

FILED  
Court of Appeals  
Division III  
State of Washington  
11/15/2019 2:48 PM  
No. 370542

Lincoln County Case No. 182-00081-22

WASHINGTON COURT OF APPEALS, DIVISION III

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LINCOLN COUNTY,

Appellant,

v.

TEAMSTERS LOCAL 690,

and

PUBLIC EMPLOYMENTS RELATIONS COMMISSION,

Appellees.

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**APPELLANT LINCOLN COUNTY'S  
OPENING BRIEF**

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## I. INTRODUCTION

This case is about transparency. Specifically: who may decide how transparent the government is going to be? This Court is asked to decide whether the people—directly or by elected representatives—have the right to transparent bargaining over public resources with private labor organizations representing public employees—*i.e.*, unions. The answer is obvious: the people enjoy the right to see and observe how their resources are being used in negotiations with unions.

The Open Public Meetings Act, “OPMA,” establishes Washington’s policy that the actions of public bodies “be taken openly” and “their deliberations be conducted openly.” RCW 42.30.010. Throughout many amendments, the OPMA continues to afford Counties and Cities discretion to open their collective bargaining meetings to the public. RCW 42.30.140.

Lincoln County, Appellant, passed a Transparency Resolution opening its collective bargaining sessions to the public, to persuade its citizens that if they voted for a tax increase open bargaining would assure the taxes were spent wisely. Teamsters Local 690 (“Teamsters” or “the union”), a private labor organization representing public employees, challenges the Resolution. This Court must decide whether legislation that opens public sector bargaining sessions to the public offends the Public Employees Collective Bargaining Act. It does not.

This Court should find that the people—either through representatives or directly—are free to open their bargaining sessions to the public, and reject a private organization’s attempt to veto this discretion. The Public Employees’ Collective Bargaining Act (“PECBA”) does not specify whether meetings must be open or closed to the public, and no decision from the Public Employment Relations Commission (PERC) or the Courts suggests otherwise. No private special interest organization should be delegated the power to dictate to the people how accountable and transparent the government will be.

## **II. ASSIGNMENTS OF ERROR**

The Public Employment Relations Commission erred when it:

1. Found that opening meetings to the public states a claim for an unfair labor practice under the PECBA, and ultimately ordered the County to bargain in private session.
2. Concluded that a public employer’s decision to open collective bargaining sessions to the public is not a managerial prerogative under the PECBA.
3. Concluded that the past practice of the parties governs whether collective bargaining will be conducted publicly or privately.
4. Made the factual finding that the County refused to bargain, and that the parties’ past practice was to bargain in private.

## **III. ISSUES PRESENTED**

- A. Whether the PECBA preempts the County’s Transparency Resolution, where the PECBA is silent on open meetings, PERC has never extended

the PECBA to preempt open meetings, the OPMA accords Counties discretion to open their meetings, and the relevant Court decision affirms that the OPMA and PECBA do not conflict?

- B. Whether the decision to open meetings to the public is a managerial decision “at the core of entrepreneurial control” for a public employer, where public employers are accountable to the people for how they spend resources, and the policy of Washington State is to hold open meetings?
- C. Whether the past practice controls in the case of disagreement over opening meetings to the public, where PERC decisions establish that past practice controls only over mandatory subjects of bargaining—wages, hours, working conditions?
- D. Whether PERC’s conclusion that the County in fact refused to bargain and that the past practice of the parties was to engage in private meetings is supported by substantial evidence?

#### **IV. STATEMENT OF THE CASE**

##### **1. The Parties, Prior History, and Open Bargaining**

Lincoln County is governed by three Commissioners, elected by the people of Lincoln County. The County possesses extensive powers and “may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” Wa. Const. art. XI, § 11. Its power is co-extensive with the State’s so long as it does not violate State law. *Snohomish Cty. v. State*, 97 Wn.2d 646, 649 (1982).

Teamsters Local 690 is a local of the private international labor organization, The Teamsters, and is headquartered in Spokane, WA. Since

2016, Teamsters 690 has represented two units of commissioned and non-commissioned public safety employees in Lincoln County.

The County and Teamsters 690 are parties to collective bargaining agreements (“CBA”) for employees in the bargaining units. The County Commissioners bargain directly on behalf of the County.

The CBAs between the County and Teamsters were set to expire December 31, 2016. Administrative Record (“AR”) at 529, 545, 819; *Lincoln County (Teamsters Local 690)*, Decision 12844 (PECB, 2018), Finding of Fact No. 3; AR at 258. Teamsters did not in fact negotiate the two CBAs, though they did perform housekeeping changes when they signed on to the two contracts negotiated by the former union, the Lincoln County Deputies Sheriff’s Guild, in 2014. AR at 693, 740, 817.

**A. The County’s need to increase Public Safety spending and the Transparency Resolution**

Lincoln County has a tight budget. Public safety spending takes up a great share of that budget, and the County had been struggling to maintain its level of commissioned and non-commissioned officers. AR at 645, 696-98, 711. To restore the number of deputies to its former number, the County presented a public-safety sales tax increase proposal to the voting public by sponsoring an initiative on the November 2016 local ballot. AR at 696.

The Commissioners believed it would be helpful to show the voting

public they could be trusted to use the additional taxes efficiently. To encourage the tax increase, the Commissioners reviewed an idea they had discussed on prior occasions: opening collective bargaining session to the public. AR at 696. In addition to believing opening meetings is sound policy, the Commissioners now had an additional reason to do so in support of the tax increase for public safety. AR at 753-54.

The County promoted the Transparency Resolution in connection with the tax increase. AR at 754. The Commissioners wanted to do “everything in [their] power to demonstrate to the voters that [they] were going to spend [the voters’] money as openly and transparently as [they] possibly could.” AR at 753. The Commissioners relayed this message in newspaper articles and public conversations, *Id.*, and there were “lots of conversations with the public” about the subject. AR at 711. The idea was apparently well received. AR at 753.

On September 6, 2016, with the tax ballot measure two months away, the Commissioners passed Resolution 16-22, “Improving Transparency by Negotiating Collective Bargaining Contracts in a Manner Open to the Public,” and memorialized their rationale in the Resolution itself:

**WHEREAS**, A transparent government is the top priority for Lincoln County; and

**WHEREAS**, The Open Public Meetings Act was passed by citizen initiative in 1972 (*sic*); and

**WHEREAS**, The legislative declaration of the Open Public Meetings Act (RCW 42.30.010) states in Part:

*The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.; and*

**WHEREAS**, Collective Bargaining Agreements are among the most expensive contracts negotiated by Lincoln County; and

**WHEREAS**, Both taxpayers and employees deserve to know how they are being represented during collective bargaining negotiations; and

**WHEREAS**, The impression of secret deal-making will be eliminated by making collective bargaining negotiations open to the public, and

**WHEREAS**, Public observance of collective bargaining contract negotiations will not preclude bargaining representatives of both sides from meeting separately and privately to discuss negotiating tactics, goals, and methods, and

**WHEREAS**, Opening collective bargaining negotiations to the public does not mean that the public will participate in the negotiations; and

...

