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No. 370542

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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LINCOLN COUNTY,

Appellant/Cross-Respondent

v.

TEAMSTERS LOCAL 690,

Cross-Appellant/Respondent

and

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent.

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CROSS-APPELLANT/RESPONDENT TEAMSTERS LOCAL 690's  
OPENING AND RESPONSE BRIEF

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## INTRODUCTION

### Re: Union's Appeal

The Public Employment Relations Commission's holding that the Union committed an unfair labor practice is contradicted by its own remedial Order, which enforces upon the parties the identical position taken by the Union in negotiations with the County: absent agreement to the contrary, the parties must bargain in private. *See*, Decision 12844-A, pp. 16, 18, AR 113, 115.<sup>1</sup> It cannot be illegal for the Union to take the same position with the County that PERC itself takes.

Furthermore, private bargaining, as sought by the Union and ordered by PERC (if negotiations did not result in different arrangements), more surely advances the State's legitimate interest in promoting good faith collective bargaining and the orderly resolution of labor disputes, and is fully consistent with the past practice between the parties and all applicable legal authority. In contrast, the County's position directly conflicts with past practice, is unsupported by any applicable legal authority, and hobbles productive collective bargaining (as it was intended to by its creator and advocate, the Freedom Foundation).

Alternatively, as explained below, County Resolution 16-22 was preempted by the Open Public Meetings Act, which pointedly exempts collective

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<sup>1</sup> AR = Agency Record; UX = Union Exhibit; EX = Employer Exhibit; TR = Transcript.

bargaining from coverage.

**Re: Union's Response to County's Appeal**

Contrary to the first sentence of the County's brief, this case is *not* about transparency. This case is about a decision issued by the state agency in charge of public sector labor relations regarding the parties' duties to bargain. By contending otherwise, the County implicitly concedes that its appeal has no credible basis in the most relevant fields of law: labor and administrative. In any event, the County has not provided any basis in governing law for reversing PERC's conclusion that the County breached its duty to bargain when it refused to bargain mandatory subjects unless the Union acceded to its position on a permissive subject, namely, that all bargaining take place in public and in compliance with the Open Public Meetings Act.

The County's novel constitutional and other theories are similarly unsupported. The County cites no legal authority establishing a constitutional prerogative to dictate that all bargaining occur in public. It likewise makes no policy or other argument that public bargaining better serves the State's legitimate interest in peaceful and effective labor relations than does private bargaining. These omissions are not surprising, because PERC, the NLRB, the federal courts, and the state courts all recognize that private bargaining better promotes effective collective bargaining than does public bargaining. As such, PERC, in the exercise of its expertise, was entitled to find that the County breached its duty to bargain

and order that, absent a voluntary agreement to the contrary, it must bargain in private.

### **ASSIGNMENTS OF ERROR**

1. PERC's conclusion that Local 690 committed an unfair labor practice is in error.
2. PERC erred when it concluded that the County's resolution is not preempted by the Open Public Meetings Act, which explicitly exempts collective bargaining from coverage.
3. PERC's failure to address its hearing examiner's erroneous exclusion of evidence offered by the Union is itself in error.
4. PERC's failure to admit and consider the excluded evidence is in error.

### **ISSUES PRESENTED**

1. Do PERC's decision and order, which purport to enforce a legal duty to bargain permissive subjects of bargaining, erroneously interpret and apply the law, in that they disregard uniform and longstanding court and PERC precedent holding that bargaining parties have no such duty? For identical reasons, are the decision and order arbitrary and capricious?
2. Did PERC erroneously interpret and apply the law and act arbitrarily and capriciously when it concluded that Local 690 committed an unfair labor practice when it insisted upon the same result that PERC ordered: i.e., that, absent agreement to the contrary, negotiations be conducted in private?
3. Where bargaining parties cannot agree whether negotiations should occur in private or public, whose position should prevail?
  - a. What role should past practice play in determining who prevails?

- b. What other factors, if any, are to be considered in determining who prevails?
4. Does the Open Public Meetings Act preempt the County's resolution requiring that collective bargaining be conducted in compliance with the OPMA, which explicitly exempts collective bargaining from coverage?
5. Where unrebutted documentary and other evidence establishes that the County's resolution was written, marketed to the County and defended by the Freedom Foundation at its sole expense, did PERC err when it failed to consider, as part of its determination of good faith, evidence offered by the Union establishing that the Foundation exists to destroy labor unions and burden public sector collective bargaining?

### **STATEMENT OF THE CASE**

The Union adds only the following to the County's Statement:

#### **Procedural History**

Following an evidentiary hearing and briefing, PERC Hearing Examiner Jamie Siegel issued a written decision finding that both parties had breached their duties to bargain. Both parties appealed to the Public Employment Relations Commission (PERC), which affirmed those holdings, but significantly revised the remedy, in a decision dated August 29, 2018. Lincoln County ("the County" or "the Employer") filed a petition for review in Lincoln County Superior Court, while Teamsters Local 690 ("the Union" or "Local 690") filed its petition in Thurston County. After much procedural wrangling, both petitions were

adjudicated in Whitman County Superior Court, which affirmed PERC in all respects. Both parties now appeal to this Court.<sup>2</sup>

### **The Union and the contracts**

There are approximately twelve Sheriff's deputies in the commissioned bargaining unit and approximately eight corrections/communications employees in the non-commissioned bargaining unit.<sup>3</sup>

Prior to Teamsters Local 690's becoming the exclusive bargaining representative for both the commissioned and non-commissioned bargaining units, the two units were represented by the Lincoln County Deputy Sheriffs Guild ("the Guild").<sup>4</sup> Historically, contract negotiations between the County and the Guild were always conducted in a private setting.<sup>5</sup>

On January 7, 2014, Local 690 succeeded the Guild as the certified bargaining representative for the commissioned bargaining unit, following a

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<sup>2</sup> At page 13 of its Brief, the County artificially truncates some aspects of the procedural history and misstates others. As the index to the certified record discloses, both parties filed their unfair labor practices on the identical date: February 28, 2017. Contrary to the County's portrayal, PERC never failed "to issue a cause of action against the County." The very PERC decision quoted by the County, issued on the identical date it found a County cause of action, finds a Union cause of action against the County for refusal to bargain. *See*, AR 1118 ("the second allegation of the complaints qualify for a refusal to bargain cause of action"). Only an additional cause of action (changing past practices unilaterally), was postponed until May 15<sup>th</sup>.

<sup>3</sup> Tr. 158: 14-17 (Note: Citations to the transcript will designate page and lines in the following form: Tr. [page number]:[line number]-[line number].), AR 818.

<sup>4</sup> EX-1, AR 529; Union Exhibit ("UX")-3, AR 458; UX-4, AR 463; Tr. 79: 21-25, AR 739; Tr. 80: 1-10, AR 740.

<sup>5</sup> Tr. 78: 2-4 (County commissioner and lead negotiator Robert Coffman), AR 738; Tr. 241; 3-7 (bargaining unit dispatcher and Guild and Teamster negotiator Brad Sweet), AR 901.

PERC-supervised election.<sup>6</sup> On November 19, 2015, again succeeding the Guild, Local 690 became the exclusive bargaining representative for the non-commissioned bargaining unit.<sup>7</sup>

Following the transitions from the Guild to Local 690, the County worked cooperatively with the Union to amend the Guild's labor agreements to reflect Local 690's successorship.<sup>8</sup> On July 22, 2014, the County and Local 690 executed a labor agreement for the commissioned bargaining unit,<sup>9</sup> and, on July 5, 2016, another one for the non-commissioned unit, both in effect from January 1, 2014 to December 31, 2016.<sup>10</sup> For both units this process was completed in private.<sup>11</sup>

**The Freedom Foundation successfully markets its agenda to the County.**

On August 12, 2016, Matthew Heyward of the "Freedom Foundation" emailed Lincoln County Commissioner Rob Coffman a document the Foundation had written titled "Collective Bargaining Transparency Model Resolution."<sup>12</sup> On its face, the document appears to be a generic form for use by any Washington municipality, consisting of non-specific statements of policy interspersed with blank fields, labelled "city/county," for the municipality to fill in. Upon receipt,

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<sup>6</sup> EX-1, AR 529; UX-3 (PERC Certification, 1/7/14), AR 458; Tr. 156; 11-16 (The commissioned bargaining unit is eligible for interest arbitration under RCW 41.56.430—490), AR 816.

<sup>7</sup> Tr. 79: 21-25, AR 739; 80: 1-10, AR 740; UX-4 (PERC Order of Affiliation, 11/19/15), AR 413.

<sup>8</sup> Tr. 80: 6-15 (Coffman), AR 740; Tr. 154:9-12 (Teamster rep and lead negotiator Joe Kuhn), 814.

<sup>9</sup> Tr. 157: 1-25 (Kuhn), 817; Tr. 158:1-3, AR 818; EX-1, AR 529.

<sup>10</sup> Tr. 158: 4-11 (Kuhn), AR 818; EX-2, AR 545.

<sup>11</sup> Tr. 80: 1-25 (Coffman), AR 740; Tr. 157: 11-25, AR 817; Tr. 158; 1-17 (Kuhn), AR 818.

<sup>12</sup> UX-19, AR 515; Tr. 82: 9-10 (Coffman: "The resolution was originally drafted by the Freedom Foundation..."), AR 742.

