

No. 89344-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

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Kitsap County,

*Petitioner,*

vs.

Kitsap County Deputy Sheriff's Guild,

*Respondent.*

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BRIEF OF AMICUS CURIAE  
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### **3. Identity and Interest of Amicus**

Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation organized primarily for educational purposes and the advancement of knowledge in the area of municipal law. WSAMA has no direct interest in this matter. It has an interest in the impact that this case has upon collective bargaining and the labor arbitration process.

### **4. Statement of the Case**

Kitsap County ("County") and the Kitsap County Deputy Sheriff's Guild ("Guild") had a collective bargaining agreement that expired on December 31, 2009. CP 187, ¶ 2; CP 289-92 (portion of agreement). The parties could not settle upon the terms and conditions of a new agreement, and the matter proceeded first to mediation and, then, to interest arbitration. CP 187, ¶ 2.

Wages were one of the issues upon which the parties could not agree. The County proposed no increase, while the Guild proposed an increase of 2% for 2010, an increase that by formula would come to 1.3% for 2011, and another formula increase that would come to 3% for 2012. CP 80. Health insurance was another issue upon which the parties could not agree. The County proposed changing the employee's percentage share of his or her own

health care premium costs from 0% in the expired agreement to 3% and the employee's share of family dependent premium costs from 10% in the expired agreement to 15%. CP 91; CP 188, ¶ 3; *see also* CP 290-91 (health care cost share provisions of expired contract).

The interest arbitration panel considered the economic issues of wages and health care coverage together. CP 80-93. Upon consideration of various economic factors, the neutral chair of the arbitration panel determined with respect to wages and health insurance:

I therefore award no rate increases for 2010 and 2011; a 2.0% schedule increase retroactive to the first pay period in January, 2012; and an additional 0.5% schedule increase retroactive to the first pay period in July 2012 along with a change in insurance cost participation: Retroactive premium payroll deductions in July 2012, the Deputies shall pay three percent (3%) of the premium of employee-only coverage and 15% of the premium for dependent coverage. The County shall continue to pay 100% of employee-only dental. The exact calculation of each Deputy's insurance costs (for employee and spouse, employee and two dependents, etc.) shall be done just as it has been done in the past.

CP 92-93; *see also* CP 100. Any retroactively effective changes to health care premium cost shares were offset by corresponding retroactive wage increases. CP 382-83.

The Guild challenged the authority of the arbitration panel to make changes to the allocation of health care costs effective as of the commencement date of the new collective bargaining agreement. CP 2-3.

The Guild acknowledged in the proceedings below that its prior contract with the County expired in 2009. CP 187, ¶ 2; CP 228, ¶ 2; CP 326, ¶ 2. It argued, however, that RCW 41.56.470 required the County to continue the expired contract during the pendency of arbitration proceedings and therefore created a property right to any benefits under that contract during that period that could not thereafter be diminished by the arbitration panel. The Pierce County Superior Court granted summary judgment in favor of the Guild holding that the portion of the arbitration award regarding allocation of health costs contravened the state's wage withholding law and constituted an unconstitutional taking of property in violation of due process. CP 435-37.

## **5. Argument**

The case presents a legal question of great importance to Washington cities. Recent poor economic conditions forced many counties and cities to ask collective bargaining units to make concessions when negotiating expiring contracts. Such requests are unpopular and difficult to settle. As a consequence, many negotiations in which such requests are made result in arbitration. The Superior Court's decision in this matter incorrectly limits the authority of interest arbitrators by disallowing any benefit decreases other than those which apply prospectively from the issuance date of an arbitration award and therefore creates a situation where any delay in the arbitration

process unfairly prejudices only one side to the arbitration proceedings: public employers.

Amicus submits that RCW 41.56.470 does not operate to create a vested property right. "Property interests are created and their dimensions are defined by rules which stem, not from the constitution, but from state law." *Giles v. Social & Health Servs.*, 90 Wn.2d 457, 460, 583 P.2d 1213 (1978); *see also Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). RCW 41.56.470 provides only that:

During the pendency of the proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his or her rights or position under chapter 131, Laws of 1973.

It prevents a party from unilaterally changing employment conditions to the detriment of the another during the pendency of labor arbitration proceedings but does not purport to limit the authority of an arbitration panel.

In *Harris v. Labor & Industries*, 120 Wn.2d 461, 843 P.2d 1056 (1993), the widow of a worker who had been receiving temporary disability payments since 1979 challenged a 1986 statute that reduced his benefits. This Court rejected an argument that the worker had a contractual right to a certain level of benefits that vested at the time of injury, writing:

A vested right, entitled to protection from legislation, must be

something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*

*Harris*, 120 Wn.2d at 475, quoting *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975). Amicus submits that any expectation of a specific level of benefits under an expired contract through RCW 41.56.470 is contingent upon the result of an arbitration proceeding under Chapter 41.56 RCW and does not rise to the level of a vested right.

Amicus submits that retirement benefit cases such as *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008); *Leonard v. Seattle*, 81 Wn.2d 479, 503 P.2d 741 (1972), and *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956) are inapposite. Each dealt with a unilateral attempt to take away a contractual benefit after it had vested. *Navlet* explained: "As a general principle, rights that vest in a collective bargaining agreement survive the term of the agreement." *Navlet*, 164 Wn.2d at 829. The court therefore reasoned that the vested nature of the benefit conferred in the collective bargaining agreement was the critical issue in the case. *Id.* Unlike the benefits at issue in those cases, the interests asserted here did not vest during the term of a collective bargaining agreement. "The Guild contract with the County expired at the end of 2009 and the Deputies have been

working without a contract since." CP 326, ¶ 2.