**WHEREAS**, Making collective bargaining contract negotiations transparent does not conflict with and is not preempted by state law; and

**WHEREAS**, The Open Public Meetings Act (RCW 42.30.140) permits collective bargaining contract negotiations to be exempted from the open public meetings *requirements*, but this exemption does not *compel* such negotiations to be secret; and

**WHEREAS**, The Open Public Meetings Act (RCW 42.30.140) does not prohibit governments from making these negotiations open to the public;

**THEREFORE, BE IT RESOLVED,**

From this day forward, Lincoln County shall conduct all collective bargaining contract negotiations in a manner that is open to the public; and

Lincoln County shall provide public notice of all collective bargaining negotiations in accordance with the Open Public Meetings Act (RCW 42.30.060 – 42.30.080); and

This resolution does not include meetings related to any activity conducted pursuant to the enforcement of a collective bargaining agreement (CBA) after the CBA is negotiated and executed, including but not limited to grievance proceedings....

AR at 560-561.

The Transparency Resolution worked. The tax increase ballot initiative passed, receiving 58 percent support.<sup>1</sup> Using these funds, the Commissioners were eventually able to provide the County with an additional Sheriff's Deputy and a partial prosecutor's office position, and to establish a reserve fund for public safety spending. CP at 251, ¶ 13.

**B. Teamsters challenges the Resolution and PERC determines that it does not violate any PECBA provision**

Teamsters 690's representatives met with the Commissioners two

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<sup>1</sup> The tax increase proposal had failed at least twice before, where no Transparency Resolution was presented. *See* Clerk's Papers (CP) at 250 (Declaration of Commissioner Rob Coffman); *see also* <http://results.vote.wa.gov/results/20071106/lincoln/> and <http://results.vote.wa.gov/results/20081104/lincoln/> (last visited Nov. 11, 2019).

weeks after the County adopted the Transparency Resolution. In a public meeting, they demanded the Commissioners to rescind the Resolution, and suggested that it would be a “costly endeavor” if the County did not do so. AR at 708-10. The County declined to capitulate.<sup>2</sup>

On September 26, 2016, Teamsters filed two ULPs against the County (one for each bargaining unit) with PERC. The union alleged that the PECBA barred the County from passing the Transparency Resolution unless the union agreed. AR 711-713; AR at 566, 592. The Complaints alleged that by opening its meetings to the public without the union’s consent, the County refused to bargain a mandatory subject, and discriminated against unionized employees. AR at 566, 592.

PERC Hearing Examiner Jessica Bradley dismissed the complaints. She did so because the Transparency Resolution did not “deprive[] any of [the County’s] employees of some ascertainable right, benefit, or status,” and did not “constitute[] a change to a mandatory subject of bargaining.” *Lincoln County*, Decision 12648 (PECB, 2017).<sup>3</sup> Teamsters also argued that the Resolution, on its face, would frustrate the bargaining process. But this

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<sup>2</sup> Since passage of the Resolution, the County has bargained open meeting with other unions without issue, including the American Federation of State Municipal and County Employees Locals 1254 and 1254CH. CP at 251, ¶ 15.

<sup>3</sup> Available at <https://decisions.perc.wa.gov/waperc/decisions/en/item/214545/index.do?q=resolution+16-22> (Last visited July 1, 2019).

argument was rejected too, since a Resolution that all bargaining sessions be public did not apparently “describe any specific examples of the employer refusing to meet and bargain at reasonable times and places.” *Id.* Accordingly, the complaints were dismissed. *Id.*

The Union appealed the Examiner’s decision to the PERC Board on January 30, 2017, but it eventually withdrew its appeal. PERC closed the case on February 15, 2017. AR at 629. With the appeal withdrawn, the Examiner’s decision became a final order. *See* WAC 391-45-350; AR at 622 (“This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.”).

**C. The parties’ bargaining sessions, and the union’s resolution to not bargain publicly**

On October 31, 2016, with the CBAs coming to expiration at the end of December, the County reached out to the union to initiate bargaining. AR 714-716, 632. The parties agreed on January 17, 2017, which would be in open meeting. AR 720-21. Mr. Kuhn emailed opening proposals.

*i. January 17, 2017 bargaining session*

On January 17, while the union’s complaint was pending, the three County Commissioners as the bargaining team for Lincoln County met with Teamsters 690 met for their first bargaining session, in open public meeting. This was the first time the County had bargained any substantive matter

with Teamsters 690<sup>4</sup>. Commissioner Coffman convened the meeting and announced the negotiations were open to public observation, but not public participation. AR at 809; *see* AR at 796. At least one member of the public, a local journalist, was present. AR at 826, 793. The parties worked through the union’s proposals, and reached tentative agreements. AR at 721, 723, 867-74. However, the parties had to set over negotiations to a later date, February 27, 2017. AR at 726. Mr. Kuhn forwarded his bargaining counter-proposals which included agreements reached, and the Union’s revised demands, *see* AR at 641, and on February 13, the union withdrew its pending ULP complaint with PERC. AR at 627.

*ii. Teamsters’ decision to bargain privately*

Unbeknownst to the County, on February 16, 2017, Teamsters 690’s Executive Board convened to make a decision regarding future bargaining. It passed an internal resolution titled its “Integrity in Bargaining Resolution.” AR at 475. In it, the Teamsters 690 executive board resolved to bargain in private in the future:

...

**THEREFORE**, Teamsters Local 690 does hereby resolve:

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<sup>4</sup> AR at 817 (Question from union counsel: “So at that time [when Teamsters took over from the Guild], back in the first half of 2014, was there any real need for, kind of, classic, full-table give-and-take bargaining between 690 and the county?” Answer from union representative Mr. Kuhn: “No....”)

All collective bargaining on behalf of members of Teamsters 690 with their respective employer representatives shall be performed in a private atmosphere.

That this resolution shall apply to any and all direct communications with employer representatives related to collective bargaining, including, but not limited to, negotiations regarding wages, hours and working conditions, contract administration, scheduling of meetings, personnel matters, grievance processing, mediation, or (*sic*) arbitration....

AR at 475-76.

Teamsters 690 later indicated that it made this resolution in order to bring the public meetings issue to a head. *See* AR at 851-52 (“We needed to get some formal ruling from PERC on the matter...”); AR at 884; *see also* AR at 214 (“Teamsters Local 690 eventually ‘teed up’ the disagreement for resolution by PERC by passing a resolution of its own...”). The union made its decision three days after Teamsters withdrew its appeal from Hearing Examiner Jessica Bradley’s decision, and 30 days after the first, successful, bargaining session with the County on January 17, 2017.

*iii. February 27, 2017 bargaining session*

On February 27, the County and Teamsters 690 met again to continue negotiations in public. Commissioner Coffman, as before, convened the open public meeting. AR 728. One member of the public, the local journalist from the January 17 bargaining session, was in attendance.