Coffman, who served as the County’s lead negotiator with the Union, inserted “Lincoln County” into the fields. However, a comparison of the Foundation’s Model (UX-19, AR 515) with the County Resolution as passed (EX-3, AR 560) discloses that he made no substantive changes.<sup>13</sup> Coffman would later testify that although he knew in advance there would be “pushback” from Local 690 regarding the effect of Resolution 16-22, he nevertheless did not contact Local 690 Business Representative Joe Kuhn (or Local 690) to notify him of the County’s desire to conduct collective bargaining sessions in public.<sup>14</sup>

On September 6, 2016, the Lincoln County commissioners passed Resolution 16-22, which required that all collective bargaining negotiations be conducted “in a manner that is open to the public” and in accordance with the public notice requirements of the Open Public Meetings Act (RCW 42.30.060—42.30.080).<sup>15</sup> Although Coffman sent copies to all County department heads, elected officials, and Heyward (along with a cover note thanking the Foundation “for all [its] help”), he did not send a copy to the Union or inform Kuhn.<sup>16</sup>

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<sup>13</sup> The only evident change was to eliminate a paragraph from the Foundation’s form, at page 2, that permitted bargaining representatives to “meet [ ] separately and privately to discuss negotiating tactics, goals, and methods.”

<sup>14</sup> Tr. 91:21 (Coffman expected “pushback”), AR 751; Tr. 89: 1-17 (Coffman: never notified the Union), AR 749.

<sup>15</sup> EX-3, AR 560.

<sup>16</sup> Tr. 97: 9-20, AR 757; See also, UX-20 (Coffman to Heyward, 9/6/16; AR 518. The County’s claim, at page 5 of its Brief and elsewhere, that its Resolution was to encourage voters to agree to a proposed tax increase is completely uncorroborated by any documentary evidence, despite that the Union requested to see any such documentary support at the hearing. See, Tr. p. 92-94, AR 752-754. In addition, the County’s implication that there were “lots of conversations” about the

**As bargaining commences, the Union expressly reserves its position.**

On October 31, 2016, the County commissioners sent Kuhn a letter noting the contracts' impending expirations and stating, "[w]hile the Board of County commissioners does not have a desire to modify either agreement, we remain entirely open to entering collective bargaining negotiations should the Sheriff's deputies and employees, by and through their Union, wish to do so."<sup>17</sup> In response, Kuhn contacted Commissioner Scott Hutsell to inquire whether the contents of the County's letter meant that the County was willing to extend the existing labor agreements for another three years.<sup>18</sup> On November 2, 2016, the commissioners replied, cautioning that "we do not consider this correspondence 'negotiations' or 'collective bargaining;'" nonetheless, the County *did* bargain with Kuhn, telling him that they were not willing to extend certain provisions of the agreements, particularly referencing wage provisions.<sup>19</sup>

As the parties scheduled negotiations for January 17, 2017, Kuhn reserved in writing the Union's position that the County could not unilaterally require that negotiations be public, saying in an email to the County, "[i]f this is going to be a

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connection between the proposed tax increase and the Resolution, at page 5, is contradicted by the very page of the hearing transcript it cites, which discloses that those conversations were about the tax increase alone, not the Resolution or any connection between the two. *See*, Tr. p. 51, AR 711.

<sup>17</sup> EX-11 (County's undated letter), AR 632. Contemporaneously, on November 1, 2016, Local 690 sent Coffman two letters opening contract negotiations for both units. UX-15, AR 506; UX-16, AR 508.

<sup>18</sup> EX-12, AR 633.

<sup>19</sup> *Id.*

public meeting we will meet however we are not giving up our position regarding the resolution that was passed and the subsequent ULP charge that was filed.”<sup>20</sup>

On January 17, 2017, Local 690 and the County met in the commissioners’ room of the Lincoln County courthouse for their scheduled bargaining session.<sup>21</sup> The bargaining session was an agenda item of a regularly scheduled Board of County commissioners meeting and was open to the public.<sup>22</sup> The County commissioners sat behind an elevated dais in stuffed chairs, while Kuhn was consigned to a wire chair at a table on the floor below, with his bargaining team behind him in the gallery of the commissioners’ room.<sup>23</sup> Also present was a member of the public, a reporter from the Davenport Times newspaper, Mark Smith.

The first thing Kuhn told the commissioners was that, although the Union was willing to negotiate, it reserved its position that it disagreed with the County about the County’s demand to bargain in public and that the Union was not “giving up [its] ability to challenge the resolution.”<sup>24</sup> Kuhn stated that the Union

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<sup>20</sup> EX-14 (Kuhn email to County Clerk Marci Patterson, cc Coffman, 12/27/16), AR 636. The Union had filed a ULP regarding the County’s resolution, which was pending at the time.

<sup>21</sup> EX-17 (Mark Smith, *‘Cordial’ Discussions Open County’s First Collective Bargaining in Public*, Davenport Times, January 19, 2017, AR 642.

<sup>22</sup> EX-16, AR 640; Tr. 106:22 (Coffman), AR 766.

<sup>23</sup> Tr. 164: 13-16 (Kuhn), AR 824; EX-17 (Mark Smith, *‘Cordial’ Discussions Open County’s First Collective Bargaining in Public*, Davenport Times, January 19, 2017, at ¶20), AR 642.

<sup>24</sup> Tr. 164:22-25 (Kuhn), AR 824; Tr. 165: 1-3 (Kuhn), AR 825; Tr.106: 10-14 (Coffman acknowledging Kuhn’s reservation), AR 766.

was nonetheless willing to “proceed forward with negotiations in good faith.”<sup>25</sup> The County recognized Kuhn’s reservation and the parties proceeded to bargain.<sup>26</sup>

Kuhn then shared the Union’s initial proposal for the non-commissioned bargaining unit,<sup>27</sup> which included items carried forward from the Guild contract, together with new items developed during an employees-only demands meeting.<sup>28</sup> In addition to economic proposals, the Union proposed new language regarding performance evaluations, light duty accommodations, and safety standards that would obligate the Employer to comply with accepted safety practices as established by the Washington State Department of Labor and Industries’ Safety and Health Program.<sup>29</sup> Kuhn, himself a former corrections officer with eleven years’ experience as a lead negotiator for corrections officers at the Washington State Department of Corrections, included the safety proposal at the request of non-commissioned employees, following reports of jail overcrowding and a recent incident in which an inmate escaped as a direct result of the County’s failure to comply with its own policies.<sup>30</sup>

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<sup>25</sup> Tr. 106:10-25, AR 766; 107: 1-4 (Coffman acknowledging Kuhn’s reservation), AR 767; EX-17 (newspaper article), AR 642.

<sup>26</sup> Id.

<sup>27</sup> Tr. 168: 1-4 (Kuhn), AR 828.

<sup>28</sup> Tr. 167: 1-13 (Kuhn), AR 827

<sup>29</sup> UX-7 (Teamsters’ mark-up), AR 471; Tr. 168: 24-25 (Kuhn), AR 828; Tr. 169:1-25 (Kuhn), AR 829.

<sup>30</sup> Tr. 169: 13-21 (Kuhn), AR 829; Tr. 170: 10-17 (Kuhn), AR 830.

**Despite Resolution 16-22, the *County* demands to bargain in private.**

When Kuhn sought to explain the Union's safety proposal to the commissioners, he was abruptly cut off by County bargaining team member Sheriff Magers, who indicated that he would rather discuss the safety and performance evaluation issues "away from the bargaining table."<sup>31</sup> Kuhn acquiesced to Sheriff Magers's request and, at the conclusion of the meeting, without objection from any of the commissioners, he, Magers and Undersheriff Watkins met privately to bargain the Union's safety, performance evaluation and light duty proposals.<sup>32</sup> Kuhn testified that, like the Sheriff, he actually preferred to discuss these proposals privately because the basis for each of them implicated specific bargaining unit employees, who would not want their names, medical information, or performance evaluations to be disclosed publicly. Similarly, the details regarding jail overcrowding and the escape of a jail inmate as a result of the County's negligence were likely to cause community controversy if they appeared on the front page of the newspaper.<sup>33</sup>

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<sup>31</sup> Tr. 171: 14-24 (Kuhn), AR 831; Tr. 62: 8-22 (Coffman acknowledging Kuhn's proposal), AR 722; EX-17 (newspaper article, "A provision desired by the union to conduct employee evaluations in accordance with an existing sheriff's department policy prompted a request from Sheriff Wade Magers to have a separate, private conversation with Kuhn that Magers suggested the concern behind the request 'could be resolved through the policy rather than including this in the contract.'"), AR 642.

<sup>32</sup> Tr. 171:14-25, AR 831; Tr. 172:1-19, AR 832; Tr. 174: 15-23 (Kuhn), AR 834.

