

FILED
Court of Appeals
Division III
State of Washington
2/12/2020 3:17 PM

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 BRIEF

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I. Introduction

In the beginning of its Opening Brief, Benton County repeated what it did back in 2016 and 2017 when it initially committed the unfair labor practices against Teamsters Local 839: It completely ignored and undermined Teamsters Local 839's role in collective bargaining. Surprisingly, Teamsters Local 839, and its role as bargaining agent for employees at Benton County, are barely mentioned in the opening of Benton County's brief. This is not an accident. Benton County is trying to make this case about employees and the Employer, and completely carve out the Union. But State law prohibits this.

This shows, unfortunately, that Benton County still doesn't get it. It has a duty to bargain with Teamsters Local 839 regarding the wages, hours, and working conditions of its employees—even if other Washington State Statutes relate to and/or cover issues that Benton County must bargain about.

Benton County also ignores RCW 41.56—the collective bargaining statute that governs this case—and tries to trick the Court into thinking that this case is governed by RCW 49.48. But Benton County is

wrong. This is just another example of how Benton County still doesn't get that it must bargain with Teamsters Local 839.

RCW 41.56—the collective bargaining statute that governs this case—could not be more clear about Benton County's duty to bargain with Teamsters Local 839 about wages, hours, and working conditions—including repayment plans for the overpayment of wages. And if RCW 41.56 happens to conflict with another Washington State Statute—again, it could not be more clear (under RCW 41.56.905) that RCW 41.56 must be liberally construed and trumps other state statutes:

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, longstanding case law and state statutes establish that Benton County had a duty to bargain with Teamsters Local 839 regarding a repayment plan for its bargaining unit members.

Notably, Benton County has still failed to distinguish (or even mention) the governing PERC decision for this case, *Tacoma Police Union Local 6 v. City of Tacoma*, Decision 11097 (PECB, 2011)¹, where a PERC Hearing Examiner found that the City of Tacoma violated RCW

¹ *Affirmed at Tacoma Police Union Local 6 v. City of Tacoma*, Decision 11097-A (PECB, 2012).

41.56 when it did not provide the Union with proper notice and an opportunity to bargain about the repayment of wages—as in this case.

Therefore, the Court should affirm PERC’s Decision and Order in this case and deny Benton County’s Appeal of the Public Employment Relations Commission’s (“PERC” or “the Commission”) Decision and Order.² And despite claims by Benton County, there is also no error of Findings of Fact or Conclusions of Law. Moreover, Benton County cannot overcome the strong deference that Courts must give to PERC when reviewing its decisions.³

II. Statement of the Issues

1. Did PERC properly rule that Benton County committed an unfair labor practice when it refused to bargain with Teamsters Local 839 about the repayment of wages for its bargaining unit members?

2. Did PERC properly rule that Benton County committed an unfair labor practice when it proposed and then implemented repayment plan options directly to Teamsters Local 839 bargaining unit members, without bargaining with and/or presenting these proposals to the Union?

3. Did PERC properly rule that Benton County committed an unfair labor practice when it unilaterally deducted overpayment wages

² CP 87-91 (Decisions 12790-A and 12791-A (PECB, 2018)). “CP” refers to the Clerk’s Papers followed by a specific page number. The Clerk’s Papers for this case include the Administrative Record from PERC that was submitted to the Court on or around May 1, 2018.

³ *City of Bellevue v. Int’l Ass’n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382; 831 P.2d 738 (1992).

from Teamsters Local 839 bargaining unit members without negotiating with the Union and/or reaching agreement with the Union?

4. After PERC found that Benton County committed unfair labor practices by refusing to bargain with Teamsters Local 839 regarding a repayment plan, directly dealing with employees, and unilaterally imposing a repayment plan, did PERC properly order a remedy that included, but was not limited to, that Benton County return to the status quo, repay the wages with interest, and bargain with Teamsters Local 839 regarding a repayment plan?

III. Statement of the Case

1. Teamsters Local 839 Represents Corrections Officers in Benton County.

Teamsters Local 839 (“Local 839” or “the Union”) is the exclusive bargaining representative for all full-time and regular part-time Corrections Officers at the Benton County Sheriff’s Office in the Department of Corrections for Benton County (“the County” or “the Employer”).⁴ This bargaining unit currently consists of approximately 100 members in the Department of Corrections that work for Benton County.⁵ As Corrections Officers (COs), this bargaining unit is eligible for interest arbitration.⁶

⁴ CP 525, 528, 540-579 (Shjerven Decl. ¶ 3, 14, Ex. E. (Cites to the record are from the exhibits and/or declarations and/or briefs from the Summary Judgment filings of both parties as well as the appeal of the Examiner’s Decision to the Commission. For example, the cite for this footnote refers to Clerk’s Pages of the Administrative Record, followed by citations to the original documents – paragraphs 3, 14, and Exhibit E of the Shjerven Declaration filed with the Union’s Motion for Summary Judgment (SJ))).

⁵ CP 525 (Shjerven Decl. ¶ 3).

⁶ *Id.*

2. Benton County Notifies Bargaining Unit Employees of Overpayments and Unilaterally Imposes Repayment Plan— Without Giving the Union Notice and the Opportunity to Bargain.