AR at 793. The County was unaware of the union’s recent decision. See AR at 851-52, 260.

Mr. Kuhn spoke first for the union. After introducing himself and indicating the union wanted to bargain, counsel for the union took over and explained that the union preferred to bargain in private, not in open. AR at 728. The union requested that everyone leave the meeting room except those doing the bargaining. *Id.* The Commissioners would not support this request, and stated that, pursuant to its Transparency Resolution, the session would be open to the public. *Lincoln County* Decision 12844 (PECB, 2018), Finding of Fact No. 11; AR at 260.

The parties stated their positions back and forth several times. Eventually “the union team left the meeting and went into the break room,” and the County “kept the meeting open until the union team left the building.” *Id.* at Finding of Fact No. 12; AR at 260.

## **V. PROCEDURAL HISTORY**

Lincoln County filed an unfair labor practice (“ULP”) Complaint against the union on February 27, 2019 for conditioning the union’s willingness to bargain mandatory subjects (wages, hours, working conditions) upon capitulation over permissive subjects (matters not affecting wages, hours, working conditions). WAC 391-45-110 provides that the Executive Director of PERC, or a designated staff member, shall

determine whether the facts alleged in the complaint may constitute an unfair labor practice within the meaning of the applicable statute. PERC issued a cause of action against the union on March 23, 2017. AR at 1122-24.

The union filed a complaint against the County, too. PERC did not issue a cause of action against the County at first, however, stating instead that:

It is not apparent that bargaining guidelines and other parameters could constitute a mandatory subject of bargaining.... In order to state a cause of action for unilateral change the complainant would need to explain how the employer's insistence on making collective bargaining contract negotiations open to the public, could constitute a change to a mandatory subject of bargaining.

AR at 1117. PERC gave the union an opportunity to amend its complaint, which it did, and PERC issued a cause of action against the County on May 15, 2017. AR at 1097.

The case was heard before Hearing Examiner Jamie Siegel, and a ruling was issued on April 3, 2018. She concluded that both parties committed ULPs, however, which did not resolve the conflict. *See Lincoln County (Teamsters Local 690)*, Decision 12844 (PECB, 2018); AR at 260-61.

The County and the union appealed to the PERC Board, and on August 29, 2018, PERC issued its decision, *Lincoln County (Teamsters*

*Local 690*), Decision 12844-A (PECB, 2018)<sup>5</sup> AR at 8. PERC, too, concluded that both parties committed ULPs.

PERC concluded that Teamsters committed an ULP for essentially the reasons advanced by the County: that the union conditioned its willingness to bargain mandatory subjects on the County's capitulation on a non-mandatory subject of bargaining.

To find that the County had committed an ULP, PERC first attempted to distinguish its earlier 2017 decision finding that the Transparency Resolution was not an unfair labor practice, *Lincoln County*, Decision 12648 (PECB, 2017). AR at 100-101. It then ruled that the County also committed an ULP by conditioning its willingness to bargain mandatory subjects on the union's agreement to bargaining in public. AR at 109. This, PERC found, was a refusal to bargain in violation of the PECBA.

As a remedy, the Commission ordered the County (and union) to negotiate regarding whether meetings would be open to the public. AR at 112-16. The Commission believed that the past practice of the parties was closed bargaining, however, and ordered the County to bargain in private if the parties could not reach agreement: "if the parties are unable to come to a resolution through good-faith negotiations and mediation, the parties will

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<sup>5</sup> The citations for the Commission and the Examiner's decisions are similar, but not identical. The Commission's is differentiated by an "A:" the Commission's decision is "12844-A" and the Examiner's is "12844."

negotiate from the *status quo*—that is, in private meetings.” AR at 111; See also AR at 115.

Both parties appealed PERC’s decision to the Court under the Administrative Procedures Act (“APA”), RCW 34.05. The parties contested venue, and during this time Teamsters filed two new ULP complaints against the County for allegedly failing to comply with the PERC order pending appeal. *See* CP at 440, 513. The Court below ordered Teamsters to refrain from seeking enforcement of the PERC order temporarily, CP at 502, and eventually Teamsters voluntarily withdrew them. Eventually the Courts decided that venue was proper in Lincoln County Superior Court.

On August 28, 2019, Lincoln County Superior Court, the Honorable Judge Gary Libey of Whitman County sitting by assignment, summarily affirmed the PERC’s decision. CP at 1052-57.

On September 3, 2019, the County timely filed its notice of appeal. CP at 1058, 1061.<sup>6</sup> On September 16, 2019, Teamsters filed its notice of cross-appeal. CP at 1073.

## **VI. ARGUMENT**

PERC erred when it decided that Lincoln County committed an unfair labor practice (ULP).

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<sup>6</sup> The County filed its first notice of appeal, and then an amended one, on the same date, Sept. 3, 2019.

PERC has already ruled that the County committed no ULP when it passed the Transparency Resolution. This Court should vacate PERC's instant decision in so far as PERC found that the County committed an ULP by abiding by its Transparency Resolution. Furthermore, this Court should affirm the decision in so far as it found that the union committed an ULP by refusing to bargain unless the County rescinded its Resolution and bargained in closed session.

**1. SUMMARY OF ARGUMENT**

PERC's decision is in error for at least four reasons.

First, PERC erred in so far as it issued a cause of action for an ULP against the County for abiding by its Transparency Resolution, and then found a ULP for the same. In doing so, PERC interpreted the PECBA to preempt Transparency Resolutions. In fact, no authority suggests that the PECBA invalidates a public employer's decision to make collective bargaining sessions open to the public, and representative bodies such as County Commissioners enjoy plenary power to open its meetings pursuant to the Washington State Constitution, and discretion to do so under the OPMA, RCW 42.30.140.

Second, PERC erred in refusing to recognize that, if the PECBA does govern the employer/union relationship in this context, open public meetings are a public employer's prerogative under the PECBA caselaw.

Opening meetings to the public is a decision at the “core of entrepreneurial control” for a public employer under the PECBA, and as such the County may decide to open its meetings to the public even over a union’s objection.

Third, PERC erred by applying the *status quo* doctrine—the doctrine that the parties to collective bargaining must maintain the *status quo* based on past practice—to the permissive subject of whether or not bargaining sessions should be open to the public.

Finally, even if the past practice controls in this case, PERC’s factual findings are unfounded. PERC found that the County refused to bargain, and that the past practice of the parties was to bargain in private. In fact, Lincoln County and Teamsters 690 have no past practice of bargaining together.

## **2. STANDARD OF REVIEW**

PERC is an administrative agency of limited jurisdiction and competence, with “only... authority to enforce Washington State’s collective bargaining laws.” *State – Corrections*, Decision 12749 (PSRA, 2017).<sup>7</sup> Thus, the Court grants deference to PERC’s interpretation of the PECBA, chapter 41.56 RCW. *See City of Vancouver v. Pub. Emp’t Relations Comm’n*, 180 Wn. App. 333, 347, 325 P.3d 213 (2014). This

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<sup>7</sup><https://decisions.perc.wa.gov/waperc/decisions/en/item/233056/index.do?q=Decision+12749+>

limited deference for only those matters within PERC's expertise is written also into the APA. *See, e.g.* RCW 34.05.461(5) ("Where it bears on the issues presented, the agency experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.")