<sup>33</sup> Tr. 173:7-25, AR 833; 174:1-25, AR 834; Tr. 175:1-17 (Kuhn), AR 835. PERC's Hearing Examiner found, and the Commission did not disagree, that this episode demonstrated that "the parties' ability to engage in full and frank discussions, as part of their obligation to bargain in

**The County refuses to bargain.**

On February 27, 2017, Local 690 and the County met in the Commissioner's room to bargain.<sup>34</sup> In particular, wages and benefits remained outstanding for both bargaining units.<sup>35</sup> In anticipation of the bargaining session, Kuhn emailed the County marked-up counterproposals on February 10, 2017.<sup>36</sup>

The contents of the meeting are not materially disputed by either party, although the County's recitation arguably leaves the reader with the mistaken impression that Union counsel simply tried to clear the room, without seeking to bargain. In fact, Union counsel Jack Holland stated more than once that the Union was ready, willing and able to bargain.<sup>37</sup> Holland further stated that the Union was not in agreement with the County's position on bargaining in public and preferred to proceed with negotiations in accordance with the status quo between the parties, which was bargaining in private.<sup>38</sup> Accordingly, Holland requested that any individual not associated with either party's bargaining teams

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good faith, was impaired by having a person not party to the negotiations observe." Decision 12844, pp. 13-14, AR 253-54.

<sup>34</sup> UX-18 (Kuhn's bargaining notes), AR 514; EX-18 (Mark Smith, *Contract Talks Stall When Union Reps Fail to Persuade commissioners to Bar Public*, Davenport Times, March 2, 2017), AR 644.

<sup>35</sup> Tr. 67:8-18 (Coffman), AR 727; Tr. 72:1-9 (Coffman), AR 732.

<sup>36</sup> EX-16 (Kuhn cover email, 2/10/17), AR 640; EX-20 (Union markup non-comm.), AR 646; EX-21 (Union markup comm.), AR 650.

<sup>37</sup> Tr. 178:1-9 (Kuhn), AR 838; Tr. 292: 25, AR 952; Tr. 293:1-8 (Holland), AR 953.

<sup>38</sup> Tr. 178:1-9 (Holland), AR 838; Tr. 68: 12-16 (Coffman), AR 728.

be excused from the room.<sup>39</sup> In reply, Commissioner Coffman indicated that the County was likewise willing, ready and able to bargain but that it would do so “pursuant to our transparency resolution.”<sup>40</sup> After the parties went back-and-forth in the same vein a few times, Commissioner Scott Hutsell said, “I guess we are not going to bargain today,” to which Commissioner Coffman added, “[w]e are willing to bargain, so long as it is public.”<sup>41</sup>

### **The Rejection of Union exhibits 21 through 29**

At the hearing before PERC Hearing Examiner Jamie Siegel on September 19<sup>th</sup> and 20<sup>th</sup>, 2017, Ms. Siegel rejected nine exhibits offered by the Union to establish that the County’s Resolution was passed in furtherance of a bad faith agenda. Union exhibits 21 through 29 consisted of a variety of materials taken from the website of the Freedom Foundation, which, as detailed above, was solely responsible for the drafting of the County’s Resolution 16-22. Those materials make clear that the Foundation exists for the purpose of destroying labor unions; the Foundation calls them “a disease.”<sup>42</sup> The County’s attorneys, who were Foundation employees working for free, never challenged the authenticity of the

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<sup>39</sup> Tr. 68: 12-16 (Coffman), AR 728; Tr. 178: 2-9 (Kuhn), AR 838; Tr. 293: 1-11 (Holland), AR 953.

<sup>40</sup> Tr. 68: 24-25, AR 728; Tr.69:1 (Coffman), AR 729.

<sup>41</sup> UX-18 (Kuhn’s notes, including one indicating Commissioner Hutsell said, “Guess we are not going to bargain”), AR 644; Tr. 178: 16-23 (Kuhn testifying to Hutsell’s statement), AR 838; Tr. 272: 6-15 (Hutsell admitting that he interrupted to say, “I guess we are not going to bargain today,” but contending that his inflection indicated a question), AR 932.

<sup>42</sup> Section IV of this Brief, *infra*, contains additional quotes from the Foundation’s website reflecting its vituperative anti-union animus.

exhibits, contending only that they were not relevant. The Union's Notice of Appeal of the Hearing Examiner's Decision (AR 237) included an objection to the evidentiary ruling, as did the Union's Notice of Appeal to Superior Court (AR 6). The issue was fully argued in the Union's briefs to the Commission (AR 224-227) and Superior Court (CP 944-947). Nonetheless, neither the Commission nor the Superior Court ruled on the issue.

## **ARGUMENT IN SUPPORT OF UNION'S APPEAL**

### **I.**

#### **PERC'S DECISION AND ORDER REST UPON A LEGAL CONTRADICTION IN TERMS: THAT THE PARTIES HAD AN OBLIGATION TO BARGAIN A PERMISSIVE SUBJECT.**

The governing legal principles, which are correctly recited in the Hearing Examiner's and Commission's decisions, are well-settled in both the courts and PERC. As PERC has explained on countless occasions, "a public employer covered by the Public Employees' Collective Bargaining Act Chapter 41.56 RCW has a duty to bargain with the exclusive bargaining representative of its employees." *Yakima County*, Dec. 10204-A (PECB, 2011), citing *Peninsula School District v. Public School Employees*, 130 Wn.2d 401, 407 (1996). Likewise, courts, the National Labor Relations Board, and PERC "identify three broad categories of bargaining: mandatory subjects, permissive subjects and illegal subjects." *Yakima County, supra*, at p. 4 citing *Wooster Division Borg-*

*Warner*, 356 U.S. 342 (1958)<sup>43</sup>; *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997).

The parties' duty to bargain extends only to mandatory subjects, which relate generally to "wages, hours and working conditions." *Yakima County, supra*, at p. 5. "It is an unfair labor practice for either an employer or an exclusive bargaining representative to refuse to bargain a mandatory subject." *Id.* Although parties are free to negotiate regarding permissive subjects, they are not obliged to do so:

Management and union prerogatives, along with procedures for bargaining mandatory subjects, are "permissive" subjects over which the parties may negotiate, but are not obliged to do so.

*Id.*, citing *City of Pasco*, 132 Wn.2d at 460. Most important for present purposes, Washington courts and PERC unfailingly agree that "ground rules" for bargaining are permissive, not mandatory. PERC has stated, "while parties may make and implement agreements about how they will satisfy their statutory obligations, 'ground rules' are not a mandatory subject of bargaining." *State -- Fish and Wildlife*, Decision 11394-A (PSRA, 2012), at p. 10.

On its face, PERC's decision directly contravenes these universally-accepted principles. PERC unambiguously finds at page 8 of its decision that

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<sup>43</sup> The Commission looks to the NLRB and the courts in administering state collective bargaining laws, though is not required to follow federal law. See *Clallam Public Hospital District 1*, Decision 4187 (PECB, 1992).

“procedures for bargaining are permissive subjects of bargaining,” and that “whether negotiations should be held in open public meetings” is procedural and should be treated no differently from “other procedures for how bargaining will be conducted.” *Id.*<sup>44</sup> PERC nonetheless finds that both parties committed an unfair labor practice by refusing to bargain regarding this permissive subject, thereby conjuring a legal riddle — how can a union be found to have breached a duty to bargain when, in the same decision, PERC finds that the issue not bargained is of a type the union had no duty to bargain?

This fundamental flaw in PERC’s decision, in and of itself, requires that it be reversed pursuant to RCW 34.05.570(3)(d), (h) and (i) because it is inconsistent with PERC’s own precedent and is accordingly arbitrary and capricious. The Union therefore requests that the Court remand this matter to PERC with instructions to remedy the flaw and issue a new decision that complies with governing court and PERC precedent, as detailed below.

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<sup>44</sup> Neither party appeals or otherwise challenges PERC’s finding that the public/private issue is a permissive subject.

## II.

### **THE UNION DID NOT BREACH ANY DUTY WHEN IT INSISTED THAT THE PARTIES CONTINUE TO BARGAIN IN COMPLIANCE WITH THEIR PAST (SUCCESSFUL) PRACTICE OF PRIVATE BARGAINING.**

As detailed below, the Union was entitled to insist upon private bargaining in response to the County's unilaterally ordering public bargaining. Because PERC correctly ruled that the public/private issue is a permissive ground rule, the Union had no duty to bargain it or knuckle under to the County. The real issue before PERC (and now before this Court), then, was which party should prevail in the absence of agreement. All signs point to the Union.

#### **A. The Public/Private Issue Is The Type Of Permissive Subject As To Which Past Practice And Other Circumstances Are Relevant To A Determination Of Whose Position Prevails.**

PERC's Hearing Examiner correctly explained an important aspect of permissive subjects of bargaining that is routinely ignored or carelessly passed over by even the best labor practitioners: i.e., there are three different types of permissive subjects with three different forms of analysis and three different sets of rules regarding implementation. The NLRB and the courts routinely gloss over this complexity by quoting boilerplate prohibiting implementation of permissive subjects:

But if the subject is a permissive one, the other party may refuse to discuss it; a proposal cannot thereafter be implemented absent an agreement to do so. *Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 457 (7th Cir., 1992); *Solutia, Inc.*, 357 NLRB No. 15, slip op. at 5 (2011), enfd. 699 F.3d 50 (1st Cir., 2012).

*See, Aggregate Industries*, 359 NLRB, 1419, 1421 (2013).<sup>45</sup> Similarly, while a party may seek agreement on a permissive subject, “it may not attempt to compel an unwilling party to accept such provisions as the price of an overall contract.” *See, Servicenet, Inc.*, 340 NLRB 1245, 1253 (Dec. 15, 2003). Yet, as Hearing Examiner Siegel insightfully pointed out, many permissive subjects can in fact be implemented unilaterally by one or the other party:

Some nonmandatory subjects of bargaining constitute either a management or union prerogative. In such cases, the party that maintains the particular prerogative may take unilateral action consistent with its prerogative, potentially having an obligation to bargain the impacts of its action.