On or around November 14, 2016, employees from the Local 839 bargaining unit were notified by Brenda Chilton, Auditor for Benton County, that the County had overpaid them wages.⁷ Local 839 bargaining unit members were notified with a hand-delivered document.⁸ The County initially gave employees from the bargaining unit three options for repayment of the overpayments in a Notice – Wage Overpayment Repayment Demand letter.⁹ These notices to employees were sent to bargaining unit employees, but not sent to Union staff.¹⁰ The Union first learned about this notice from its bargaining unit members.¹¹ The County never gave Teamsters Local 839 Secretary-Treasurer Russell Shjerven and/or the Union notice, nor an opportunity to bargain about how the bargaining unit members would pay back this money.¹² The

⁷ CP 526 (Shjerven Decl. ¶ 5).

⁸ CP 526 (Shjerven Decl. ¶ 5).

⁹ CP 526, 530-531 (Shjerven Decl. ¶ 5, Ex. A).

¹⁰ CP 526 (Shjerven Decl. ¶ 5).

¹¹ *Id.*

¹² CP 525-526 (Shjerven Decl. ¶¶ 1-5).

overpayments went back several months,¹³ and not all of the bargaining unit members received the same amount of overpayment.¹⁴

All along, the Union has wanted to work with the County on getting any overpayments back to the County, but the Union has steadfastly insisted that the County must bargain with the Union first before the County could start deducting additional monies or taking hours from employee leave banks.¹⁵

The notice from Benton County informed employees that reimbursements for the overpayments would be deducted starting in January 2017.¹⁶ The terms of the repayment plans were unilaterally implemented and not negotiated with the Union.¹⁷ The Union was never given a chance to bargain about the pay-back plan.¹⁸ The parties were not at impasse and the Union never agreed to any repayment plan.¹⁹ The parties have also not been to interest arbitration on this issue.²⁰

On or around November 23, 2016, Benton County also gave bargaining unit members the option of paying back these overpayments with hours from floating holidays, annual leave, and/or compensatory

¹³ CP 526 (Shjerven Decl. ¶ 5).

¹⁴ *Id.*

¹⁵ CP 527 (Shjerven Decl. ¶ 6).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ CP 527 (Shjerven Decl. ¶ 6).

²⁰ *Id.*

time.²¹ Again, the Union received this notice from bargaining unit members, not from the County.²² The County sent this second notice document to bargaining unit employees, but not to Secretary Treasurer Russell Shjerven and/or the Union staff.²³

3. Teamsters Local 839 Demands to Bargain About Overpayments and the Repayment Plan and Benton County Refuses.

On or around November 30, 2016, Jesus Alvarez, Jr., (Alvarez) of the Union made a demand to bargain about the overpayment issue.²⁴ Alvarez is a Business Representative for Teamsters Local 839.²⁵ On or around December 1, 2016, the County, through Sheriff Keane, notified the Union via email that it was not willing to bargain about the overpayments.²⁶ The County continued to refuse to bargain about the manner in which the bargaining unit members would pay back the County for the overpayments.²⁷

²¹ CP 527, 532-533 (Shjerven Decl. ¶ 8, Ex. B).

²² CP 527 (Shjerven Decl. ¶ 8).

²³ CP 527, 532-533 (Shjerven Decl. ¶ 8, Ex. B).

²⁴ CP 527, 534-535 (Shjerven Decl. ¶ 9, Ex. C).

²⁵ CP 527 (Shjerven Decl. ¶ 9).

²⁶ CP 527, 536-539 (Shjerven Decl. ¶ 9, Ex. D).

²⁷ CP 527 (Shjerven Decl. ¶ 9).

In addition, the County unilaterally implemented the repayment plans without providing the Union notice and an opportunity to bargain.²⁸ The County also directly contacted bargaining unit employees about paying back monies to the County without including the Union in these discussions.²⁹

4. The County Starts Deducting Overpayments From Wages in January 2017 Without Agreement From Employees and/or The Union.

At the beginning of January 2017, the Employer began to unilaterally deduct additional monies from employee paychecks in the bargaining unit, without the Union's agreement, to recover the money related to the overpayments.³⁰ The County took out 5% of gross wages after federal taxes were taken out.³¹ The initial deduction was taken out in January 2017 for the December 2016 pay period.³² Another payment was taken out of wages in February 2017.³³ With these deductions, bargaining unit employees' paychecks were less than what is required under the wage

²⁸ CP 528 (Shjerven Decl. ¶ 10).

²⁹ CP 528 (Shjerven Decl. ¶ 11).

³⁰ CP 528 (Shjerven Decl. ¶ 12).

³¹ CP 551, 504 (Grimm Decl. ¶ 6; Williams Decl. ¶ 6 (these declarations were filed with the Union's Summary Judgment Motion)).

³² *Id.*

³³ *Id.*

provisions of the contract.³⁴ The County continued to deduct the additional monies from paychecks without employee or Union agreement.³⁵ In January 2017, the County also began taking hours from bargaining unit employees' leave banks to help pay back the overpayments.³⁶ The Union was never given the opportunity to bargain or agree on behalf of its members to any of these repayment terms.³⁷ The County has now recovered all of the overpayments.

IV. Argument

1. Standard of Review: The Court Should Grant the Commission's Decision Great Deference, Especially in Regard to Remedy

Although the Court reviews conclusions of law, and applications of law, and interpretations of statutes, *de novo*; "PERC's interpretation of collective bargaining statutes is 'entitled to substantial weight and great deference.'"³⁸ Therefore, the Court should affirm all aspects of PERC's Decision and Order because the Commission correctly applied the law; its

³⁴ CP 528 (Shjerven Decl. ¶ 13.).