Outside of PERC's expertise, the Court reviews PERC's conclusions of law *de novo*, and may substitute its own interpretation of the law for that of PERC's. *Yakima Cty. v. Yakima Cty. Law Enf't Officers' Guild*, 174 Wn. App. 171, 180, 297 P.3d 745, 749 (2013). Likewise, a Court reviews whether legislation conflicts with general laws under Article XI, § 11 *de novo*. *Weden v. San Juan Cty.*, 135 Wn.2d 678, 693, 958 P.2d 273, 280 (1998). Courts presume legislation is constitutional, and when a challenger brings a claim against the constitutionality of legislation, the challenger has the burden of showing the constitutional violation beyond a reasonable doubt. *Emerald Enterprises, LLC v. Clark Cty.*, 2 Wn. App.2d 794, 804, 413 P.3d 92, 97 (2018).

On review, the Court reviews the Commission's decision, not the hearing examiner's, though the Examiner's findings are considered together with other opposing evidence. *Pub. Employees Relations Comm'n v. City of Vancouver*, 107 Wn. App. 694, 704, 33 P.3d 74, 80 (2001). When appeal is taken from Superior Court, the Court of Appeals sits in the same position as the Superior Court and applies the APA directly to the agency decision.

*State, Dep't of Ecology v. Douma*, 147 Wn. App. 143, 151, 193 P.3d 1102, 1106 (2008) (citations omitted).

**3. PERC ERRED WHEN IT FOUND A CAUSE OF ACTION AGAINST THE COUNTY ABSENT ANY AUTHORITY THAT THE PECBA PREEMPTS OPEN PUBLIC MEETINGS**

PERC erred when it issued a cause of action against the County under the PECBA and ultimately found that the County refused to bargain. Transparency Resolutions are not implicated by the PECBA at all; no authority—PECBA, PERC, statutory, or judicial—suggests that Transparency Resolutions do. This Court should vacate PERC’s order as it applies to the County, and find, as PERC did on January 10, 2017, that the County’s Resolution has no effect on mandatory subjects of bargaining, does not deprive employees of any rights, and is not a demand to meet or negotiate at unreasonable times or places.

Whether the PECBA implicates the Resolution at all is a matter of constitutional dimension because the question is one of preemption. Thus, answering this question comes *before* considering whether or not the County violated any *particular* provisions of the PECBA, which it did not.

When PERC found a cause of action against the County on May 15, 2017, for abiding by its Resolution, PERC did so even though it had already determined previously, on January 10, that the Resolution interfered with no PECBA rights, was not a unilateral change affecting mandatory subjects

of bargaining, and was not a demand to bargain at unreasonable times or places. *See* sec. IV.1.B, above; *Lincoln County*, Decision 12648 (PECB, 2017)<sup>8</sup>. PERC’s January 10, 2017 decision was, and continues to be, the correct resolution of this controversy.

PERC correctly decided this issue on January 10, 2017. But when the union raised, for the first time in negotiations, the issue of closing the session to the public at the second bargaining session. Subsequently, leaving negotiations when the County declined to close the meeting to the public on February 27, 2017, PERC found a cause of action against the County. *See* AR at 1097. Thereafter, PERC found that the County was bound by a (nonexistent) *status quo* of private bargaining with Teamsters, and ordered the County to bargain in private. AR at 111.

PERC’s error finding a cause of action and ordering the County to bargain in private, thereby concluding that the PECBA preempts the County’s Transparency Resolution, is reviewable under RCW 34.05.570(3)(a) (violation of constitutional provision), (3)(b)(outside agency’s statutory authority or jurisdiction), (3)(d) (erroneous interpretation and application of the law), and 3(h) (order inconsistent with a rule of the agency without explanation).

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<sup>8</sup><https://decisions.perc.wa.gov/waperc/decisions/en/item/214545/index.do?q=resolution+16-22>

**A. Whether the PECBA implicates – preempts – the County’s Transparency Resolution is a constitutional question.**

Under Article XI, § 11 of the Washington Constitution, “counties may make and enforce all regulations that do not conflict with state law.” *Emerald Enterprises*, 2 Wn. App.2d at 803 (citations omitted). Their powers are “as extensive as that of the legislature....” *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461, 463 (1980). This—the “home rule” principle—is “shorthand for the presumption of autonomy in local governance.” *Watson v. City of Seattle*, 189 Wn.2d 149, 166, 401 P.3d 1, 10 (2017) (citations omitted). The principle is “particularly important” with respect to matters touching on taxation. *Id.* Its purpose is to decrease state-level interference with local affairs, and increases local government accountability. *Id.* Local legislation is all the stronger when the State grants local government discretion within a statutory scheme. *See Edmonds Shopping Ctr. Associates v. City of Edmonds*, 117 Wn. App. 344, 354, 71 P.3d 233, 237 (2003).

Local governments’ powers are not unlimited. State laws of general application may limit counties’ powers. *See Adams v. Thurston Cty.*, 70 Wn. App. 471, 479, 855 P.2d 284, 289 (1993), *disapproved of on other grounds by Snohomish Cty. v. Pollution Control Hearings Bd.*, 187 Wn.2d 346, 386 P.3d 1064 (2016) (internal citations omitted); *see State v. Truong*, 117

Wn.2d 63, 67-69, 811 P.2d 938 (1991) (The issues presented by this case are whether [Cowlitz County Code] 10.40.020... Conflicts with RCW 70.96A.190 and 66.44.270.... If any of these is answered “yes,” the ordinance is unconstitutional.”). Thus, whether or not a State law of general application invalidates a local law is a preemption issue, and a constitutional matter. *Id.*

Legislation is preempted where it “‘prohibits what the state law permits,’ ‘thwarts the legislative purpose of the statutory scheme,’ or ‘exercises power that the statutory scheme did not confer on local governments.’” *Emerald Enterprises*, 2 Wn. App.2d at 804 (citing *Dep’t of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 378, 337 P.3d 364 (2014)). For a challenge to succeed, the conflict must be so stark that the local legislation and the general law “cannot coexist.” *Adams*, 70 Wn. App. at 479 (citing *Town of Republic v. Brown*, 97 Wn.2d 915, 919, 652 P.2d 955, 957 (1982)). The Court is reluctant to second-guess elected representatives, who are “presumed to be in touch with the conditions” of the counties they serve. See *Petstel, Inc. v. King Cty.*, 77 Wn.2d 144, 151, 459 P.2d 937, 941 (1969).

