

68376-4

68376-4

NO. 68376-4

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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WASHINGTON FEDERATION OF  
STATE EMPLOYEES,  
Appellant,

and

UNIVERSITY OF WASHINGTON,  
Respondent.

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OPENING BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

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**I. Introduction: The Public Employment Relations Commission appropriately found the University of Washington guilty of an unfair labor practice for attempting to bargain the configuration of bargaining units of University employees.**

The Washington Federation of State Employees (WFSE) is the exclusive bargaining representative for a bargaining unit of civil service employees at University of Washington. The unit has historically included persons employed in the Specimen Processing Technician (SPT) civil service job classification. The unit was created by the state civil service board and later confirmed by the Public Employment Relations Commission (PERC or Commission) when it acquired jurisdiction over state employees.

The employer and union agree that the work of these employees in the SPT Classification justifies their being reallocated to the higher paying Clinical Laboratory Technician (CLT) positions. However, the University insisted that if it were to agree to reclassify the employees to the higher paying CLT position, the WFSE would have to agree that the employees would then be transferred to a different bargaining unit represented by another union (SEIU).

This was not a new position for the University. The Commission had previously found the University guilty of an unfair labor practice for

unilaterally reallocating these same employees to the CLT classification and then taking the position that they were no longer members of the bargaining unit represented by the WFSE, but had become members of the unit represented by SEIU. As a remedy for the violation, the Commission had ordered the University to restore the *status quo ante*. The University complied by returning the employees to the SPT classification and to the WFSE unit. However, shortly thereafter it advised the WFSE of its belief that the employees should again be reclassified to CLTs and once again placed in the SEIU unit. For months, the University refused to discuss the SPT's wages with the WFSE, other than in the context of the WFSE agreeing that the employees would then be members of the SEIU unit.

The WFSE filed this second unfair labor practice complaint alleging that the University "never had any intention of bargaining anything but the placement of the specimen processing technicians back into the SEIU bargaining unit." The complaint alleged that the University's conduct constituted a refusal to bargain and interference with employee rights, violations of *RCW 41.80.110(1)(e) and (a)*. In accordance with its rules, the Commission issued a preliminary ruling that if true, the allegations could constitute refusal to bargain and interference unfair labor practices.

Following a hearing, a Commission hearings examiner found that although the parties had bargained “hard,” the University’s conduct did not constitute a refusal to bargain wages for the SPTs. On appeal, the Commission agreed with its examiner that the University had bargained in good faith by meeting and discussing the SPTs’ pay. However, the Commission found that by insisting that once the SPTs were reclassified to CLTs they would be transferred to the SEIU bargaining unit, the University had committed a refusal to bargain violation, since only the Commission can determine the configuration of appropriate bargaining units.

The University appealed the Commission decision to court. The King County Superior Court found the Commission’s decision arbitrary and capricious as well as unsupported by the record and contrary to the Commission’s own rules. This appeal followed.

## **II. Assignment of Error.**

The trial court erred in reversing the Commission decision that the University was guilty of an unfair labor practice.

## **III. Issues Pertaining to Assignment of Error.**

**No. 1.** Does the administrative record support the Commission’s finding that the University had proposed and insisted that once it reclassified employees in a bargaining unit represented by the WFSE into higher

paying positions that the union agree that those employees would be transferred to another bargaining unit?

**No. 2.** Where a commission rule provides that a preliminary ruling summarizing unfair labor practice allegations limits the causes of action to those specified in the ruling and the preliminary ruling summarized the allegations as a refusal to bargain wages of certain employees, and interference with employee rights, did the Commission violate its own rule by finding the University's conditioning wage bargaining on the union's agreeing that the employees would have to be included in a different bargaining unit than the one certified by the Commission constituted a refusal to bargain and interference with employee rights?