³⁵ CP 516, 505 (Grimm Decl. ¶ 7; Williams Decl. ¶ 7).

³⁶ CP 528 (Shjerven Decl. ¶ 12).

³⁷ CP 528 (Shjerven Decl. ¶ 12).

³⁸ *Thorpe v. Inslee*, 188 Wn.2d, 282, 289; 393 P.3d 1231, 1234 (2017); quoting *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382; 831 P.2d 738 (1992).

findings are supported by more than substantial evidence; and the findings fully support the Commission's conclusions of law.³⁹

Moreover, the Court should give a strong deference to PERC because it is an administrative agency that specializes in labor relations. This is 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, 664 P.2d 1240 (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). Therefore, demanding that Benton County return to the status quo and award interest is clearly within PERC's power. If PERC cannot order Benton County to return the wages,

³⁹ See *Port of Anacortes*, Decision 12160-A (Port, 2015), citing *C-Train*, Decision 7087-B (PECB, 2002).

with interest, then PERC essentially has no remedial power and Benton County will not face any consequences for violating state labor laws. In fact, without any meaningful remedy (which must include returning to status quo and paying interest for its violation), Benton County will benefit from violating state labor laws because it will have undermined the Union and made it look weak.

Nonetheless, PERC's remedy in this case, requiring Benton County to pay back the overpayments with interest, is valid because Benton County violated the law and must suffer the consequences—not benefit. If Employers suffered no consequences after violating state labor laws, why would they ever comply? Moreover, 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 (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 (PECB, 2011). Otherwise, employers would always

refuse to bargain because there would be no financial, equitable, and/or bargaining consequences.

By ordering Benton County to return the wages with interest, PERC is effectuating the purposes of RCW 41.56: Promoting collective bargaining with Unions and discouraging employers from refusing to bargain with Unions.

Moreover, Benton County should not benefit financially or otherwise from the length of time these ULPs proceedings take and/or from its willful violation of state labor laws. Otherwise, employers will have no incentive to follow the law. On the contrary, employers may even find incentive to willfully break the law because it will benefit their bargaining position and make the Union look weak. Benton County must suffer the consequences of its violation. Teamsters Local 839 made a clear demand to bargain back in 2016—which is undisputed—and Benton County continues to ignore it. This was flagrant. Therefore, Benton County should have to pay back the money as ordered by PERC with interest.⁴⁰ In fact, PERC has absolutely no discretion for waiving the interest. WAC 391-45-410(3) is clear that unfair labor practice monetary judgments shall be subject to the same interest rates applicable to civil judgements.

⁴⁰ At the interest rate determined by PERC.

Further, Benton County keeps accruing additional interest not only because it refused to bargain, but because it has continued to refuse to follow PERC's Order and the Union's request to pay back the money. Benton County could have avoided this interest if it would have just bargained as required under state law. Or Benton County would not be liable for as much interest if it would have paid back the money after the PERC Hearing Examiner's ruling on November 3, 2017. Benton County realized the risk it was taking by continuing to appeal and not follow the original PERC Original decision for this case. Therefore, Benton County must pay the price for this risky legal behavior. If Benton County would have merely properly bargained with the Union when it made a demand to bargain back in 2016, this whole dispute could have been resolved in minutes.

Therefore, it's disingenuous for Benton County to now complain about interest when it only has itself to blame for having to pay any interest—and certainly for the amount of interest because it has delayed paying back the money as ordered—and continues to do so. At a minimum, Benton County could have paid back the money after the Hearing Examiner decision and continued with its appeals. Therefore, it only has itself to blame for the extensive interest payments.

Moreover, Benton County must pay the interest payment because it flagrantly violated the law in this case. PERC, of course, has the ability to order interest as part of a ULP remedy.⁴¹ In fact, PERC rules require interest in this case—there is no discretion: “Money amounts due shall be subject to interest at the rate which would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of payment.”⁴²

In addition, RCW 41.56 is to be liberally construed to promote the purposes behind it—to promote collective bargaining.⁴³ Benton County must be penalized for its flagrant violation of the law otherwise other employers will be encouraged to boldly violate state collective bargaining laws with no fear of consequences. In fact, if Benton County is not sanctioned for refusing to bargain, Local 839 (and other Unions) will be completely undermined when employers refuse to bargain and face no consequences. That is, Local 839, and other Unions, will look weak and will not be able to properly represents their members. Benton County’s conduct forced the Union to file an unfair labor practice charge and spend thousands of dollars to fight the County’s unlawful behavior. The County must be assessed a remedy for this violation that includes, but is not

⁴¹ See RCW 41.56.160; 41.56.905, WAC 391-45-410(3); see e.g., *Washington Federation of State Employees*, Decision 10726-A (PSRA, 2012).

⁴² WAC 391-45-410(3).

⁴³ RCW 41.56.905.

limited to, interest on the overpayments to employees, to be paid by the County (as set forth in PERC's Decision and Order).

2. RCW 49.48.200, 210, and RCW 41.56 Can Exist Without Conflict And the Commission's Decision is not Arbitrary and Capricious.

Despite what Benton County may argue, RCW 49.48.200, 49.48.210, and 41.56 can easily be read to work together without conflict. Benton County and Teamsters Local 839 could have bargained properly under RCW 41.56 and followed the guidelines described in RCW 49.48.