**B. The PECBA does not preempt the County’s Transparency Resolution**

Here, the County passed its Transparency Resolution pursuant to its Art. XI § 11 constitutional powers, within the policy directive of the OPMA. The OPMA specifically establishes open governance as the policy of the State and grants Counties the discretion to open or close meetings:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. *It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.*

RCW 42.30.010 (italics added). The OPMA was amended to exclude bargaining sessions from the OPMA’s mandate, but does not withdraw discretion from Counties to open—or close—their bargaining sessions to the public. RCW 42.30.140(4)(a).<sup>9</sup>

Not only this, but the only Court decision ever to touch on the issue establishes that that there is no conflict between the two acts. *Mason Cty. v. Pub. Employment Relations Comm'n, Teamsters Union, Local No. 378*, 54 Wn. App. 36, 39, 771 P.2d 1185, 1187 (1989). In *Mason County*, decided

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<sup>9</sup>The legislature amended the OPMA a year after Division II ruled, in *Mason Cty.*, 54 Wn. App. 36, 38 (1989), that the OPMA *required* negotiation sessions to be conducted in public. The amendment to the OPMA does not require negotiation sessions to be conducted publicly. See RCW 42.30.140. The County anticipates that the union will present argument related to this amendment, but will have to address specific arguments in its response.

before the legislature amended the OPMA to exempt CBA negotiations from its mandate, a County and a local chapter of the Teamsters had failed to bargain in public as required under the OPMA, and for this reason certain private negotiations were non-binding. The Court of Appeals, however, concluded that open meetings did not conflict with the PECBA:

[T]he Legislature intended collective bargaining... to be conducted in open public meetings....

[T]he [Open Public Meetings] Act and the Public Employees' Collective Bargaining Act can be reconciled by conducting collective bargaining sessions at open meetings. There are no serious conflicts between the two acts.

*Mason Cty.*, 54 Wn. App. at 40.

While it is true that the legislature later amended the OPMA to exempt CBA negotiations from its mandate, adding the exemption provision to the OPMA in fact *increased* the power of public employers and municipalities, since they now have flexibility to bargain in private or in public. If the legislature had intended to occupy this field and prohibit open bargaining, it could easily have done so. The legislature “is presumed to intend the plain meaning of its language.” *State v. Garcia*, 179 Wn.2d 828, 836, 318 P.3d 266, 272 (2014) (internal citations omitted)

Finally, no PECBA provision nor PERC case prohibits Counties from opening meetings to the public. This is for a simple reason: the

PECBA does not apply to matters with little or no bearing on the statutorily-delineated subjects of collective bargaining: “The scope of mandatory bargaining... is limited to matters of direct concern to employees. Managerial decisions that only remotely affect ‘personnel matters’, and decisions that are predominantly ‘managerial prerogatives’, are classified as nonmandatory subjects.” *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Employment Relations Comm'n*, 113 Wn.2d 197, 200, 778 P.2d 32, 34 (1989) (internal citations omitted). PECBA imposes a duty to engage in collective bargaining in good faith over “grievance procedures and... personnel matters, including wages, hours and working conditions...” only. RCW 41.56.030.

For this reason, PERC intervenes only “when the conduct of a party indicates a refusal to bargain in good faith....” *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 460, 938 P.2d 827, 833 (1997). No PERC decision has ever concluded that PECBA invalidates a public agency’s duly adopted resolution providing for bargaining in public. If anything, the contrary is true, since, according to PERC’s Hearing Examiner in *Lincoln County*, Decision 12648 (PECB, 2017), passage of the Transparency Resolution itself was not an ULP. It is an exercise in absurdity to rule that a County may *pass* legislation opening meetings to the public but when a

union demands that the County throw members of the public out of a session, the County may not *apply* it.

**C. This Court should not extend the PECBA to preempt open public bargaining meetings**

This Court should not perpetuate PERC’s unsupported extension of the PECBA to invalidate openness in public collective bargaining, for at least five reasons.

First, the people of Washington have shown a strong preference for open government in the Public Records Act (“PRA”), RCW 42.56, campaign disclosure laws, RCW 42.17A, and the OPMA, RCW 42.30.010. The OPMA was passed in 1971 - one year before the PRA, around the time of Watergate. Both the OPMA and the PRA share virtually identical statements regarding their import to Washingtonian self-governance:

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010.<sup>10</sup> As for the PRA, the Supreme Court has made it clear that open government laws safeguard “nothing less than the preservation of the most central tenets of representative government, namely, the

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<sup>10</sup> See also RCW 42.56.030.

sovereignty of the people and the accountability to the people of public officials and institutions.” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 251 (1994). The importance of open government in Washington cannot be overstated.

Second, as PERC acknowledged, many other jurisdictions, including local agencies in Washington State, have passed open bargaining legislation. AR at 107 (“We are aware that open negotiations are becoming more common”). Public employee collective bargaining is or has been open to the public, in whole or in part, in Idaho, Oregon, Florida, Kansas, Minnesota, Montana, Tennessee, Texas, for example. *See* AR 348-394 (providing the statute, and a brief review of each). Locally, Ferry County adopted an identical resolution on March 6, 2017. AR at 208. The same is also true for the Pullman School District, AR 335. Kittitas County adopted a substantially identical ordinance on November 7, 2017 and later successfully negotiated.<sup>11</sup> AR at 332.

Last year, in December 2018, the Board of County Commissioners of Spokane County passed Resolution 18-0950, “In the Matter of Improving Transparency by Negotiating Collective Bargaining Agreements in a

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<sup>11</sup> Kittitas County passed a subsequent moratorium Resolution on their Transparency Resolution, citing the instant litigation. CP at 906.

Manner Open to the Public.” Spokane County Resolution 18-0950.<sup>12</sup> CP at 909-10. Spokane County’s Transparency Resolution and its reasoning are also almost identical to Lincoln County’s, and cites the OPMA. *Id.*

On top of that, this year the City of Spokane placed Proposition 1 on the ballot, asking Spokane voters “shall the Spokane City Charter be amended to require all collective bargaining negotiations be transparent and open to public observation...?”<sup>13</sup> Voters answered unequivocally “yes,” with over 77% in favor of opening collective bargaining to public observation.<sup>14</sup>

Third, now, more than ever, the desirability of public oversight and review in the area of public sector collective bargaining cannot be overstated in light of the United States Supreme Court’s recent decision in *Janus v. AFSCME, Council 31*. In *Janus*, the Supreme Court affirmed that collective bargaining speech and activity are core political speech and activity of the greatest concern and interest to the public. *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2474, 201 L. Ed. 2d 924 (2018)(It is “impossible to argue that the level of ... state spending for employee benefits [involved in collective bargaining] ... is not

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<sup>12</sup> Available through Spokane County’s Resolution Directory at <http://cp.spokanecounty.org/commissioners/commpub/ImageCntrl.aspx> (last visited Nov. 11, 2019)

<sup>13</sup> See <https://www.spokanecounty.org/DocumentCenter/View/27341/City-of-Spokane---Proposition-1-PDF> (last visited Nov. 14, 2019).