**No. 3.** Since by statute decisions regarding appropriate bargaining unit configurations are exclusively for the Commission to decide, did the Commission act arbitrarily and capriciously or commit an error of law in finding the University guilty of an unfair labor practice for conditioning wage negotiations on the union's agreement that the employees would be transferred to a different bargaining unit represented by a different union?

#### **IV. Statement of the Case.**

##### **A. Statement of Proceedings.**

On April 30, 2008, the WFSE filed an unfair labor practice complaint with the Commission. The complaint alleged that the University committed refusal to bargain and interference violations of *RCW 41.80.110(1)(a) and (e)*.<sup>1</sup> Commission rules provide for the Commission staff to review the complaint to determine whether if true the allegations state a cause of action for a violation. *WAC 391-45-110*. The Commission initially found the complaint insufficient, and in accordance with *WAC 391-45-110(1)* the Commission issued a deficiency notice affording the WFSE the opportunity to cure the deficiencies.<sup>2</sup>

On May 29, 2008, the WFSE filed an amended complaint. In paragraph 3.10 of the amended complaint it alleged that the University had notified the WFSE “of the ‘contemplated reclassification’ of the specimen processing techs and specimen processing tech leads in the WFSE bargaining unit to the clinical laboratory tech 1 and 2 positions in SEIU’s bargaining unit.” In paragraph 3.24 the WFSE further alleged that “the

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<sup>1</sup> AR. 1 (AP1-4-AP1-125). References to the administrative record certified to the King County Superior Court are found at Clerks Papers (CP) 9 and are referenced hereafter by the Administrative Record (AR) tab and page number(s).

<sup>2</sup> AR. 2 (AR2-126-AR2-127).

UW never had any intention of bargaining anything but the placement of the specimen processing technicians back into the SEIU bargaining unit.”<sup>3</sup>

This time the Commission found that the complaint allegations stated a cause of action and issued a “preliminary ruling” for interference and refusal to bargain violations in accordance with WAC 391-45-110(2).<sup>4</sup> The University filed an answer to the complaint.<sup>5</sup> (The WFSE later amended the complaint a second time to allege a violation for circumventing the union and dealing directly with the employees. This charge was ultimately dismissed and is not involved in the appeal.)

Following a hearing, an examiner reviewing the record,<sup>6</sup> dismissed the complaint, finding that while both sides had engaged in hard bargaining, no refusal to bargain violation (which includes the duty to bargain in good faith) had occurred.<sup>7</sup> The WFSE appealed the decision to the Commission.<sup>8</sup>

On March 1, 2011, the Commission issued its decision in which it disagreed with the examiner, stating that “[t]he configuration of bargain-

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<sup>3</sup> AR. 3 (AR3-128-AR3-135).

<sup>4</sup> AR. 4 (AR4-136-AR4-137).

<sup>5</sup> AR. 4 (AR5-138-AR4-145).

<sup>6</sup> The decision of the examiner conducting the hearing was set aside by the Commission and remanded to another examiner, for violation of the long standing Commission policy against extensive verbatim copying from one of the party’s (in this case the University’s) post-hearing brief. See AR.21 (AR21-1087-AR21-1088).

<sup>7</sup> AR. 22 (AR22-1090-AR22-1108).

<sup>8</sup> AR. 23 (AR23-1110-AR23-1115).

ing units is a function the Legislature delegated solely to the Commission.” It adopted the findings of the examiner, adding an additional finding that:

12. During the course of negotiations described in Finding of Fact 7 and 8, the employer proposed and insisted that once the employees in the Specimen Processing Technician classification were reallocated to the Clinical Laboratory Technician position, those employees would be transferred to the bargaining unit of employees represented by the SEIU.<sup>9</sup>

The Commission adopted the examiner’s conclusions of law as well except that it added a new conclusion that:

6. By its actions and communications described in Finding of Fact 12, the employer attempted to bargain the configuration of the bargaining units represented by WFSE and SEIU in violation of RCW 41.80.110(e) and (a).<sup>10</sup>

The Commission entered its decision and order finding the University guilty of the unfair labor practice consistent with the finding and conclusion it had added to the decision of the Examiner.<sup>11</sup>

The University filed a Petition for Judicial Review of this portion of the Commission decision to the King County Superior Court.<sup>12</sup> On January 31, 2012, Judge Kimberly Prochnau issued a “Findings of Fact, Con-

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<sup>9</sup> AR. 27-1160.