The Court and PERC properly address this. The plain language is clear, leaving little reason for the Court to review the legislative histories. RCW 49.48.210(10) provides an inexpensive and efficient method for unionized employees to resolve disputes regarding the amount of the overpayments (going through the grievance procedure as opposed to going to court or through an administrative procedure). This section is not superfluous. RCW 49.48.200 and 49.48.210 don't take away collective bargaining rights, they just provide a mechanism for resolving overpayment disputes.

Therefore, RCW 49.48.210(10) serves an important role in resolving disputes with the amount of the overpayments with unionized employees—but that is not an issue in this case. Here, we are dealing with

a repayment plan. RCW 49.48.210 is not useless or has no meaning. It has a role to play in overpayments, but not in this case. RCW 49.48, however, does not deal with negotiating a repayment plan, that is covered by RCW 41.56. That is the issue in this case.

Notably, RCW 49.48.210(1)⁴⁴ does not apply to unionized employees—RCW 49.48.210(10) does. And although not an issue for this case, an employer has no right to sue a unionized employee to recover the undisputed overpayment—it must bargain with the Union about a repayment plan since RCW 41.56 trumps RCW 49.48; and 49.48.210(1) doesn't even apply to Unionized employees, (RCW 49.48.210(10) does).

Moreover, RCW 49.48.210(10) allows an employer to only give *notice* to employees about an overpayment, which is consistent with RCW 41.56. That is, merely giving notice to employees of an overpayment is not direct dealing. Just like it is not direct dealing when an employer tells an employee that he or she is suspended (and doesn't tell the Union). Direct dealing occurs when an employer gives notice of the overpayment *and* then tells the employee how he or she is going to pay back the money. RCW 49.48.210(10) doesn't allow this.

⁴⁴ Benton County may have improperly relied on RCW 49.48.210(1)—even though it doesn't apply to unionized employees, which probably—at least in part—led to it committing unfair labor practices.

Consequently, Local 839 does not object to Benton County simply notifying employees about the overpayments. Local 839 does object, however, to Benton County contacting employees and dictating the repayment amount, frequency, and duration without providing the Union with (1) proper notice and (2) an opportunity to bargain.

Even if the Union was given proper notice, which it wasn't, Benton County must still give the Union an opportunity to bargain. And if the parties do not agree and reach impasse, then the issue must go to interest arbitration in this case. Because this bargaining unit is interest arbitration eligible, Benton County cannot implement even after the parties reach impasse. But the parties never got close to impasse here because Benton County refused to bargain from the start.⁴⁵

RCW 49.48.210(1), which is for non-unionized employees, states that an employer can also demand payment within a certain amount of time. This conduct could arguably be considered direct dealing—but again it is for non-unionized workplaces. That is why RCW 49.48.210(1) is not relevant for this case; RCW 49.48.210(10) is. And notably, RCW

⁴⁵ Also, the action or inaction of other bargaining units in relation to the overpayments by Benton County is irrelevant to this ULP. Other unions, for whatever the reason, may have waived their bargaining rights in this situation, but the actions of another bargaining unit do not revoke Local 839's statutory right to require bargaining over this mandatory subject—the deduction of wages to collect overpayments.

49.48.210(1) specifically makes an exception for unionized workers by referring to RCW 49.48.210(10).

In addition, RCW 49.48.210(6) and (9) are for non-unionized employees. As described above, employers that have unionized employees must follow RCW 49.48.210(10) when giving notice about overpayments. Even so, subsection RCW 49.48.210(6) and (9) refer back to 49.48.200—which allows for collective bargaining because of the discretion given the parties for repayment plans.

Notably, if the legislature wanted RCW 49.48.200 and .210 to supersede RCW 41.56 it would have said so in the statutes (RCW 41.56 was already enacted and clearly states that it trumps other statutes in RCW 41.56.905). But it doesn't. Nonetheless, RCW 49.48.200, 49.48.210, and 41.56 can all be read to work together and not conflict. And if there was a conflict, the plain language of RCW 41.56.905 makes clear that RCW 41.56 prevails.

Therefore, RCW 49.48.200 allows for bargaining over such issues as what is disposable income, what rate will the overpayments be paid back, and/or how long will an employee be given to pay back the overpayment. RCW 49.48.200 may place some “guardrails” on bargaining, but there is still plenty of room to bargain (for example, negotiating a repayment plan of less than 5%).

How and when the money is paid back is also a working condition, wages and/or wage-related matter under RCW 41.56 because overpayment of wages obviously deals with wages—even if these wages must be paid back to the employer. It also is wages because employees will make less wages than what the contract calls for each week or month when they get additional pay deducted from their wages.

3. *State v. Adams* Provides No Guidance to this Case.

Despite claims by Benton County, *State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987), provides no guidance to the present case for several reasons. To begin, RCW 49.48.200 and 49.48.210 were not enacted at the time *Adams* was decided (which Benton County has acknowledged). Moreover, there is no evidence that the Union involved in *Adams* made a demand to bargain or filed any unfair labor practice related to the State's conduct. In fact, the Union in *Adams* may have waived its right to bargain and/or file an unfair labor practice—which is certainly not the case here. Furthermore, a review of *Adams* makes it clear that the Union was certainly not involved in the litigation or issues. There is not even a discussion of RCW 41.56 or the employer's duty (or non-duty) to bargain. *Adams* simply is not helpful to the current case.