Decision 12844, at pp. 10-11, AR 241, 250-51. See also, *Federal Way School District*, Decision 232-A (PECB, 1977) (“Matters... **which are regarded as a prerogative of employers or of unions** have been categorized as ‘nonmandatory’ or ‘permissive’.”) Thus, permissive subjects falling within management’s prerogative can indeed be implemented unilaterally, without the union’s agreement. *See, e.g., Port of Seattle*, Decision 11763-A (PORT, 2014) (management may implement a permissive stamping proposal because it is a management prerogative, subject only to bargaining effects); *City of Bellevue*,

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<sup>45</sup> This *Aggregate Industries* decision was vacated at 2014 NLRB Lexis 502 (NLRB, 2014) in the aftermath of the US Supreme Court’s decision in *NLRB v. Noel Canning*, 189 Lawyer’s Ed. 2d 538 (2014), along with hundreds of other NLRB opinions issued without, in the Court’s view, a quorum. Upon re-hearing, the Board affirmed its previous decision, quoted above, at 2014 Lexis 836 (2014), enforcement granted and denied in part in *Aggregate Industries*, 824 F.3d 1095 (D.C. Cir., 2016).

Decision 3343-A (PECB, 1990) (management may implement a permissive re-shifting of bargaining unit work to new unit classifications). Likewise, certain other permissive subjects falling within the union's prerogative may be implemented by the union, without management's agreement. *See, e.g., NLRB v. Corsicana Cotton Mills*, 178 F2d 344, 347 (5th Cir., 1949) (employer may not insist upon a clause providing that non-union employees have right to vote at union meetings); *Lewis County*, Decision 464 (PECB, 1978), *aff'd Lewis County*, Decision 464-A (PECB, 1978) (union may determine unilaterally who is permitted to vote on formulation of union's proposals for collective bargaining); *Lake Washington School District*, Decision 6891 (PECB, 1999) (PERC dismissal of employer complaint concerning union's unilateral actions during a contract ratification process).<sup>46</sup>

However, as the Hearing Examiner explained (and the Commission ruled), the public/private issue is an example of a third species of permissive subject, as to which *neither* party holds a prerogative:

*Neither party has the prerogative to impose its preference to bargain in private or public meetings. (Italics in original). ...Whether parties bargain in public or private meetings is neither a management nor a union prerogative. In this case neither party has the prerogative to*

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<sup>46</sup> In its Decision the Commission essentially, if tersely, adopted the Hearing Examiner's analysis. *See*, Decision 12844-A, pp. 6-7, AR 104-05 ("Permissive subjects fall into different categories. Some...are managerial prerogatives....[so] the employer is free to make a changes before bargaining the effects of its decision....Similarly, if the permissive subject is a union prerogative, the union would be free to make a change before bargaining.").

independently determine and impose its preference to bargain in private or public meetings. The subject in this case is non-mandatory because it falls into the category of bargaining procedures or ground rules, not because it is the prerogative of one of the parties.

Decision 12844, pgs.10-11, AR 250-51.

The question for the Court, then, is how do parties resolve a dispute regarding this third type of permissive subject. Although the Hearing Examiner and the Commission cite no PERC or other cases specifically addressing this subject, *Aggregate Industries v. NLRB*, 824 F.3d 1095 (D.C. Cir., 2016), analyzes the issue directly. There, the NLRB had found that the unilateral transfer of drivers out of the bargaining unit constituted a change in the scope of the bargaining unit, a permissive subject, rather than a transfer of bargaining unit work, a mandatory subject that could be implemented unilaterally following bargaining impasse. It therefore held that the employer committed an unfair labor practice when it unilaterally transferred the drivers over the union's objection. On appeal, the D.C. Circuit refused to enforce the NLRB's order on the basis of its finding that the employer's action was more akin to a mandatory transfer of work than a permissive change in the scope of the bargaining unit.

In the course of arriving at this holding, the court analyzed the mandatory/permissive dichotomy at length, much along the lines of the Hearing Examiner and Commission in our case, noting, in particular, that there are three different types of permissive subjects. Many permissive subjects are of a type as

to which one or the other party holds a prerogative to act unilaterally:

The Board has used the terms to mean that a party may decline to bargain about a proposal precisely because that party has authority to decide the issue unilaterally.

*Id.*, at 1099, footnote 4. However, there is a third type of permissive subject as to which neither party holds a prerogative:

The difficulty is that the terms “permissive” and “non-mandatory” imply that the parties need not bargain, but they do not determine whose position prevails in the absence of bargaining.

*Id.* The court therefore declares that if the parties cannot reach an agreement with respect to a permissive subject, as to which neither party holds a prerogative to proceed unilaterally, they must maintain the “status quo:”

...the Company has no choice but to maintain the status quo. A unilateral change to a permissive subject of bargaining is illegal. \* \* \* In this case, we use the terms to mean that if one party refuses to bargain about a certain issue, **both sides must maintain the status quo.**

*Id.* at 1099, footnote 4, (emphasis added). *See also, Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362, 376 (2018) (adopting *Aggregate Industries* analysis and quoting it: “... an employer... ‘has no choice but to maintain the status quo’ on a permissive subject”).

On the basis of this reasoning and authority, the Court should take the opportunity to instruct that the determination of which party’s position prevails with respect to a permissive subject as to which neither party possesses a prerogative should be made pursuant to past practice and the operative status

quo.<sup>47</sup> In addition, the analysis should consider the bad or good faith of each party and whose position is most likely to promote the ultimate goals of maintaining labor peace, promoting good faith bargaining, and signing contracts.

**B. Past Practice Supports A Finding That The Negotiations Should Remain Private, Absent The Parties' Voluntary Agreement To The Contrary.**

It is undisputed that, prior to the passage of the County's resolution, the Union and the County successfully negotiated a series of collective bargaining agreements in a private setting. This history is documented at pages 5-6, above, including that the County participated year-after-year without objection.

Pursuant to the authority and analysis above, this past practice must be maintained, failing an agreement by the parties to the contrary.

**C. The Case Authorities Cited By the Commission and the Hearing Examiner Uniformly Support A Conclusion That Private Bargaining More Surely Promotes Candid and Productive Bargaining Than Does Public Bargaining.**

The Commission's ruling that the Union committed an unfair labor practice by insisting upon private bargaining in the absence of contrary agreement is contradicted by the Commission's own analysis. Neither the County, nor the Hearing Examiner, nor the Commission has cited any authority endorsing or expressing a preference for public bargaining over private bargaining, or claiming

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<sup>47</sup> The Union does not use the term "status quo" as applied to mandatory terms in the aftermath of the expiration of a collective bargaining agreement. Here, as in the D.C. Circuit decision above, "status quo" simply means the current reality.

that public bargaining does not inhibit the free expression essential for productive bargaining. To the contrary, all of the law relied upon by the Commission and the Hearing Examiner uniformly supports a finding that private bargaining is preferable to public bargaining. Indeed, the Commission expressly concedes:

While we rely on Washington State labor law to reach our decision in this case, we note that collective bargaining has historically taken place in private meetings. We further note that the National Labor Relations Board and federal courts have opined that collective bargaining occurs best when it is conducted off the record, in the sense that the sessions are not transcribed or recorded. [citations omitted].

Decision 12644-A, p. 8, AR 106.

Thus, in *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652 (10th Cir., 1981) cert. denied, 452 U.S. 961 (1981), cited by the Commission and relied upon by the Hearing Examiner, the court affirmed an NLRB holding that the employer committed an unfair labor practice by conditioning its willingness to bargain upon the making of a transcription of the bargaining by a court reporter. In rebutting the company's argument that "no honest bargainer can be disadvantaged by the recording of a bargaining session," the court replied in terms that are equally applicable here:

However, the Board and numerous experts in the field of labor relations believe that the presence of a court reporter "has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." [citation omitted] It may cause parties to talk for the record rather than to advance toward an agreement. [citation omitted] The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations.

*Id.*, at 656.

*Nabisco Brands, Inc.*, 272 NLRB 1362 (1984), also relied upon by the Hearing Examiner, strongly endorses this position. There, the Board found that the union committed an unfair labor practice by insisting that the parties continue their long practice of tape recording bargaining sessions. The Board justified its holding by noting that “the use of a tape recorder in collective bargaining inhibits negotiations.” *Id.*, at 1365. Thus, the Board prohibited the recording of bargaining sessions on the basis of a finding that it would inhibit negotiations, despite that there was a long practice of doing so.

PERC, too, has implicitly recognized that private collective bargaining promotes the “free exchange of ideas and possibilities” necessary for the parties to successfully reach compromise. Thus, in finding that audio-recording of contract negotiations is a permissive subject of bargaining, PERC adopted the NLRB’s analysis, which emphasized that a tape recording “inhibit[s] free collective bargaining”:

Experience has taught that the presence of a stenographer or tape recorder does inhibit free collective bargaining. Both sides talk for the record and not for the purpose of advancing negotiations toward eventual settlement. Each becomes over conscious of the recording of his remarks. The ease of expression so necessary to proper exposition of problems is hampered.

