of employment by applying the statutory process in RCW 49.48.200 (and .210) to recoup overpayments through deductions from wage payments. In fact, evidence in the record establishes Benton County regularly deducted from employees' wages pursuant to statutory and/or other applicable authority.

In order for PERC to have found sufficient evidence on the record for summary judgment that Benton County committed a unilateral change of a term and condition of employment without bargaining a mandatory subject of bargaining, the record on summary judgment must show the dispute pertains to a mandatory subject of bargaining. *Kitsap County*, Decision 8292-B (PECB, 2007).

PERC's order erroneously requires Benton County to bargain a repayment plan, in derogation of government's rights pursuant to RCW 49.48.200 (and .210) to recover undisputed debts owed Benton County. PERC's decision and order result in an absurd situation where while conceding the public funds unquestionably belong to Benton County, Benton County nonetheless is required to pay public funds *back* to employees that *never* had *any* ownership interest in and allow these employees to benefit from interest on such funds. PERC's order then requires the parties to expend considerable resources in negotiating an agreement on a repayment plan contrary to the express statutory authority of Chapter 49.48 RCW, and bargain to impasse or engage in interest arbitration as required.

RCW 49.48.200(2) generally limits the amount that may be recouped each pay period at five percent of the employee's disposable earnings, unless it is an employee's final pay period. The employees herein

had the statutory option to elect to pay more than five percent. Under PERC's erroneously legal conclusion, Benton County loses the use of a sizeable amount of public funds for months, and even longer if the Union advances the matter to interest arbitration following negotiations to impasse and PERC mediation. In the meantime, PERC's decision would allow employees to collect interest on public funds in their possession, for which they do not have and will never have, a right to possess, control and/or own.

F. PERC's legal conclusion is contrary to the law, and substantial justice has not been done.

Based on the above, the Court should reverse PERC's decision. PERC failed to consider or at least fully appreciate the context and intent of the Legislature's 2003 enactment regarding Chapter 49.48 RCW, and 2004 amendments, resulting in RCW 49.48.200 (and .210). PERC also failed to consider or at least fully appreciate the fact that the Legislature *expressly* mandated that *only* when union employees covered by a CBA dispute the *occurrence* or the *amount* of the overpayment, were they entitled to utilize the CBA grievance procedures.

The Legislature understood that many public employees collectively organize in unions, but nonetheless opted to *not* require government employers to notify unions of overpayments. Instead, the Legislature only required government employers to *directly* notify *employees*. RCW

49.48.200. Like the case before the Court,¹¹ many overpayment instances do not involve any dispute about the *existence* or *amount* of the debt. Yet it was only when the debt is disputed that the Legislature afforded union employees the right to use CBA grievance procedures. RCW 49.48.210 (10). That requirement is logical, because if there is a dispute about the debt, then the employer may or may not be wrongfully reducing an employee's wages without due process protections.

However, if the employee does not dispute the debt and does not seek an opportunity to be heard through the grievance procedures, then it is not a "personnel matter" subject to the definition of collective bargaining under RCW 41.56.030 (4), as determined by PERC. Rather, it is a debtor/creditor issue, and the employee undeniably was paid the full amount of their wages, albeit earlier than they were entitled. It is for that reason that RCW 49.48.210 (6) and (9) were adopted and state that if an employee does not dispute the debt, the debt shall be deemed established and the employer shall proceed to recoup the funds pursuant to RCW 49.48.200.

Furthermore, Benton County's interpretation is *clearly* consistent with the Court's holding in *Adams* that an employer may civilly sue an employee for recovery of erroneous overpayments of unearned wages

¹¹ PERC found the Union does not dispute that overpayments occurred, the amounts of the overpayments, or that the employees are required to repay the overpayments. CP 89.

despite the lack of collective bargaining and may recoup the amount from wages so long as the *employee* (not the union) is given an opportunity to be heard pursuant to a statutory process. *See generally State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987).

Benton County's interpretation and application of RCW 49.48.200 (and .210) is also consistent with Legislative intent reflected by its decision to add RCW 49.48.210 (10) in 2004 and explicitly grant employees covered by a CBA the ability to utilize the grievance procedures in the CBA, *but only if they dispute the debt*. It is also consistent with the rules of statutory construction that require PERC to not render RCW 49.48.210 (10) superfluous, and to interpret Chapter 41.56 RCW and RCW 49.48.200 (and .210) in harmony.

G. PERC's decision ordering Benton County to return the recouped funds, as well as interest, does not serve substantial justice and is arbitrary and capricious.

An administrative agency acts in an arbitrary or capricious manner if it takes "willful and unreasonable action, without consideration of facts or circumstances." *Terhar v. Department of Licensing*, 54 Wn. App. 28, 34, 771 P.2d 1180, *rev. den.*, 113 Wn.2d 1008 (1989); *Sullivan v. Department of Transportation*, 71 Wn. App. 317, 321, 858 P.2d 283 (1993).