Moreover, the issues litigated in *Adams* are also different than the issues litigated in the present case. *Adams* mostly dealt with estoppel and due process issues. Therefore, the *Adams* case is not helpful because it doesn't deal with the issues related to when a Union makes a demand to bargain about overpayments.

4. Repayment of Wages is a Mandatory Subject of Bargaining.

A. PERC Has Already Ruled that the Recovery of Overpayments of Wages is a Mandatory Subject of Bargaining.

Despite claims by Benton County, there is undisputed precedent that the deduction of wages to collect overpayments is a mandatory subject of bargaining, as a PERC Hearing Examiner and the Commission have already ruled in *Tacoma Police Union Local 6 v. City of Tacoma*.⁴⁶ *This is a dead issue.* Benton County never distinguished *Tacoma Police Local 6* (because it can't), nor did it even claim it should be overruled (which it shouldn't be). Benton County also did not present any facts, citations, or arguments to support the notion that *Tacoma Police Local 6* should be overturned.

⁴⁶ Decision 11097 (PECB, 2011); Decision 11097-A (PECB, 2012).

The facts and decision from *Tacoma Police Union Local 6 v. City of Tacoma*⁴⁷ are on all fours with the present case. In *Tacoma Police Union*, the City of Tacoma sent memoranda individually to fourteen bargaining unit members seeking reimbursement for wages related to an annual charity basketball game.⁴⁸ The employees were given three repayment options.⁴⁹ The City did not notify the union and provided no opportunity to bargain over a repayment plan.⁵⁰ PERC held that:

There is no question that payment of wages is a mandatory subject of bargaining. The decision requiring members to forfeit paid wages represents a unilateral change that should have been bargained. The union was presented with a “fait accompli” as the employer did not provide notice to the union and made a unilateral decision to recoup wages.⁵¹

The facts in the present case are identical. Therefore, the Court must find that Benton County violated RCW 41.56 when it refused to bargain with Local 839 about a repayment plan and/or the recovery of wages.⁵²

The Union does not dispute that overpayments occurred; challenge the amounts owed; or deny the overpayment of wages must be eventually paid back. This case is about Benton County

⁴⁷ Decision 11097 (PECB, 2011).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

circumventing the Union and directly negotiating deals with employees by refusing to bargain about the overpayments and a repayment plan. The Union argues that Benton County must bargain about a repayment plan and/or the recovery of wages. Once Benton County announced its plan to deduct from employee wages it turned the wage recovery issue into a mandatory subject of bargaining. For wages—or the reduction of wages (including the repayment of wage overpayments)—is clearly a mandatory subject of bargaining (and so is when and how wages are paid).

If the County would have been willing to bargain—and simply followed the law—there could have been a lot to bargain about. For example, the parties could have bargained about how much employees should have to pay back from each paycheck. Granted, RCW 41.56.905 makes clear that RCW 41.56 trumps RCW 49.48. But even RCW 49.48 leaves room for collective bargaining around repayment plans. RCW 49.48.200(1) defines a maximum of 5% of disposable wages that can be deducted from subsequent wages—but there is no minimum. So the parties could have bargained over the amount of the repayment plan: 2%, 3%, or 5%. They had a lot of discretion. In fact, 49.48.200(2) specifically allows parties to come up with different kinds of

repayment plans. Nevertheless, RCW 49.48—or any other statute—does not relieve Benton County of its duty to bargain.⁵³

As the Auditor admitted, RCW 49.48 doesn't define disposable income.⁵⁴ Therefore, the parties could also bargain about what qualifies as disposable income related to how the employees will pay back the County. And yes, 49.48.200(1)(b) allows the employer to deduct the amount still owed, from an employee's disposable earnings, in a final pay period, but the parties could still bargain what disposable earnings are. So even 49.48.200(1)(b) has room for bargaining.

For example, Benton County and Teamsters Local 839 could have agreed to a repayment plan that allowed Benton County to collect 1% of an employee's disposable earnings in each pay period until the money is fully paid back. This would have been completely consistent with RCW 49.48.200, other state laws, and the State Constitution. But Benton County denied the Union an opportunity to negotiate a repayment plan. Benton County seems to have forgotten that there is a Union involved here—Teamsters Local 839—and that it must bargain with that Union about mandatory subjects of bargaining—such as wages.

⁵³ *See, e.g.*, RCW 41.56.905.

⁵⁴ CP 418 (Chilton Decl. ¶ 23 (filed with Benton County's Summary Judgment briefing)).

Finally, the County asserts that the overpayments are not “wages” for purposes of collective bargaining. That’s how they were paid to employees and that’s how the employees are going to pay them back. Moreover, the main title of the statute—49.48.200—that Benton County repeatedly cites to and relies on is “Overpayment of Wages.” To claim that the “overpayment of wages” does not concern wages is simply ludicrous. Deducting wages from employees is clearly wages (and/or affects employee wages).

Teamsters Local 839 has a contract with Benton County and has every right (and/or standing) to police that contract and bargain about wages, hours, and working conditions at Benton County. Therefore, Benton County’s refusal to bargain with Teamsters Local 839 about the overpayment and/or the repayment wage issue violates RCW 41.56.

B. It Is Undisputed that the Union Made a Demand To Bargain and Benton County Refused.

To put it simply, there is no dispute that Local 839 requested bargaining over the overpayment/repayment issue and

Benton County refused. This is undisputed and has never been challenged by Benton County.