*City of Pullman*, Decision 8086 (PECB, 2003) (quoting *Nabisco Brands, Inc.*, 272 NLRB 1362, 1364 (1984)). Indeed, in significant recognition of the importance

of privacy and confidentiality to the free exchange of ideas in resolving contract issues, PERC itself requires that its contract mediations are “not...open to the public” and that its mediators not disclose any information acquired during the mediation to anyone “outside the mediation process for any purpose.” WAC 391-55-090 (“Confidential nature of mediation”).

The Washington Court of Appeals teaches similar lessons. In *ACLU v. City of Seattle*, 121 Wn. App. 544, 551, 89 P.3d 295, 297 (2004), Division I held that tentative lists of bargaining topics (“issue lists”) exchanged in anticipation of bargaining sessions between the City and the Seattle Police Guild were exempt from disclosure under the “deliberative process” exemption of the Public Disclosure Act.<sup>48</sup> The court noted the importance of maintaining confidentiality in collective bargaining, stating that disclosure of the issue lists “could negatively affect the process of reaching agreement through negotiations...” (*Id.* at 553), “would disrupt and politicize the bargaining process to prematurely publicize the proposals of parties in the bargaining process” and that “[p]ublic scrutiny of contract issues discussed prior to completing negotiations might be misconstrued, and disclosure would hinder a vital part of the bargaining process—the free exchange of views, opinions and proposals.” *Id.* at n.20. Finally, the court stated that the ACLU’s position “fails to recognize that... the City’s negotiators, like

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<sup>48</sup> The Court remanded for further in camera review of documents but later affirmed itself in *ACLU v. City of Seattle*, 2009 Wash. App. LEXIS 1758, at \*2 (Ct. App. July 20, 2009).

Guild representatives, must respond to the ever-changing tableau of collective bargaining” and that, until the results of the deliberative policy-making process are presented to the City council for adoption, “politicization and media comments will by definition inhibit the delicate balance—the give-and-take of the City’s positions....” *Id.*, at 553-554.

In ironic recognition of the need for privacy in bargaining, the County itself has been at pains artificially to designate collective bargaining as something (anything) else, in order to evade application of its own Resolution. Thus, the County prefaced its November 2, 2016 letter to Kuhn with the disclaimer, “[t]o be clear we do not consider this correspondence ‘negotiations’ or ‘collective bargaining’.” EX-12, AR 633. Yet, the letter unquestionably constituted collective bargaining, inasmuch as it contained a proposal to roll over the previous agreements for new terms, except for the wage provisions. *See, e.g.*, EX-11, EX-12, EX-13, EX-14, EX-15, EX-16, AR 632, 633, 635, 636, 638, 640.

As detailed at pages 10-11, above, the County has itself demonstrated its awareness that privacy is frequently essential to productive and respectful bargaining. On January 17<sup>th</sup>, Sheriff Magers requested to bargain “away from the bargaining table” about several particularly sensitive issues, despite that doing so represented a clear violation of the County’s own Resolution. Thus, the Hearing Examiner found, and the Commission did not disagree, that “the parties’ ability to engage in full and frank discussions, as part of their obligation to bargain in good

faith, was impaired by having a person not party to the negotiations observe.”  
Decision 12844, pp. 13-14, AR 253-54.

The dangers warned against by PERC, the NLRB and the courts are clearly presented by County Resolution 16-22. Thus, the County censored the public negotiations in order to evade its Resolution. Further, Kuhn ably testified regarding the impact the Resolution has already had and will continue to have if the Court permits the County to implement it unilaterally. As an exceptionally experienced labor negotiator, Kuhn explained the importance of “being able to explain [a proposed article] in the context of a closed meeting . . . with people who are not going to share that information outside of that room, or take it out of context” in order to bargain efficiently to a final agreement. Tr. 186: 19-25, AR 846; Tr. 187:1-5 (Kuhn), AR 847. Indeed, Kuhn explained that successful bargaining often involves one or the other lead negotiator floating a so-called “what if” proposal, in which the negotiator offers to go beyond the boundaries currently imposed by his/her principal, if doing so would conclude a comprehensive agreement. Kuhn warned that such breakthroughs would never occur if the negotiator knew that his/her principal might react negatively. Tr. 188: 17-25, AR 848; Tr. 189: 1-25, AR 849; Tr. 190: 1-7 (Kuhn), AR 850. The County never challenged Kuhn’s testimony on this point.

**D. In Its Remedial Order the Commission Clearly Agrees With the Union That, Absent Contrary Agreement by the Parties, Private Bargaining Is Required.**

The Commission ordered the parties to participate in good-faith negotiation sessions and PERC mediation regarding the public/private issue, and:

*c. If the parties are unable to reach agreement on how to conduct negotiations after good-faith bargaining and mediation, conduct collective bargaining sessions in private meetings.*

Decision 12844-A, pp. 16, 18, AR 113, 115 (emphasis added). Thus, the Commission agrees with the Union that, absent contrary agreement, the parties should bargain in private.

The Union therefore requests that the Court find that the Commission's conclusion that the Union committed an unfair labor practice is contradicted by the authority PERC itself relies upon and the Commission's own Order.

**III.**

**ALTERNATIVELY, THE COUNTY'S RESOLUTION IS PREEMPTED BY THE OPEN PUBLIC MEETINGS ACT; THE UNION WAS THEREFORE PRIVILEGED TO INSIST UPON ADHERENCE TO THE STATUS QUO.**

This argument is phrased in the alternative because it obviates the more detailed analysis set forth above. A preemption ruling disposes of the public/private issue without the need for an analysis that might have broader implications for permissive subjects generally. It provides a clean resolution on a basis that is well understood and can be reliably applied by bargaining parties and PERC.

Although the Union appealed and argued preemption to the Commission, the Commission expressly declined to address the issue, stating, "...it is not necessary for us to reach that issue." *See*, Decision 12844-A, p. 4, AR 101.<sup>49</sup>

**A. The Open Public Meetings Act Expressly Exempts Collective Bargaining From Coverage.**

RCW 42.30.140, "Chapter controlling – Application," states that the OPMA "shall not apply to":

(4)(a) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress.

**B. Preemption in Washington State Generally.**

The preemption doctrine in Washington "is a well-settled area of law." *See, Tacoma v. Luvene*, 118 Wn.2d 826, 833 (1992). There are two types of preemption: 1) field preemption; and 2) conflicting law preemption.

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<sup>49</sup> PERC has ruled on a variety of preemption issues over the years. *See, e.g., City of Tacoma*, Decision 12768 (PECB, 2017) (PERC's jurisdiction under RCW 41.56 preempted by the Railway Labor Act, which governed the collective bargaining relationship of the parties); *Washington State Ferries*, Decision 479-A (PECB, 1978)(PERC jurisdiction under RCW 47.64 preempted by Federal law and delegated to the U.S. Coast Guard with regard to minimum ferry manning requirements; *City of Seattle*, Decision 4687-B (PECB, 1997) (firefighter pensions as a bargaining subject were preempted by RCW 41.26).

Field preemption “occurs when the Legislature states its intention, either expressly or by necessary implication, to preempt a field.” *See, City of Seattle*, Decision 4687-B (PECB, 1997), (citing to *Brown v. Yakima*, 116 Wn.2d 556); *Tacoma v. Luvane*, *supra*. Conflicting law preemption occurs when local ordinances are potentially in conflict with State law. *See, Tacoma v. Luvane*, *supra*, at 833 (cities may enact ordinances as long as “the city ordinance does not conflict with the general law of the State.”); *Brown v. Yakima*, *supra*, at 559.

Where a statute does not address preemption, one way or the other, “resort must be had to the purposes of the legislative enactment and to the facts and circumstances upon which the enactment was intended to operate.” *City of Seattle*, Decision 4687-B (PECB, 1997).

**C. Resolution 16-22 is Preempted Because the Open Public Meetings Act, RCW 42.30, Occupies the Field with Respect to the Extent to which Meetings of Public Agencies Must be Public, Especially Collective Bargaining Meetings.**

While there is nothing in the Open Public Meetings Act, RCW 42.30, that expressly states that the legislation “occupies the field,” the language of the statute, along with the way it operates, provide ample evidence that the statute does, in fact, occupy the field of public agency meetings, especially and particularly with respect to whether collective bargaining should be public.

In *City of Seattle*, *supra*, the employer filed an unfair labor practice charge when the firefighters’ union sought to bargain regarding participation in a pension plan other than the state-created Law Enforcement Officers and Fire Fighters

Retirement System (LEOFF). PERC held that the union had committed a ULP, ruling that RCW 41.26, which established the LEOFF pension plan, occupied the field with respect to firefighter pensions, *despite that the statute itself did not say as much*. Looking to the purpose of the statute and the language defining its reach, PERC found preemption because RCW 41.26 encompassed *all* firefighters in the State of Washington, whether or not they wanted to be a part of the LEOFF pension system. *Id.*, at p. 5.

The Open Public Meetings Act (OPMA) is analogous. Its first section, 42.30.010, “Legislative Declaration,” states:

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.