<sup>14</sup> <https://www.spokanecounty.org/2995/Current-Election-Results> (last visited Nov. 14, 2019).

a matter of great public concern.”). Moreover, the political power unions wield in collective bargaining does not come from their influence over state spending alone, but also their special place at the table on policy issues. *Id.* at 2475 (“In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters... education, child welfare, healthcare, and minority rights....”). In the context of collective bargaining, what unions have to say on these matters is “of great public importance.” *Id.* Transparency Resolutions such as the ones being passed across the State allow the public to see what unions have to say in inherently political activity.

Fourth, this is the only chance that union non-members may have to see how their designated bargaining representative advocates on their behalf, for their interests, on these important topics. Given the burden that compelled representation by a single bargaining representative imposes on First Amendment Free Speech and Associational rights, the least the government can do is allow union non-members to see how their representative is representing them, and speaking on their behalf.

Here, what the County and Teamsters 690 say on these matters—both fiscal and otherwise—is of great public importance. As political action and speech, the bargaining between Lincoln County and Teamsters 690 should be open for the public to see, not hidden. The construction of the

PECBA adopted by PERC in this case is contrary to these core constitutional rights and should therefore be rejected.

Finally, this Court should not affirm PERC's extension of the PECBA into the field of politics and local policy, allowing it to preempt the Transparency Resolution, because to do so would give administrative agencies, such as PERC, influence they were never intended to have.

PERC is an administrative agency, with limited jurisdiction and competency, staffed by unelected officials. *See State – Corrections*, Decision 12749 (PSRA, 2017); RCW 41.58.010. Its mandate is limited to the regulation of public employer-union relations within the constraints of the PECBA. That the Transparency Resolution *has* been translated into PECBA terms and brought under PECBA's umbrella (by PERC's decision here) does not mean the Resolution *should* be so confined.

The hypothetical list of topics that *could* become subjects of collective bargaining, subject to the PECBA and PERC, is infinite, since at some point every conceivable aspect of the County-union relationship has some nexus to collective bargaining. What if two or more elected commissioners were non-native speakers and spoke through an interpreter during sessions? What if the County stopped providing free internet at its administration building where negotiations take place? What if the County decided to reduce the impact of global climate change by adjusting the

temperature settings in its negotiation rooms? These decisions would undeniably have some effect on collective bargaining sessions, but the PECBA cannot be allowed to regulate every type of relationship between a union and public entities exercising sovereign authority through duly elected legislative officers (or the voters directly exercising their sovereign authority). The PECBA should not be stretched to regulate all these possibilities. Local governments must retain autonomy. This is the purpose of the “home rule” principle.

If there were ever a type of decision that local governments should be able to make, it is whether to open their meetings to the public, to whom they, as elected representatives, are accountable. This is especially the case where, as here, the County passed its Transparency Resolution as a matter of good policy *and* to be transparent with newly acquired new tax dollars.

The County’s Transparency Resolution is well within the ‘home rule’ powers contemplated by the State Constitution, does a service to the people and the State’s policy directive to maintain accountability in government as stated in the OPMA, is part of a growing, positive trend, of making local government/union relationship more transparent and open to the public, and grants access to the public to observe core political speech under the First Amendment.

PERC erred to the extent it determined, absent any authority, that a County violates the PECBA when it abides by a Transparency Resolution it lawfully passes. This Court should vacate PERC's order as it applies to the County, and find, as PERC did on January 10, 2017, that the County's Transparency Resolution has no effect on mandatory subjects of bargaining, does not deprive employees of any rights, and is not a demand to meet and negotiate and unreasonable times or places.

**4. PERC ERRED BY ORDERING THE COUNTY TO MEET AND BARGAIN WITH THE UNION IN PRIVATE BECAUSE OPEN PUBLIC MEETINGS ARE AN EMPLOYER PREROGATIVE**

The PECBA does not implicate open meetings. However, even if open meetings comes under PECBA's purview, PERC erred when it ordered the County to bargain in private with the union because, under the PECBA's employer prerogative doctrine, opening meetings to the public are a public employer's prerogative.

PECBA imposes a duty on employers and unions to bargain in good faith on mandatory subjects of bargaining. The PECBA does not require the parties to bargain regarding the prerogatives of each. Open meetings, if implicated by the PECBA at all, are a public employer prerogative, not subject to mandatory bargaining. Teamsters committed an ULP by making open versus non-public meetings a subject of bargaining at the bargaining table, and conditioning its willingness to bargain on the County expelling

members of the public from observing negotiations, contrary to the Resolution.

PERC's error ordering the County to bargain over the subject of open public meetings is reviewable under RCW 34.05.570(3)(d) (erroneous interpretation and application of the law) and (3)(h) (order inconsistent with a rule of the agency without explanation).

The doctrine of prerogatives<sup>15</sup> stems from the PECBA's limited scope. As defined in RCW 41.56.030(4), the duty to bargain extends only to "wages, hours and working conditions," and the scope of mandatory bargaining "thus is limited to matters of direct concern" to the employees of the bargaining unit. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Employment Relations Comm'n*, 113 Wn.2d 197, 200, 778 P.2d 32, 34 (1989) (citations omitted). "Managerial decisions that only remotely affect 'personnel matters', and decisions that are predominantly 'managerial prerogatives', are classified as nonmandatory, or permissive, subjects." *Id.*; *City of Seattle*, Decision 11588-A (PECB, 2013).

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<sup>15</sup> Unions enjoy prerogatives, too. For example, they have the prerogative to engage in so-called "coordinated bargaining," whereby the representatives of separate bargaining units participate in the negotiations of other units for the purpose of assisting one another. *Gen. Elec. Co. v. NLRB.*, 412 F.2d 512 (2d Cir. 1969). This right, in turn, stems from the rights of both parties to determine their own representatives. *See Missouri Portland Cement Co.*, 284 NLRB 432, 434 fn.13 (1987). Likewise, unions may unilaterally determine how its proposals are developed or the ratification process. *See Lewis County*, Decision 464 (PECB, 1978), *aff'd Lewis County*, Decision 464-A (PECB, 1978).