PERC determined that Benton County must return public funds that employees acknowledge belong to the County, as well as interest¹² on those funds. For the reasons stated above, Benton County certainly did not violate any law. At the very least, this is an unsettled question of law. Benton County believed it was following the law by following the letter of RCW 49.48.200 (and .210). And neither the *Adams* case nor the express language of RCW 49.48.200 (and .210) gave any indication that collective bargaining under Chapter 41.56 RCW was required.

Not only that, but the circumstances of this case make PERC's order that Benton County return public funds, with interest, to employees that admittedly have no interest or right to possess, completely illogical. The Examiner recognized that this was an "unusual situation", and that an "order different from the regular status quo remedy" may be dictated. CP 167. Perplexingly, the Examiner, as affirmed by PERC, gave the Union the authority to demand the reinstatement of the status quo, *i.e.* payment of public funds to employees that have no right to such funds, along with

¹² Teamsters asserts interest is owed at the catch-all rate of twelve percent, presumably under RCW 4.56.110(5). CP 785. However, it appears the applicable interest rate, if any interest were owed, would be two percentage points above the prime rate, pursuant to RCW 4.56.110(3). See, for example, *Washington State Communication Access Project v. Regal Cinemas*, 173 Wn. App. 174, 293 P.3d 413, *rev. den.*, 178 Wn.2d 1010, 308 P.3d 643 (2013), wherein the Court determined the appropriate interest rate on the judgment for violations of the Washington Law Against Discrimination Act (Chapter 49.60 RCW), essentially a case arising in tort, was two percentage points above the prime rate pursuant to RCW 4.56.110 (3).

interest at an unspecified rate. The Union made that demand, resulting in the completely illogical requirement that Benton County pay the employees the recouped overpayments plus interest, and then turn around and recoup that money through negotiations in the interest arbitration process, or commence legal action to “claw back” the public funds.

The Court should recognize that Benton County did not flagrantly violate the law and that, under these circumstances, that portion of PERC’s order requiring the repayment of the funds (plus interest) to the employees should at the very least be vacated.

V. CONCLUSION

The Court should reverse PERC’s decision and order as this case is neither about “wages” nor does it involve a labor dispute triggering collective bargaining obligations. All of the affected Benton County employees have admittedly received public funds they were not owed in the form of overpayments, for hours they did not work and were required to pay this debt. RCW 49.48.200 (and .210) was expressly enacted by the Legislature to create a mechanism for government employers to recover what all agree in the instant case is undisputed debt owed by employees erroneously receiving public funds for hours not worked, through deductions from subsequent wage payments, as an option to civil action.

Chapter 41.56 RCW is limited to addressing collective bargaining, including terms and conditions of employment, wages and benefits. RCW 49.48.200 (and .210) expressly limits the role of a collective bargaining agreement to the narrow context of government employers recouping overpayments from employees in positions covered by collective bargaining agreements who dispute the *occurrence* or the *amount* of overpayment debt. Pursuant to RCW 49.48.210 (5), these employees may elect to utilize the collective bargaining agreement procedures in lieu of adjudicative proceedings pursuant to ordinance or resolution of the county, to resolve disputes as to the amount of the debt.

Benton County is obligated to recover public monies erroneously paid to its employees for hours not worked and is expressly authorized to recover these overpayments by civil action (RCW 36.01.010; RCW 49.48.210), or through the recoupment process as provided in RCW 49.48.200 (and .210). Neither process is a mandatory subject of bargaining. Clearly, a government employer would not be required to negotiate with a union prior to commencing civil action against employees to recover debt.

In sum, PERC's determination that Chapter 41.56 RCW generally applies to the process to recoup overpayments when funds are admittedly owed is a clear legal error. The Legislature limited the use of a collective bargaining agreement to situations when the debt (occurrence or amount) is

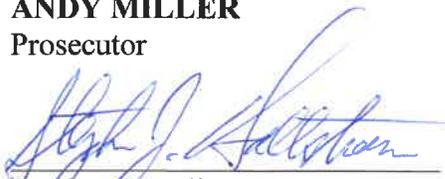
in dispute—not an issue in the case at bar. This is understandable, because if the debt is not in dispute, an employee’s full wages undeniably *were* paid, albeit *earlier* than an employee was entitled to them.

PERC’s remedy must be overturned regardless, as arbitrary and capricious. Not only does Chapter 41.56 RCW *not* apply to the recoupment of admitted and undisputed debt as in the case at bar, but Benton County had no reason to believe it did. It is clearly arbitrary and capricious to impose the draconian measure of requiring that Benton County give admittedly owed public funds back to employees, *with interest*, only to then seek recoupment once again through interest arbitration.

For all of the foregoing reasons, Benton County respectfully requests that the Court find that PERC incorrectly found ULP violations and dismiss the Union’s ULP complaints with prejudice.

RESPECTFULLY SUBMITTED this 13th day of December, 2019.

ANDY MILLER
Prosecutor



Stephen J. Hallstrom, Deputy
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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BENTON COUNTY PROSECUTOR'S OFFICE

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