In a letter dated November 30, 2016, the Union stated in part:

In the spirit of cooperation, we are sending this letter to demand to bargain the overpayment of wages to the Benton County Sheriff's Office Corrections Officers. The Union is in total agreement that if an overpayment of wages was made the Union members/employees must pay the overpayment back. But, the Union must be allowed to bargain how this is done.⁵⁵

The Union also requested bargaining in the December 1, 2016 email that included the attached November 30, 2016 letter demanding to bargain.⁵⁶ In addition, in the November 30, 2016 letter, the Union requested that Benton County not deduct wages and maintain the status quo until the both parties could bargain about how the overpayments will be repaid.⁵⁷

In response, Benton County, through Sheriff Steve N. Keane, made it clear that it would not bargain with the Union regarding the wages overpayment/deduction issue.⁵⁸ Therefore, there is no dispute, as described above, that Local 839 made a timely demand to bargain about the overpayment issue and Benton County refused.⁵⁹

⁵⁵ CP 534-535 (Exhibit C to Shjerven Declaration).

⁵⁶ CP 536-539 (Exhibit D to Shjerven Declaration).

⁵⁷ CP 534-535 (Exhibit C to Shjerven Declaration).

⁵⁸ CP 536-539 (Exhibit D to Shjerven Declaration).

⁵⁹ CP 534-539 (Exhibits C and D Shjerven Declaration).

5. Undisputed That RCW 41.56 Trumps Repayment Statute.

A. Benton County Cannot Unilaterally Impose a Repayment Plan.

As discussed already, under RCW 41.56, Benton County must bargain with Teamsters Local 839 over grievance procedures, wages, hours, and working conditions.⁶⁰ Because the COs are eligible for interest arbitration, Benton County cannot implement on a mandatory subject until bargaining to impasse and getting a decision from an interest arbitrator.⁶¹

It remains undisputed that Benton County refused to bargain about the repayment of wages.⁶² The repayment of wages to an employer is obviously a mandatory subject of bargaining under RCW 41.56—because it’s wages.⁶³ Benton County, however, unilaterally announced that it would collect overpayments, without even providing the Union with an opportunity for bargaining.⁶⁴ There was no proper notice and no opportunity to bargain here. When bargaining *was* requested by the

⁶⁰ *City of Redmond*, Decision 12617 (PECB, 2016).

⁶¹ *Amalgamated Transit Union, Local 587*, Decision 10547-A (PECB, 2010).

⁶² CP 526-528, 530-539 (Shjerven Decl. ¶¶ 5-13, Exs. A through D).

⁶³ See *United Auto Workers, Local 4121*, Decision 10771 (PECB, 2010) (“The overpayment of employee-paid premiums and any refunds resulting from overpayment is arguably a mandatory subject of bargaining.”); see also *Spokane County*, Decision 8154 (PECB, 2003).

⁶⁴ CP 526-528, 530-539, 514-516, 517-524, 503-505, 506-513 (Shjerven Decl. ¶¶ 5-13, Exs. A through D; Grimm Decl. ¶¶ 2-8, Exs. A through D; Williams Decl. ¶¶ 2-8, Exs. A through D).

Union, it was immediately rejected.⁶⁵ Consequently, there is simply no dispute that (1) the Union made a demand to bargain about the overpayments and repayment, (2) the County immediately refused to bargain with the Union about the overpayments and repayment, (3) the County deducted wages from employee paychecks without agreement from the Union, and (4) the repayment of the overpayment of wages is a mandatory subject of bargaining.⁶⁶ Therefore, the Court must affirm the Commission's decision and remedy.

B. Benton County Unilaterally Implemented the Repayment Plans and Refused to Bargain.

As discussed above, Benton County must bargain to impasse and receive an arbitrator's decision before it can implement on a mandatory subject of bargaining.⁶⁷ But here it is undisputed that Benton County implemented the repayment plans before reaching impasse because it refused to even bargain with the Union.⁶⁸ Therefore, it's undisputed that Benton County unilaterally implemented a mandatory subject of

⁶⁵ CP 526-528, 534-539 (Shjerven Decl. ¶¶ 5-13, Exs. C and D).

⁶⁶ CP 526-528, 530-579, 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).

⁶⁷ Or get agreement from the Union, which is not the case here.

⁶⁸ CP 526-528, 530-579, 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).

bargaining before bargaining, impasse, and/or getting an arbitrator's decision. This violates RCW 41.56.⁶⁹

Unfortunately, Benton County followed through with its promise to unilaterally implement its repayment plan in January 2017.⁷⁰ At that time, Benton County started to deduct wages and/or hours from leave banks from employees without bargaining and without the Union's agreement.⁷¹ This violates RCW 41.56.⁷² Therefore, after the County unilaterally made the deductions, bargaining unit employees made less than what the contract dictates. There is no past practice for Benton County to deduct wages earned and/or leave bank hours earned to recover money for overpayments that go back several months. That is, Benton County has never taken and/or deducted money from bargaining unit employees that they had already earned and are owed under the CBA. And there is also no practice of employees making less than what the contract calls for.

From the beginning, the Union has said that if overpayments were made, the Union wanted to work with the County and set up plan to have

⁶⁹ *Technical Employees' Association*, Decision 12632 (PECB, 2016) ("Unless a union clearly waives its right to bargain, the law prohibits an employer from making unilateral changes to mandatory subjects.").