This court reiterated in *Navlet* that it "may look to the interpretation of federal labor law where the law is similar to state law." *Navlet*, 164 Wn.2d at 828. Amicus submits that RCW 41.56.470 is a codification of the unilateral change doctrine recognized in *National Labor Relations Board v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 2d 230 (1962). In *Katz*, the U.S. Supreme Court held that the duty to bargain collectively under the National Labor Relations Act bars an employer subject to that act from making unilateral changes to conditions of employment while a contract is under negotiation. *Katz*, 369 U.S. at 743, 747-48. As the court further explained, however, in *Litton Financial Printing Div. v. National Labor Relations Board*, 501 U.S. 190, 206, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991):

[A]n expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract.

Any expectation to continuance of a certain level of benefits under RCW 41.56.470 is purely statutory. The dimensions of that interest must therefore be measured by the statutory scheme under which it was created.

"In ascertaining the legislative purpose consideration must be given

to all of the provisions of an act, and a construction must be adopted which is reasonable and in furtherance of the manifest purpose of the legislation."

*Roza Irr. Dist. v. State*, 80 Wn.2d 633, 638, 497 P.2d 166 (1972). RCW 41.56.010 declares that the purpose of Chapter 41.56 RCW is:

to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

The statutes recognize that the collective bargaining process takes time, and it is not always possible to reach agreement upon a new collective bargaining agreement before a prior agreement expires. They therefore allow such agreements to be made retroactively effective. RCW 41.56.950 provides:

Whenever a collective bargaining agreement between a public employer and a bargaining representative is concluded after the termination date of the previous collective bargaining agreement between the same parties, the effective date of such collective bargaining agreement may be the day after the termination date of the previous collective bargaining agreement and all benefits included in the new collective bargaining agreement including wage increases may accrue beginning with such effective date as established by this section.

The statutes also recognize that parties may be unable to reach mutual agreement. They therefore set forth both procedures for mediation "to persuade the parties to resolve their differences" and arbitration "to resolve

the dispute." RCW 41.56.440 and RCW 41.56.450. The statutes establish standards and guidelines to aid an arbitration panel in reaching a decision. RCW 41.56.465.

RCW 41.56.470 is a part of that dispute resolution system. As the Public Employees Relations Commission (PERC) explained in *International Association of Firefighters, Local 452 v. City of Vancouver*, Decision 11372-PECB (Wash. Pub. Empl. Rel. Comm'n May 14, 2012), p. 3: "RCW 41.56.470 requires an employer to maintain the status quo for uniformed, interest arbitration eligible employees, when parties have not resolved a successor collective bargaining agreement and are waiting for an interest arbitration panel to determine the terms of a new agreement. . . ." Statutory status quo rights under RCW 41.56.470 are conditional and dependent upon the ultimate decision made by an arbitration panel to resolve a dispute.

Amicus respectfully submits that the vested property right analysis utilized below by the Superior Court was in error. *See* 7/19/2013 RP, pp. 19-20. Amicus further submits that this case is representative of the problems that will occur statewide if the Superior Court's ruling is allowed to stand. As in most cases that result in arbitration under Chapter 41.56 RCW, the prior collective bargaining agreement had already expired before the arbitration of the matter commenced. The prior contract expired on

December 31, 2009. CP 289. The parties agreed that the term of a new labor contract should be from 2010-12, but a lengthy mediation process pushed arbitration into 2012. CP 327, ¶ 3. Arbitration did not commence until October 23, 2012. CP 2, ¶ 5. As a consequence, the arbitration panel could not issue its decision determining the terms and conditions of a 2010-12 contract until February 27, 2013 after the new labor agreement itself would have expired. CP 69-101. Therefore, under the Superior Court's analysis, the authority of the arbitration panel in this case and many others like it "to resolve the dispute" between the parties over the terms and conditions of a new agreement under RCW 41.56.450 would be entirely one-sided and ineffectual.

Amicus submits that the Chapter 41.56 RCW statutory scheme was created to "promote the continued improvement of the relationship between public employers and their employees. . . ." RCW 41.56.010. The chapter contemplates that parties may not be able to resolve differences during a contract term and therefore recognizes their ability to backdate new agreements that cannot be finalized until a prior agreement has expired. RCW 41.56.950. The chapter also recognizes that parties may not be able to resolve differences on their own and creates a mediation and arbitration system that ultimately authorizes arbitration panels to determine issues in

dispute, RCW 41.56.450-465, and it further prevents the parties from disrupting the dispute resolution process with unilateral changes while arbitration proceedings are pending. RCW 41.56.470. However, the statutory prohibition contained in RCW 41.56.470 does not override the remainder of the arbitration process, and an arbitration panel may make the terms and conditions of a new collective bargaining agreement as determined by the panel effective "the day after the termination date of the previous collective bargaining agreement. . . ." just as the parties could.

**6. Conclusion**

Amicus curiae requests that this court accept discretionary review in this case, reverse the Superior Court orders granting summary judgment and denying reconsideration, CP 435-37 and 479, and reinstate the findings, discussion, and award made by the Public Employees Relations Commission below. CP 69-101.

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