The United States Supreme Court developed the doctrine of managerial prerogatives under the National Labor Relations Act (“NLRA”) context, in *First Nat. Maint. Corp. v. NLRB*, 452 U.S. 666 (1981). As the Court explained, in passing the NLRA, Congress had “no expectation” that union representatives would become “equal partner[s] in the running of the business enterprise in which the union’s members are employed.” *Id.* at 676. There is an “undeniable limit to the subjects about which bargaining must take place,” which includes “only issues that settle an aspect of the relationship between the employer and the employees.” *Id.* (citing *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). Decisions with only an “indirect and attenuated impact on the employment relationship,” are not subjects about which management must bargain, since they relate to matters “wholly apart from the employment relationship.” *Id.*

PERC recognizes “that public sector employers are not ‘entrepreneurs’ in the same sense as private sector employers.” *Central Washington University*, Decision 12305-A (PSRA, 2016).<sup>16</sup> For this reason, “entrepreneurial control should consider the right of the public sector employer, as an elected representative of the people, to control management and direction of government.” *Id.*

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<sup>16</sup> <https://decisions.perc.wa.gov/waperc/decisions/en/item/171385/index.do>

A public employer enjoys prerogative to determine its budget, for example, *Spokane Education Association v. Barnes*, 83 Wn.2d 366, 376 (1974), and “[a] public employee organization does not have the right to negotiate with the employer ‘upon the subject of budget allocations.’” *Kitsap Cty. v. Kitsap Cty. Corr. Officers' Guild, Inc.*, 193 Wn. App. 40, 53 (2016). Prerogatives need not relate directly to the budget. Cities enjoy the prerogative to pass measures of moral and value-laden character, such as measures combating race-based police stops (racial profiling). *Claremont Police Officers Ass'n v. City of Claremont*, 39 Cal. 4th 623, 639, 139 P.3d 532, 542 (2006); see also *Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n*, 391 Mass. 429, 430, 462 N.E.2d 96, 97 (1984) (city prerogative to implement policy subjecting officers to polygraphs). Employers may take unilateral action consistent with their prerogatives. AR at 250; See *Port of Seattle*, Decision 11763-A (PORT, 2014).

To determine whether a particular subject is an employer prerogative, PERC employs a balancing test. It balances the subject’s relationship to employee wages, hours, and working conditions, against the extent to which the subject is a management or union prerogative. *City of Seattle*, Decision 11588-A (PECB, 2013). There are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees, and (2) the extent to which the

subject lies “at the core of entrepreneurial control,” or is a management prerogative. *Id.*; *Int'l Ass'n of Fire Fighters*, 113 Wn.2d at 203. The decision focuses on which characteristic predominates. *Id.*

The analysis here weighs unequivocally in favor of finding that open meetings is a public employer’s managerial prerogative. First, public bargaining has no relationship to wages, hours, or working conditions. Second, the decision of whether or not to show the public how resources are being negotiated in collective bargaining, “a matter of great public concern,” *Janus* 138 S. Ct. at 2474, necessarily lies “at the core of entrepreneurial control” for a public employer. This is because public employers, like the County Commissioner’s here, are tasked with allocating and safeguarding the public’s money and resources in a responsible manner consistent with the community’s goals and values. In other words, allocating the community’s resources and showing to the community how those resources are being spent *is the Commissioners’ business*. And that is exactly what the Commissioners did here. The Commissioners adopted the Transparency Resolution to improve transparency and accountability of government generally, and to encourage local support for a public safety tax increase specifically.

The legislative decision to adopt and adhere to an open governance law is intrinsically political—especially where it is tied to a tax increase.

Thus, the balancing text unequivocally weighs in favor of the Transparency Resolution being a managerial prerogative, “at the core” of elected officials’ management of taxpayer funds, and their relationship to the voting public. Indeed, it is difficult to imagine a decision more intrinsic to government management than that of whether or not to make meetings open or closed to the public. This is especially so in Washington State. PERC erred when it failed to recognize the County’s decision to abide by its Transparency Resolution as a public employer’s prerogative.

**5. PERC ERRED IN APPLYING THE *STATUS QUO* DOCTRINE TO A PERMISSIVE SUBJECT OF BARGAINING**

Even if the PECBA relates to public or private bargaining, and even if public employers do not enjoy a prerogative to open their sessions to the public, PERC erred when it applied the *status quo* doctrine governing mandatory subjects of bargaining to this permissive subject.

This error is reviewable under RCW 34.05.570(3)(d) (erroneous application of law) and (3)(i) (an order that is arbitrary or capricious). This latter provision (error for arbitrary or capricious ruling) applies because of the extraordinary circumstances of this case: PERC decided on January 10, 2017, based on established principles, that the County’s Transparency Resolution does not violate any PECBA provisions. But when the union made its demand to bargain in private on February 27, 2017, contrary to the

Resolution, PERC contravened its prior direction based on a novel extension of the *status quo* determinative doctrine.

Permissive subjects of bargaining include all those topics, subjects, decisions, relationships, and any potential points of discussion which could, potentially, become issues at the bargaining table, were one party to make them an issue. Permissive subjects are not subject to the duty to bargain; parties are not required to bargain over them. *Cowlitz County*, Decision 12483-A (PECB, 2016) (citing *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997); *Whatcom County*, Decision 7244-B (PECB, 2004)). This rule makes sense because the hypothetical list of permissive subjects is infinite. For this reason, a party to negotiations may not hold mandatory subjects hostage to permissive subjects by refusing to bargain mandatory subjects until agreement is reached on permissive ones. It is an ULP for one party to “bargain to impasse” over a permissive subject. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342 (1986).

Whether bargaining sessions are to be open or closed is a non-mandatory, permissive subject of collective bargaining. PERC acknowledges as much below. *See* AR at 112. It is “well established,” AR at 1120, that if a subject of bargaining is permissive, the parties may negotiate regarding it, but each party is free to bargain or not to bargain, and

to agree or not to agree. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997). And while the past practice, or *status quo*, between the parties controls in the case of mandatory subjects of bargaining, it does not control in the case of permissive subjects. The decision below acknowledges as much explicitly:

[O]ne of the principle distinctions between 'mandatory' and 'permissive' subjects is that the *status quo* must be maintained on mandatory subjects after the expiration of a collective bargaining agreement....

AR at 109-10 (emphasis added) (citing *City of Yakima*, Decision 3564-A (PECB, 1991))<sup>17</sup>. Conversely, the *status quo* is irrelevant concerning permissive subjects. Those obligations are tied to contract or agreement between the parties, and expire with the contract. AR at 110.

Even PERC's remedies jurisprudence does not require parties to return to the *status quo* after an ULP has been found. Where changes have been made to a permissive subject that has an effect on wages, hours, working conditions (not the case here), the perpetrator must negotiate the effects of the change, but need not revert the permissive subject back to original conditions:

When an employer has refused to bargain the effects of a permissive subject of bargaining, the Commission has traditionally ordered effects bargaining without requiring the employer to undo the decision. *Wapato School District*,

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<sup>17</sup> <https://decisions.perc.wa.gov/waperc/decisions/en/item/178315/index.do>

Decision 10743 (PECB, 2010), *aff'd*, Decision 10743-A (PECB, 2012); *Central Washington University*, Decision 10413-A (PSRA, 2011); *State – Social and Health Services*, Decision 9690-A (PSRA, 2008). In those cases, the employer acted within its statutory rights or within its entrepreneurial rights. For example, when an employer acted within its managerial prerogative to restructure how work was performed and reassigned work, the employer was ordered to bargain the effects of the decision and was not been ordered to restore the status quo ante. *Wapato School District*, Decision 10743 (PECB, 2010), *aff'd*, Decision 10743-A (PECB, 2012),

*Port of Seattle*, Decision 11763-A (PORT, 2014) (emphasis added); *see also Snohomish County*, Decision 12723-A, fn. 6 (PECB, 2018)<sup>18</sup> (“Since the employer's cell phone policy is a permissive subject of bargaining, the employer was under no obligation to revert back to the policy prior to [the employer’s] October 11, 2016, directive....”).