(Emphases added.) The next section, 42.30.020, “Definitions,” defines “public agency” and “governing body” as broadly as one can imagine. The OPMA’s core directive is clear and concise:

**All** meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

RCW 42.30.030, (emphasis added). Finally, the first sentence of Section 42.30.140, “Chapter controlling – Application,” contains perhaps the strongest evidence of the legislature’s intent to occupy the field:

If any provision of this chapter conflicts with the provisions of any other statute, the provisions of this chapter shall control:...

Not coincidentally, this same section includes the exemption for “collective bargaining sessions” quoted above.

Thus, the legislature intended to occupy the field with respect to the extent to which all meetings of governing bodies or agencies must be conducted in public, and singled out collective bargaining as exempt. Therefore, no local authority, including Lincoln County, may enact any ordinance or resolution that requires that bargaining be in public.

**D. Resolution 16-22 is Preempted Because it Conflicts with the OPMA.**

Resolution 16-22 is also preempted by the OPMA because the two conflict. A seminal preemption case, *Bellingham v. Schampera*, 57 Wn.2d, 106, examines at length a number of preemption cases and assesses the way courts have analyzed conflict preemption, landing on the following principle:

In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and **vice versa**. Judged by such a test, **an ordinance is in conflict if it forbids that which the statute permits.**

(Citations omitted; emphasis added.) This passage has been quoted with approval in numerous Washington State Supreme Court decisions, including *Brown v. Yakima*, *supra*; *Lenci v. Seattle*, 63 Wn.2d 664; and *Weden v. San Juan County*, 135 Wn.2d 678.

The OPMA, in Section 42.30.140, expressly and specifically permits collective bargaining sessions and related meetings to be held in private. Yet, Lincoln County's Resolution 16-22 requires precisely the opposite result. That is, it prohibits private bargaining, the very thing the legislature intended to preserve, thereby failing the *Bellingham* "test."

PERC's detailed analysis of the legislative history of the OPMA's collective bargaining exemption, in *City of Fife*, Decision 5645 (PECB, 1996), provides additional support for this conclusion. There, PERC found the employer committed an unfair labor practice when, in a public meeting, the city council refused to authorize the mayor to sign a collective bargaining agreement to which the council had agreed in private negotiations with the union. *Fife* explains that the original version of the OPMA of 1971 included three exemptions, but *not* one for collective bargaining. *Id.*, at p. 17-18. *Fife* notes that in 1986 PERC issued *Mason County*, Decision 2307-A (PECB, 1986), in which it found the employer guilty of an unfair labor practice for "repudiating a collective bargaining agreement which had been negotiated at private sessions attended by two of the three members of the employer's governing body." *Id.*, at pp. 20-21. The Court of Appeals reversed PERC, holding that the private negotiations violated the OPMA. *City of Fife, supra*, at p. 22; *Mason County v. PERC*, 54 Wash. App. 38 (1989) *rev. denied* 113 Wash. 2d 1008 (1989). In *Fife's* portrayal, "[t]he Legislature reacted" to the *Mason County* court's decision by enacting the OPMA

exemption for collective bargaining now found in RCW 42.30.140(4)(a). *City of Fife, supra*, at p. 24. *Fife* characterized the legislative intent behind the exemption in terms that speak directly to Resolution 16-22:

...the expansive language used in RCW 42.30.140(4)(a) indicates the Legislature intended to **altogether exempt** collective bargaining negotiations from the OPMA.

*Id.*, at p. 25 (emphasis added).

As PERC sees it, then, Resolution 16-22 attempts to do the very thing the legislature intended to prevent: i.e., permit employers unilaterally to apply the OPMA to collective bargaining, as Mason County had done and to which the legislature “reacted.”

For these reasons the Union requests that PERC hold that Lincoln County Resolution 16-22 is preempted by the OPMA. Consequently, the Resolution is invalid, and cannot be enforced, and the Union’s resistance to it cannot form the basis of an unfair labor practice.

#### IV.

**CONSIDER THE SOURCE: THE COUNTY’S RESOLUTION IS INSEPARABLE FROM ITS DRAFTER, WHICH ACTS IN BAD FAITH FOR THE PURPOSE OF CRIPPLING COLLECTIVE BARGAINING, AND THE COMMISSION’S FAILURE TO REVERSE THE HEARING EXAMINER’S EXCLUSION OF EVIDENCE TO SUPPORT THIS ARGUMENT ITSELF CONSTITUTES REVERSIBLE ERROR.**

As pointed out in the Statement of the Case, above, the Commission made no ruling regarding the Hearing Examiner’s rejection of nine exhibits offered by the Union (UXs 21-29), despite that the Union had appealed and briefed the issue.

The Freedom Foundation is a radically anti-union organization based in Olympia. The Washington Court of Appeals has found that it exists to “expose, defund, and discredit” labor unions.<sup>50</sup> Worse, the Foundation has proudly announced that “public-sector unions are a disease that is killing our state.” *See*, UX 24 (Freedom Foundation website materials).<sup>51</sup> It has informed its readership that “we have implemented a plan to bankrupt SEIU” (UX 26) and has distributed classic fake news, including cartoon graphics of SEIU leadership beating kneeling workers (UX 27, pg. 0082). In response to an article on a union website claiming that the “Freedom Foundation plans [a] legal assault on labor” and has declared a war on unions that “will be an expensive and divisive one for unions in Washington State,” the Foundation crows, “you better believe it.” *See*, UX 29, pg. 00112. Perhaps most shocking, the Foundation’s founder, Tom McCabe, claimed in an unhinged screed that “union thugs” and “union bosses” instigated violence in order to “to raise taxes and spending for everyone for their own personal benefit.” Accusing unions of “treat[ing] our state’s labor force like human ATM machines to fund their radical left-wing schemes,” he announces that “there is no path to a stronger, freer, more prosperous Washington that does not involve the total defeat of the discredited Union machine!” *See*, UX 25.

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<sup>50</sup> *Service Employees International Union 925 v. Freedom Foundation*, 197 Wash. App 203, 209 (2016); *see also* Union Ex. 23 (content of Freedom Foundation’s website).

<sup>51</sup> In this section of its Brief, the Union must of necessity refer to exhibits offered by the Union, but rejected by the Hearing Examiner.

These are the motivations of the organization that wrote, marketed, and still underwrites the legal defense of Lincoln County's Resolution. As detailed in the Statement of the Case section, above, the Resolution was drafted entirely by the Freedom Foundation; the County only filled in the blank fields in a generic form. This was done as part of a state-wide effort focused on small jurisdictions, including Lincoln, Clallam, Mason and Chelan Counties. Perhaps most probative of the motivations behind the County's resolution, the Foundation provided and paid for two lawyers (Mr. Dewhirst and Mr. Ostroff) to defend the Resolution at the PERC hearing, for all briefing, and in this appeal. *See*, UX 22, 10/5/16 email, Commissioner Coffman to Sherriff Magers ("the Freedom Foundation has committed funds to fight this on our behalf."); UX 17 (Davenport Times, 1/19/17 at paragraph 4), AR 510.

The materials appearing at Union Exhibits 21-29 are inseparable from an evaluation of the motivations behind the County's Resolution, and therefore should have been admitted into evidence.<sup>52</sup> PERC has uniformly held that the subjective motivations underlying bargaining proposals are highly relevant to a determination of their good or bad faith. *See*, e.g., *Port of Walla Walla*, Decision 9061-A (citing *City of Snohomish*, Decision 1661-A (PECB, 1984) (conduct reflecting rejection of the principles of collective bargaining considered bad faith

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<sup>52</sup> In addition, Union Exhibits 21-29 should have been admitted under Fed. R. Evid. 201(b)(2).

bargaining); *Kennewick General Hospital*, Decisions 4815-A, 5052-A, 5594 (PECB, 1996) quoting *Continental Insurance Co. v. NLRB*, 495 F.2d 44 (2nd Cir., 1974) (because “‘it would be extraordinary for a party to directly admit a bad faith intention,’ the motives of a party must be ascertained from circumstantial evidence”); *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988) (citing *A-1 King Size Sandwiches*, 732 F.2d 872 (11th Cir., 1984) (evidence of good faith bargaining cannot mitigate bad faith bargaining violations).

Only the Freedom Foundation’s inflexible anti-union, anti-collective bargaining agenda can explain the County’s predetermined and immovable position on the public/private ground rule. As PERC has recognized, “good faith is inconsistent with a predetermined resolve not to budge from an initial position.” *Northshore Utility District*, Decision 10534-A (PECB, 2010) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). Yet, in the Autumn of 2016 the County presented the Union with the Freedom Foundation’s *fait accompli*, requiring that bargaining be conducted in accord with its own Resolution 16-22, or not at all, and has not changed a single letter of the Resolution since. Tr. 68: 24-25, AR 728; Tr. 69: 1 (Kuhn), AR 729. They reiterated this identical dictate on February 27, 2017, despite that the Union had demonstrated its conciliatory approach by bargaining in public on January 17, 2017, as a result of which the parties were not far from achieving a comprehensive contract. Tr. 106: 10-25, AR 766; Tr. 164: 22-25, AR 824; Tr. 165: 1-3, (Kuhn), AR 825. *See, e.g.,* EX-11, EX-12, EX-13,

EX-14, EX-15, EX-16, AR 632, 633, 635, 636, 638, 640. Clearly, the County remained intransigent because arriving at a contract agreement with the Union would render the public/private issue moot, thereby preventing this appeal from becoming the test case the Foundation craves.