<sup>10</sup> AR. 27-1161.

<sup>11</sup> AR. 27 (AR27-1149-AR27-1163).

<sup>12</sup> CP 1.

clusions of Law and Order” reversing the Commission decision and adopting the decision of the examiner.<sup>13</sup> The WFSE timely appealed.<sup>14</sup>

**B. Statement of Facts.**

For purposes of this appeal, the WFSE accepts the findings of fact by the examiner, adopted by the Commission, with the Commission’s additional finding 12, *supra*, as the relevant facts of the case.<sup>15</sup> For the court’s convenience those findings are set forth herein verbatim.

FINDINGS OF FACT

1. The University of Washington is a state institution of higher education within the meaning of Chapters 41.06 and 41.80 RCW and as part of its functions, operates and staffs an acute care hospital and regional trauma center at Harborview Medical Center and a regional medical center at University Hospital.
2. The Washington Federation of State Employees, an employee organization within the meaning of Chapter 41.80 RCW, is the exclusive bargaining representative of “all classified staff employees of the University of Washington performing work at the Harborview Medical Center in the classifications” including, but not limited to: the Specimen Processing Technicians.<sup>16</sup>
3. In 2003, the employer, using specific language in the parties’ collective bargaining agreement, reclassified Specimen Processing Technicians represented by the union and working at Harborview Hospital as Clinical Laboratory Technicians. The employer had de-

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<sup>13</sup> CP 29.

<sup>14</sup> CP 30.

<sup>15</sup> In its petition for review the University did not challenge any of the findings of the examiner. Accordingly, the only factual issue concerns the adequacy of the record to support the additional finding by the Commission [Finding 12].

<sup>16</sup> A copy of PERC decision 9391 clarifying and defining the WFSE bargaining unit is Appendix A.

terminated that the responsibilities of the Specimen Processing Technicians were comparable to that of the Clinical Laboratory Technicians working at the employer's University Medical Center. The Clinical Laboratory Technicians at the University Medical Center were paid at a higher pay scale than were the Specimen processing Technicians at Harborview.

4. On October 10, 2003, the union filed a complaint charging unfair labor practices against the employer for skimming the work of the Harborview Clinical Laboratory Technicians out of its bargaining unit.
5. On June 15, 2004, Service Employees International, Local 925 (SEIU), was certified as the exclusive bargaining representative of: "All full time and regular part-time unrepresented non-supervisory laboratory technical employees employed by the University of Washington in hospitals and clinics operated by the University of Washington, *excluding confidential* employees, supervisors, internal auditors, and *employees in other bargaining units.*" (emphasis supplied)
6. On March 2, 2005, the examiner issued her decision on the union's charge of unfair labor practices. She found that the employer had skimmed bargaining unit work from the union and ordered that the *status quo ante* be restored by the return of the laboratory work done by the technicians at Harborview to the union's bargaining unit. The decision was appealed and the Commission affirmed the decision on September 5, 2006.
7. Subsequent to the examiner's decision on the union's charges of unfair labor practices, the parties engaged in several years of correspondence concerning the parties' interests in paying the now-reclassified Specimen Processing Technicians on the same pay scale as the Clinical Laboratory Technicians. The union, however, wanted the work to remain in its bargaining unit, while the employer was concerned that if it reclassified the employees it would again be faced with a skimming charge, this time by SEIU.