Finally, even Teamster’s briefing before PERC, below, tacitly acknowledges the novel theory it propounds:

[T]he public/private issue is an example of a third species of permissive subjects...

The question for the Commission, then, is how do the parties resolve a dispute regarding this third type of permissive subject.

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<sup>18</sup><https://decisions.perc.wa.gov/waperc/decisions/en/item/310858/index.do?q=Decision+12723-A+-+PECB>

AR at 217 (Teamsters Union Local 690’s Appeal Brief) (citations to the Hearing Examiner’s decision below omitted). The union argued (and argues) that the past practice should apply in these circumstances, and PERC accepted the argument.

PERC came to this conclusion by identifying open bargaining as a “ground rule” or “bargaining procedure.” *See* AR at 107. However, in addition to providing no analysis as to why or how open meetings is a ground rule, PERC compounded its error with its ultimate order to the parties: that the *status quo* governs the disagreement. This conclusion is completely unsupported by any case law and, notably, the Hearing Examiner in the decision below did not make it. Instead, the Hearing Examiner merely concluded that open meetings was a procedure for bargaining, that both the union and the County committed an ULP, and ordered both parties to bargain with one another. AR at 261-63. PERC’s lack of reasoned decision, combined with its unprincipled extension of the *status quo* doctrine to this permissive subject of bargaining, is error, since under the PECBA open meetings is most naturally classified as an employer prerogative, or simply deserving of no special designation at all.<sup>19</sup>

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<sup>19</sup> The County anticipates that much of the union’s argument will be devoted to buttressing PERC’s decision on this point. Without knowing the specific arguments, however the County will have to address them in its responsive briefing.

This Court should vacate PERC’s decision below in so far as it concluded that the past practice of the parties determines resolution of what PERC considers to be a permissive subject, whether bargaining will be in private or in public.

**6. PERC’S FACTUAL CONCLUSIONS THAT THE COUNTY REFUSED TO BARGAIN AND THAT THE PARTIES’ PAST PRACTICE WAS TO BARGAIN IN PRIVATE ARE UNSUPPORTED BY THE RECORD**

Even if Transparency Resolutions are subject to the PECBA, open meetings are not a public employer’s prerogative under the PECBA, and open or closed sessions is a newly discovered “third species” of permissive subject where the past practice is determinative, PERC’s factual conclusions based on the record below—that the County conditioned its willingness to bargain mandatory subjects on capitulation over permissive subjects, and that the past practice of the parties was to bargain in private—is unsupported. This is error under RCW 34.05.570(3)(e) (for an order that is not supported by evidence that is substantial).

The Court reviews challenges to PERC’s findings of fact for substantial evidence, *i.e.* evidence sufficient to persuade a fair-minded person of their truth. *Yakima Police Patrolmen’s Ass’n v. City of Yakima*, 153 Wn. App. 541, 553, 222 P.3d 1217 (2009) (internal citations omitted).

**A. The County did not refuse to bargain on February 27, 2017; the union did**

Teamsters acted in bad faith by secretly conditioning its willingness to bargain on the County’s capitulation and agreement to expel observers. Assuming, *arguendo*, that PERC’s classification of open meetings as a permissive subject that is not a managerial prerogative, it was in fact the union that committed a patent ULP by deliberately and unjustifiably<sup>20</sup> making open vs. private meetings an issue at the bargaining table on February 27, 2017.

The record fully supports that it was Teamsters that chose to make open versus closed meetings a subject of collective bargaining. It was the union that first contacted the County Commissioners and asked that they rescind the Resolution, intimating of consequences if they did not. AR at 708-10. The union in secret passed its “Integrity in Bargaining” resolution without informing the County, thereby “teeing up” the issue and bringing it to a head. *See* AR at 213, 851-52, 260. The union was the party that actually raised the issue during the second bargaining session with the County, on February 27. AR at 99. When the County would not do as the union demanded and close the meetings to the public—practically speaking, expel the single observer that was present—the union left. AR at 100. This was

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<sup>20</sup>Teamsters 690 has attempted to argue that public meetings inhibits the flow of negotiations. PERC did not adopt this conclusion. *See* AR at 16-17.

a patent refusal to bargain. Even if PERC’s formulation of the law is correct, it erred in so far as it found that the County conditioned its willingness to bargain on agreement to permissive subjects of bargaining.

**B. The County and union had no past practice of private bargaining**

Assuming *arguendo* that PERC’s *status quo* determinative formula is correct, PERC’s factual conclusion regarding the actual past practice of the parties is not. PERC concluded that the parties’ past practice was to engage in private bargaining sessions. AR at 111. But this conclusion is unsupported by substantial—indeed any—evidence. Instead, the weight of the evidence shows unequivocally that the County and Teamsters have no past practice bargaining, since the Teamsters had only just taken over from the Guild, and no negotiations had yet been conducted.<sup>21</sup> See AR at 693, 740, 817.

Since the parties have no past practice or *status quo* together, even under PERC’s formulation of the law, PERC should have ruled that the County did not commit an ULP by opening its meetings to the public.

By concluding that “past practice” includes the past practice of *other* representatives for the same bargaining unit, PERC essentially gave unions a perpetual veto power over local governments wishing to be accountable

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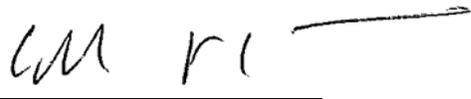
<sup>21</sup>If they have *any* past practice, it is in open meetings, albeit during pending litigation, on January 17, 2017.

to the public. If PERC's formulation of the law is correct, PERC should have found that, as here, where no past practice exists, the public employer's legislation making itself be accountable to the public supersedes the union's desire for secrecy. This Court should so find.

## VII. CONCLUSION

Allowing a private labor organization to determine how accountable a government body shall be is anathema to the principle of home rule, and to the people's insistence that they remain "informed so that they may retain control over the instruments they have created." RCW 42.30.010. No private entity should dictate to the government—local or otherwise—how accountable it shall be. For the above stated reasons, Lincoln County requests that the Court reverse the decision of the Public Employment Relations Commission in part and conclude that Lincoln County did not commit an unfair labor practice when it passed and abided by its Transparency Resolution.

Respectfully submitted this 15th day of November, 2019.

By: 

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## CERTIFICATE OF SERVICE

I, Jennifer Matheson, certify that on November 15, 2019, I caused the foregoing Statement of Arrangements to be filed with the Court of Appeals Division III, and caused a true and correct copy of the same to be delivered via e-mail to the following:

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**Appellate Court Case Number:** 37054-2  
**Appellate Court Case Title:** Lincoln County v. Public Employment Relations Commission, et al  
**Superior Court Case Number:** 18-2-00081-6

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