⁷⁰ CP 503-505,506-513, 514-516, 517-524 (Williams Decl. ¶¶ 2-8, Exs. A through D; Grimm Decl. ¶¶ 2-8, Exs. A through D).

⁷¹ CP 526-528, 530-579, 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).

⁷² *Technical Employees' Association*, Decision 12632.

the employees pay the money back to the County.⁷³ Discussions about repayment plans, interest (if any), and other issues related to the overpayments and repayment could be discussed and resolved through collective bargaining. All these issues could have, and should have, been resolved through the collective bargaining process.

In addition, Benton County may cite other state statutes related to the repayment of the overpayment of wages to justify its refusal to bargain. But PERC laws and regulations, including the duty for 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 Benton County that some other state statute governs or trumps Benton County's duty to bargain under RCW 41.56 is invalid.

⁷³ CP 527 (Shjerven Decl. ¶ 6).

Benton County has unilaterally deducted employee wages and/or hours from leave banks—without bargaining—and without Union approval or agreement. This too, is undisputed.⁷⁴

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, that does not erase the bargaining requirement. Benton County still deducted money from paychecks and/or hours from employee leave banks without bargaining.⁷⁵ If it got bad advice from the County Auditor, that is between Benton County and its Auditor (an internal 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.⁷⁶ Consequently, Benton County cannot claim immunity because they may have been instructed to do this by their County Auditor.

⁷⁴ CP 526-528, 530-579, 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).

⁷⁵ CP 526-528, 530-579, 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).

⁷⁶ *Id.*

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

Moreover, Benton County's statutory analysis in its appeal brief is fundamentally flawed. Nothing in state law indicates or implies that unions should not be a part of negotiating wages—including overpayments. *Tacoma Police Union Local 6* confirms that the Union must be part of negotiations for wages—including the deduction of wages. In fact, RCW 41.56.905 makes clear that state collective bargaining laws trump any other state laws that they may conflict with.

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 than 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 end-of-month adjustments are different than the current situation and are not equivalent—or even similar to past practices—as described in the *Tacoma Police Union Local 6*.⁷⁷ Further, Benton County even admitted that this overpayment issue was unique—and therefore there can be no past practice.

⁷⁷ Decision 11097 (PECB, 2011).

6. Benton County Directly Dealt with Bargaining Unit Employees.

Where employees have exercised their right to organize for purposes of collective bargaining, as the COs in this case, Benton County “is obligated to deal only with the designated exclusive bargaining representative on matters of wages, hours and working conditions. RCW 41.56.100; RCW 41.56.030(4).”⁷⁸ Where a Union is in place, as here, Benton County “may not circumvent the exclusive bargaining representative through direct communications with bargaining unit employees.”⁷⁹

Notably, if the COs were **not** represented by a union, then Benton County’s conduct may have been permitted. But the COs are represented by Teamsters Local 839.⁸⁰ Therefore, Benton County has additional obligations under state law—in particular RCW 41.56—when dealing with employee wages, hours, and working conditions—including when dealing with overpayments.

In the past, PERC has found unfair labor practices, or direct dealing violations of RCW 41.56, where an employer negotiated directly

⁷⁸ *Pasco Police Officers’ Association*, Decision 4197-B (PECB, 1999).

⁷⁹ *Pasco Police Officers’*, Decision 4197-B.

⁸⁰ CP 525-526, 528, 540-579 (Shjerven Decl. ¶¶ 2-4, 14, Ex. E).

with employees about layoffs,⁸¹ and proposed changes in wages and working conditions.⁸²

Here, Benton County, through its agent Auditor Brenda Chilton, directly dealt with bargaining unit members and circumvented the Union.⁸³ She did this by contacting employees directly and telling them what repayment plans were available and how much would be taken out of employee pay checks.⁸⁴ The Union had no say or input.⁸⁵

Chilton is Auditor for Benton County—the Employer of the COs and signatory to the CBA.⁸⁶ The bargaining unit employees are employees of Benton County and are paid by Benton County.⁸⁷ 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—or as an agent of the County. Plus—most importantly—it happened: Pay was unilaterally deducted from employee paychecks

⁸¹ *Seattle-King County Health Department*, Decision 1458 (PECB, 1982).

⁸² *City of Raymond*, Decision 2475 (PECB, 1986).

⁸³ CP 526-528, 530-533, 503-504, 506-509, 514-551, 517-476 (Shjerven Decl. ¶¶ 5-13, Exs. A and B; Grimm Decl. ¶¶ 3-5, Exs. A and B; Williams Decl. ¶¶ 3-5, Exs. A and B).

⁸⁴ *Id.*

⁸⁵ CP 526-528, 530-539, 503-505, 506-513, 514-516, 517-524 (Shjerven Decl. ¶¶ 5-13, Exs. A through D; Grimm Decl. ¶¶ 3-8, Exs. A through D; Williams Decl. ¶¶ 3-8, Exs. A and D).

⁸⁶ CP 528, 540-579 (Shjerven Decl. ¶ 14, Ex. E).

⁸⁷ 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).

without employee or Union approval.⁸⁸ And the deductions caused bargaining unit employees to make less than is required under the CBA.⁸⁹ Therefore, Benton County—the Employer—deducted pay without employee and/or Union agreement.⁹⁰

Moreover, Benton County has ratified Chilton’s conduct by actually deducting the wages that she has ordered deducted.⁹¹ 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 has to be held liable for its conduct—and Chilton’s conduct.