The Commission therefore erred in not requiring the admission of Union exhibits 21 through 29. The Union is entitled to introduce evidence of the motive behind the County's Resolution and its uncompromising stance regarding it for the purpose of establishing the County's breach of its duty of good faith.

### **RESPONSIVE ARGUMENT**

#### **V.**

#### **THE COUNTY'S PREEMPTION ARGUMENT IS A STRAW MAN.**

The County's first-stated argument – that PERC in effect ruled that the Public Employee Collective Bargaining Act (PECB) “preempted” its Resolution – has no basis in PERC's decision. In addition, as detailed below, it is in direct conflict with an earlier decision of the PERC unfair labor practice manager, which the County mentions, but mischaracterizes. In the Union's view, the County does this because it has correctly concluded that its appeal cannot survive objective application of governing principles of labor and administrative law. It therefore uses preemption to access a more congenial body of law -- constitutional law – then uses constitutional law to attack preemption -- a classic straw man.

**A. The County’s Claim That PERC Held That PECB “Preempts” The County’s Resolution Directly Conflicts With The Unambiguous Contents Of PERC’s Decision.**

The principal basis for the County’s appeal is its claim that PERC essentially held that PECB “preempted” the County’s Resolution. Beginning at page 19 of its Opening Brief, the County asserts that when PERC found that the County committed a ULP, it “thereby conclude[ed] that the PECBA preempts the County’s Transparency Resolution....” *See also*, e.g., Cty.’s Opening Br., p. 15, l. 3 (similar wording). This contention serves as the County’s launching point for its constitutional analysis.

Yet, the argument misstates the unambiguous contents of the Decision and the record. Far from ruling against the County on a preemption issue, PERC expressly declined to discuss preemption, stating, “...it is not necessary for us to reach that issue.” *See*, Decision 12844-A, p. 4, AR 101. Thus, PERC instead found that the County’s blank refusal to bargain unless the Union capitulated to its Resolution violated its duty to bargain under PECB. This distinction is critical, because the authorities and standards governing preemption analysis are materially different from the authorities and standards governing violations of the duty to bargain. Moreover, the preemption argument concerns the Resolution itself, whereas PERC’s decision addresses the County’s actions.

In addition, the Union has never argued that PECB preempts the County’s Resolution, only that the Open Public Meetings Act (OPMA) does. *See*,

Teamsters Local 690's Post-Hearing Br., pp. 10-16, AR 440-46. And the PERC Hearing Examiner actually ruled in the County's favor on this second species of preemption, expressly rejecting the Union's OPMA preemption argument. *See*, Decision 12844 (PECB, 2018), pp. 15-16, AR 255-56.

**B. PERC's January 10, 2017 Decision Further Undercuts  
The County's Argument.**

The County's Brief repeatedly references a January 10, 2017 ruling by PERC unfair labor practice manager Jessica Bradley dismissing a ULP charge filed by the Union. At points the County vaguely implies, without clearly arguing, that Bradley's dismissal somehow conflicts with PERC's later finding that the County committed a ULP.

The Commission and the PERC Hearing Examiner, Jamie Siegel, have both (correctly) rejected this implication, reasoning that Bradley's decision was both procedurally and substantively different from Siegel's and the Commission's.<sup>53</sup> The Commission rejected the County's argument, pointing out that Bradley's decision was a pre-hearing finding (in the nature of a CR 12(b)(6) dismissal), while Siegel's followed a full evidentiary hearing on the merits, addressing new facts that had not yet occurred when Bradley ruled. *See*, AR 100-

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<sup>53</sup> The County has by its conduct itself acknowledged the differences. Although it continues to waft the implication analyzed in the text, it has abandoned its express, first-stated argument to Siegel that Bradley's decision precluded a finding that the County had committed a ULP. *See*, AR 312, County's Post-Hearing Brief, p. 8.

101 (Commission decision). In her decision Siegel similarly explained that Bradley's dismissal was based upon the Union's inability to allege "specific incidents where the employer actually refused to meet and bargain at reasonable times and places." *See*, AR 256 (Siegel quoting Bradley). Thus, as Bradley reasoned and Siegel emphasized, the County's mere adoption of its Resolution was not, in and of itself, a ULP. It was not until the County specifically refused to bargain on February 27<sup>th</sup> that PERC found a cause of action and ordered an evidentiary hearing.

This distinction is equally material to an analysis of the County's preemption theory. Bradley not only did *not* find that PECB preempted the Resolution, she found that the Resolution's mere issuance, without more, was a legal non-event under PECB.

For these reasons, the Union requests that the Court find that the County has misstated PERC's preemption findings and the Union's preemption argument.<sup>54</sup> The Union therefore requests that the Court reject the County's incorporation of constitutional standards via its preemption straw man.

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<sup>54</sup> Of course, this finding does not prevent the County from responding to the argument in the Union's Opening Brief that the County's Resolution was indeed preempted by the Open Public Meetings Act. The Union looks forward to reading that response and replying as appropriate.

## VI.

### **THIS IS NOT A CONSTITUTIONAL CASE, AND THE STANDARDS OF REVIEW OF CONSTITUTIONAL CLAIMS (WHATEVER THEY MAY BE) ARE NOT RELEVANT HERE.**

The County argues that PERC effectively found that its Resolution was unconstitutional. County Opening Brief, pp. 18 and p. 22. However, the Union's unfair labor practice charge did not claim, and PERC did not find, that Lincoln County's passage of its Resolution was unconstitutional. PERC found instead that the County breached its duty to bargain under RCW 41.56 when it conditioned its willingness to bargain mandatory subjects on the Union's capitulation to permissive subjects. In short, the issue in our case is not whether the County's Resolution is constitutional but whether its application in the manner done here constituted an unfair labor practice. Therefore, this Court's appellate review is governed by the usual standards applied in an administrative appeal, not constitutional standards.

Contrary to the County's assertion, *Adams v. Thurston County*, 70 Wn. App. 471, 479, 855 P.2d 284 (1993), disapproved on other grounds, *Snohomish County v. Pollution Control Hearings Board*, 187 Wn.2d 346, 386 P.3d 1064 (2016), does not stand for the proposition that preemption is "a constitutional matter." The *Adams* court neither states, suggests, nor implies that all allegations that enforcement of a county resolution violated a state statute constitutes, *ipso facto*, a constitutional claim. Instead, the *Adams* court analyzes whether a

Thurston County ordinance that delayed the vesting of title to land conflicted with state statutes, finding that it did. *Id.* at 482. Along the way, it recited the following boilerplate: “An ordinance which violates or conflicts with general statutes is invalid [citation omitted] and unconstitutional.” *Id.* at 479. However, it never again mentions constitutionality, let alone analyzes it. Further, contrary to the County’s implication, it never indicates that analysis of whether a county ordinance violates state law necessarily imports constitutional standards.

Similarly, *State v. Truong*, 117 Wn.2d 63, 811 P.2d 938 (1991), holds that a county ordinance violated RCW 70.96A.190 and was “therefore unconstitutional.” *Id.* at 68. Most significant for present purposes, the court made its unconstitutionality finding on the basis of a statutory analysis that did not apply the “reasonable doubt” sought by the County here.

*Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998), likewise does not support the County. *Weden* involves a frontal constitutional attack on a county ordinance banning “motorized personalized watercraft” on county lakes. Indeed, the first paragraph of the *Weden* court’s opinion states “We are asked to determine whether that ordinance is unconstitutional....” *See, Weden, supra*, at 684. As such, the case has no relevance to our case. In any event, the *Weden* court’s analysis of whether the county ordinance violated RCW 88.02 and 88.12 (among other chapters) directly contradicts the County’s argument that PERC has

the burden of establishing “beyond a reasonable doubt” that the County’s Resolution violated PECB. *Weden* applied no such burden of proof. *Id.* at 693.

*Emerald Enters., LLC v. Clark County*, 2 Wn. App. 2d. 794, 413 P.3d 92 (2018), is irrelevant for identical reasons. There, Division II applied a heightened burden of proof only to the claim of unconstitutionality. *See, id.* at 804. The Court significantly did not apply a heightened burden of proof when evaluating whether the ordinance in question was preempted by Washington’s Uniform Controlled Substances Act, RCW 69.50. *Id.* at 814.<sup>55</sup>

## VII.

### **THE COUNTY’S “MANAGEMENT PREROGATIVE” ARGUMENT IS MISPLACED AND LEGALLY BASELESS.**

Throughout its Brief, the County argues that it has a “management prerogative” to implement whatever bargaining ground rules it wishes, including a requirement that the Union bargain in public. The County relies primarily upon *City of Seattle*, Decision 11588-A (PECB, 2013) and *Int’l Ass’n of Firefighters, Local Union 1052 v. PERC*, 113 Wn.2d 197, 778 P.2d 32 (1989).

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<sup>55</sup> *Janus v. AFSCME, Council 31*, 138. S. Ct. 2448, 201 L. Ed. 2d 924 (2018), relied upon by the County, has nothing to do with this case. *Janus* simply holds that public employees who are not “members” of the union cannot be required to contribute the equivalent of monthly dues as a fair share fee. The Supreme Court’s opinion has nothing to do with, as the County appears to argue, openness in government or the public’s right to know. The *Janus* court never mentions such policies or concerns, focusing instead upon whether the payment of a fee equivalent to dues by employees who are not members of the union constitutes forced speech in violation of the First Amendment.