Benton County continues to argue that this can’t be direct dealing because deduction of wages is not a mandatory subject of bargaining. But we already know from *Tacoma Police Union* that it is. Therefore, it’s undisputed that Benton County circumvented the Union and directly dealt with the bargaining unit.

⁸⁸ CP 526-528, 530-579, 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).

⁸⁹ CP 528, 540-579, 504-505,506-513, 551-516, 517-524 (Shjerven Decl. ¶ 14, Ex. E; Williams Decl. ¶¶ 6-8, Exs. A through D; Grimm Decl. ¶¶ 6-8, Exs. A through D).

⁹⁰ CP 526-528, 530-579, 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).

⁹¹ CP 526-528, 530-579, 504-505,510-513, 551-516, 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).

In fact, Benton County openly admits that it directly and personally contacted each bargaining unit member individually and informed them about the repayment plan.⁹² And again, the violation is not just that Benton County contacted individual employees to give notice of overpayment. It's that Benton County contacted employees individually and notified them of Benton County's unilaterally implemented repayment plan for each affected employee in the bargaining unit (which according to Benton County is around 85 Corrections Officers).⁹³

That is, Benton County was directly dealing with around 85 Corrections Officers about the repayment plan instead of going through the Union (since Benton County contacted all of these employees individually). Moreover, there is still no dispute that Benton County refused to bargain about the overpayment/wage deduction issue with anyone from the Union. The fact that no negotiations took place is part of

⁹² CP 369-370, 371, 439-441, 452-453, 458-460, 353-398, 418-419, 423, 428-435, 370, 372-373, 386-388, 396-398, 404-412, 441-444, 446, 458-460, 464-480 (Rosa Sparks Declaration (filed with Benton County's SJ Response Brief), ¶¶ 14-18, 21; Linda Ivey ¶¶ 13-22, Exs. B and D; Benton County's SJ Opening Brief, pages 4-5; Chilton Declaration (filed with Benton County's SJ Opening Brief) ¶¶ 20, 25, 39, Exs. B and C; Sparks Declaration (filed with Benton County's SJ Opening Brief) ¶¶ 19, 25-29; Keane Declaration (filed with Benton County's SJ Opening Brief) ¶¶ 45-48, Exs. C, F, and G; Ivey Declaration (filed with Benton County's SJ Opening Brief) ¶¶ 22-32, 38, Exs. D, F, G, and H)).

⁹³ CP 372, 439-441, 452-453, 458-460 (Sparks Declaration (filed with Benton County's SJ Opposition Brief) ¶ 24; Ivey Declaration (filed with Benton County's SJ Opposition Brief) ¶¶ 13-22, Exs. B and D).

the problem. The other part of the problem is that the County directly dealt with employees—instead of with the Union.

Therefore, Benton County violated RCW 41.56 when it directly contacted employees in the bargaining unit and told them what they would have to pay back with each paycheck related to the overpayments, and then refused to bargain about this.

Moreover, the situations described by Benton County on pages 20-21 and 29 of their brief (end of the month adjustments, garnishments, support payments, payment agreement, IRS tax liens, and DOR liens) are much different than the present deduction of wages by Benton County for overpayments from several months earlier. Therefore, when the employer in *Tacoma Police Union* tried a similar defense, PERC rejected it.⁹⁴

V. Conclusion

Benton County has not presented any evidence, facts, or law to justify overturning the Commission's decision. At the end of the day, the County is merely trying to confuse or complicate the issue to hide its wrongdoing. It cannot escape the undisputed facts that it directly contacted bargaining unit members and circumvented the Union when it announced it was going to unilaterally deduct wages from employee

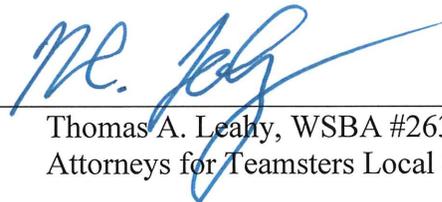
⁹⁴ Decision 11097 (PECB, 2011); Decision 11097-A (PECB, 2012).

paychecks. Then, after the Union requested to bargain about the overpayment/reduction of wages issue, it refused. Benton County then unilaterally began deducting wages from employee paychecks starting in January 2017 without agreement from the Union.

Consequently, Benton County committed unfair labor practices when it directly dealt with bargaining unit members and unilaterally implemented a repayment plan and started to deduct wages from employees without agreement from Teamsters Local 839. Therefore, the Court must find that Benton County violated RCW 41.56 and affirm the Commission's Decision and Remedy.

DATED this 12th day of February, 2020.

REID, McCARTHY, BALLEW & LEAHY L.L.P.



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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

BENTON COUNTY,

Appellant,

v.

TEAMSTERS LOCAL 839,

Respondent

CASE No. 36974-9-III

CERTIFICATE OF SERVICE FOR
TEAMSTERS LOCAL 839's
RESPONSE BRIEF

DECLARATION OF SERVICE

The undersigned hereby certifies that on the 12th of February, 2020, he caused the foregoing **Teamsters Local 839 Response 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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February 12, 2020 - 3:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36974-9
Appellate Court Case Title: Teamsters Local #839 v. Benton County
Superior Court Case Number: 18-2-00861-9

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