The argument misperceives the context of our case. The cases cited announce tests for distinguishing mandatory from permissive subjects. However, in our case, PERC has already ruled that the public/private issue is a permissive one, and neither party contends otherwise. Thus, the tests set forth in *City of Seattle, supra*, and *Firefighters Local 1052, supra*, are not particularly relevant.

Accordingly, the County's claim to a management prerogative is entirely unsupported. The core of its argument, at page 36, contains no citations to legal authority or portions of the record evidencing past practices in its favor.

*City of Seattle, supra*, heavily relied upon by the County, strongly undercuts its argument. In that case, PERC held that certain issues were permissive rather than mandatory, which is not disputed in our case. Immediately following the portions of the Decision quoted by the County, PERC states:

Permissive subjects of bargaining are management and union prerogatives, **along with the procedures for bargaining mandatory subjects, over which parties may negotiate.**

*Id. at 3* (emphasis added). That is, as the Union explained in detail above, some permissive subjects are management prerogatives while others are union prerogatives, and a third type, exemplified by "procedures for bargaining mandatory subjects," is neither. Inasmuch as PERC and courts recognize this distinction, the County's assertion that the existence of a third type of permissive subject is "novel" or "... a newly discovered third species," is without merit. County Opening Brief, p. 40 and 42.

## VIII.

### **THE COUNTY’S PAST PRACTICE ANALYSIS IGNORES LONGSTANDING LEGAL PRECEDENT AND UNDISPUTED FACTS.**

The County does not dispute that it conducted contract negotiations in private with the Lincoln County Deputy Sheriff’s Guild for years prior to the succession of Teamsters Local 690 in 2014.<sup>56</sup> The County nonetheless asserts that even if the *status quo* “dictates the outcome,” the question of private versus public bargaining cannot be resolved with reference to past practice because, the County claims, there is no past practice. *See*, Cty. Opening Br., p. 44. The County bases this assertion on the fact that Local 690 only recently became the collective bargaining representative for the commissioned and non-commissioned officers in Lincoln County, disregarding years of private bargaining between itself and Local 690’s predecessor as exclusive collective bargaining representative.

The County’s argument is legally wrong. PERC and the NLRB have both ruled that a past practice with a predecessor union continues in effect when a successor union takes the reins. In *City of Marysville*, Decision 5306 (PECB, 1995), PERC ruled that, just as contract terms and past practices must continue unchanged when a workplace gets a new owner or operator,<sup>57</sup> past practices

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<sup>56</sup> Tr. 238: 24-25; Tr. 239: 1-25; Tr. 241: 1-9 (Brad Sweet, former Guild Secretary Treasurer). AR 898, 899, 901.

<sup>57</sup> *See*, *SMI/Division of DCX-CHOL Enterprises, Inc.*, 365 NLRB No. 152, 210 LRRM 1828, 2017 BL 449648 (when successor employer adopted predecessor’s CBA, “as a matter of law, it also adopted the existing practices...”); *see also*, *Courier-Journal*, 342 NLRB 1093, 175 LRRM 1410

likewise continue when there is a change in the exclusive collective bargaining representative. Specifically, *City of Marysville* holds that a job share practice that accrued under the predecessor union nonetheless was binding upon the employer after it recognized the successor union (in circumstances nearly identical to ours).

Indeed, the National Labor Relations Board has found that long-standing past practices must continue after the recognition of a new collective bargaining representative even in a workplace that previously had *no* prior union representation of any kind.<sup>58</sup> In *Acme Die Casting*, 309 NLRB 1085,<sup>59</sup> the Board found that an employer's established practice of awarding pay raises on a regular basis to a non-unionized work force must continue even after, in a Board-conducted election, the employees selected a union to represent them. Because the evidence established that the employer had for years awarded twice-yearly pay raises, "... the [Employer] violated Section 8(a)(3) and (5) of the Act by failing to give raises in 1988" after the employees voted in a union. *Id.*, at 1086.

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(2004) (successor employer allowed to make changes to employee health insurance benefits because making such changes was a long established past practice of the predecessor employer).

<sup>58</sup> Decisions construing the National Labor Relations Act are persuasive in interpreting similar provisions of RCW 41.56. *Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wash. 2d 373, 383, fn. 2 (1992) citing *Nucleonics Alliance, Local Union 1-369 v. WPPSS*, 101 Wash. 2d 24, 32-33 (1984).

<sup>59</sup> *Acme Die Casting, a Division of Lovejoy Industries Incorporated and UERMWA*, 309 NLRB 1085, 143 LRRM 1133 (1992).

In any event, the County's claim that it has never bargained in private with Teamsters Local 690 is factually inaccurate. Employer Exhibits 11 and 12 (AR 632, 633), letters from the County to the Union in late October and early November, 2016, reflect negotiations between the parties regarding a potential extension ("rollover") of the previous collective bargaining agreement. These negotiations were in private. Similarly, communications regarding the scheduling of the January 17<sup>th</sup> negotiations, as reflected in Employer Exhibits 13 and 14 (AR 635, 636) are themselves "negotiations" within the meaning of the law, i.e. communications between an exclusive collective bargaining representative and an employer. These negotiations were also in private. Finally, as a matter of labor law nomenclature, the process of converting the Sheriff's Guild contract to a Teamsters Local 690 contract, about which Mr. Coffman testified, also constituted private "negotiations." *See*, Tr. 80: 2-15, AR 740.

The Union therefore requests that the Court find that PERC's finding that the status quo with Local 690 was private bargaining is supported by substantial evidence and must therefore be affirmed.

## **IX.**

### **SOME OF THE COUNTY'S ARGUMENTS ARE HYPOCRITICAL.**

The County's complaint, at page 43, that the Union passed its "Integrity in Bargaining" Resolution without notice to the County is a case of the slug calling the worm slimy. It is undisputed that the County passed its own Resolution

without notice of any kind to the Union. Several months later the Union merely gave the County a taste of its own medicine.

Similarly, contrary to the County's argument (p. 43), it was the County, not the Union, who picked this fight. As explained above, the County and its unions have a long history of peaceful and productive collective bargaining in private. It was the County that knowingly chose to provoke the unions by secretly passing its Resolution.<sup>60</sup>

### CONCLUSION

For all of these reasons the Union requests that the Court:

1. Reverse the PERC Decision's Conclusion of Law that the Union committed an unfair labor practice;
2. Vacate PERC's entire Order to the Union;
3. Expressly instruct that private bargaining better promotes good faith collective bargaining and the orderly resolution of labor disputes than does bargaining in public and is more in keeping with the purposes of collective bargaining statutes and the authority thereunder, and that, as a consequence, private bargaining is the applicable default for all public employee collective bargaining, absent voluntary agreement to the contrary between the bargaining parties; and
4. Reverse the Hearing Examiner's rejection (affirmed *sub silentio* by the Commission) of Union exhibits 21 through 29 and find that the masterminding and ramrodding of Resolution 16-22 by a vituperatively

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<sup>60</sup> The County improperly references materials not contained in the administrative record, in violation of RCW 34.05.566, 570, which confine judicial review to "the administrative record." At page 27 of its Brief (citing AR 332, 335), the County references materials attached to its post-hearing brief to the Examiner, which she expressly declined to consider (AR 257, fn. 8) and materials from Ferry County (citing AR 208) that appeared for the first time as an extra-record attachment to its PERC appeal.

anti-union, anti-collective bargaining organization tainted the Resolution with bad faith; OR,

5. Alternatively, hold that ordinances or other enactments by public employers that require that collective bargaining be conducted in public are preempted by the Open Public Meetings Act, necessitating rescission of County Resolution 16-22, affirmance of PERC's finding of a ULP by Lincoln County and reversal of PERC's finding of a ULP by Teamsters Local 690.

RESPECTFULLY SUBMITTED this 30 day of December, 2019.

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

LINCOLN COUNTY,

Appellant/Cross-Respondent,

v.

TEAMSTERS LOCAL 690,

Cross-Appellant/Respondent

and

PUBLIC EMPLOYMENTS

RELATIONS

CASE No. 370542

CERTIFICATE OF SERVICE  
FOR TEAMSTERS LOCAL 690's  
OPENING AND RESPONSE BRIEF

**DECLARATION OF SERVICE**

The undersigned hereby certifies that on the 30<sup>th</sup> of December, 2019, he caused the foregoing **Teamsters Local 690's Opening and Response Brief** to be filed electronically via the e-filing system. This copy has a corrected signature page, now with attorney Michael R. McCarthy's signature. 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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I declare under penalty of perjury under the laws of the State of Washington that  
the foregoing is true and correct.



Richard Russo, Paralegal

**REID MCCARTHY BALLEW LEAHY LLP**

**December 30, 2019 - 12:52 PM**

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**Comments:**

This is a refile of our brief, originally filed on 12/13/19, this one signed by attorney Michael R. McCarthy. Due to exigent circumstances the first filing was signed, with Mr. McCarthy's authorization, by Richard Russo, a paralegal at the firm. This filing has a new signature page, and is otherwise without change. We apologize for the confusion and inconvenience, and thank the court for its consideration.

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