8. During the course of this negotiation the parties did agree that the affected employees at Harborview would be Y-rated, that is, they would continue to be paid at the higher rate of pay, but their pay would stay at that rate until the rate paid the classification of Specimen Processing Technician equaled what the existing employees were being paid. The negotiations included a request by the employer that the two unions involved meet and discuss this issue. Such a meeting did not take place.
9. On November 10, 2007, the union received a petition from a number of the affected Specimen Processing Technicians at Harborview Medical Center, asserting that the union had caused them to not receive the pay increases that had been received by the Clinical Laboratory Technicians at the University Medical Center. The union alleged that the employees had included a copy of a letter from the union to the employer along with the petition, but the author of the petition testified that he had not seen the letter before and had not included it with the petition.
10. On May 28, 2008, a group of the affected Harborview Specimen Processing Technicians and their private attorney requested a meeting with the employer. The employer immediately notified the union and requested its presence at such meeting. The union wrote the employer and stated that they had no intention of meeting with a third party.
11. The above-referenced meeting took place on July 15, 2008, when the employer's representative met with two of the Specimen Processing Technicians and their attorney. According to testimony of the employer's representative, one of the employees present at the meeting, and the employee's attorney, the history of the issue was presented and the employees presented their position, but nothing that could be characterized as negotiations took place at the meeting.

These were the findings by the Examiner. The Commission added Finding of Fact 12 to those of the Examiner as an additional finding of its own.

12. During the course of negotiations described in Finding of Fact 7 and 8, the employer proposed and insisted that once the employees in the Specimen Processing Technician classification were reallocated to the Clinical Laboratory Technician position, those employees would be transferred to the bargaining unit of employees represented by the SEIU<sup>17</sup>

Evidence in the record supporting the Commission's Finding 12 included the following:

In 2003, the University had reclassified the employees in the SPT classification to CLTs. It also took the position that the employees (and their work) were therefore no longer included in the WFSE bargaining unit. The University was eventually found guilty of a breach of the duty to bargain, an unfair labor practice, for "skimming" the WFSE unit work.<sup>18</sup> Nevertheless, the University persisted for the next several years in its position that the WFSE agree that the employees be reclassified to CLTs and placed in the SEIU bargaining unit.<sup>19</sup>

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<sup>17</sup> AR22-1105-AR22-1107 (Findings 1-11 of Examiner) and AR27-1160 (Finding 12 of the Commission).

<sup>18</sup> Ex. 1, AR. 11-653-670.

<sup>19</sup> See e.g. Ex. 18, AR. 11-794; Ex. 2, AR. 11-672-673; Ex. 3, AR. 674-677; Ex. 4, AR. 11-684; Ex. 5, AR. 11-685-686; Ex. 6, AR. 11-687-690.

Finally in June 2007, the University returned the employees to the SPT class and WFSE bargaining unit. At exactly the same time, the University also advised the union that it was going to study the “proper” classification for the employees in the SPT classification.<sup>20</sup>

A few months later, during October 2007, the University advised the WFSE it had completed the study and that it contemplated returning the employees in the SPT classification in the WFSE unit to the CLT classification and place them in SEIU unit.<sup>21</sup>

In a November 27, 2007 response to several intervening union requests to meet regarding the employees’ SPT compensation, the University responded that it would meet with the union *if* the union had any creative solution consistent with the interests of the University which the University clearly described as the re-classification of the employees to the CLT classification and their transfer to the SEIU unit.<sup>22</sup>

In April 2008, the University told the employees in the SPT classification of its intent to reclassify them to the CLT classification and place them in the SEIU unit.<sup>23</sup> In the parties’ bargaining session on June 5, 2008, the University repeated its position that the SPTs needed to be reclassified

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<sup>20</sup> Ex. 38, AR. 11-939.

<sup>21</sup> Ex. 35, AR. 11:826.

<sup>22</sup> Ex. 44, AR. 11-946.

<sup>23</sup> Ex. 48, AR. 11-951 and TR. 356:1 through 361:13 (AR. 10-518 to 523).

and transferred to the SEIU unit.<sup>24</sup> These facts are consistent with the Commission's Finding No. 12.

Although unnecessary, the trial court entered its own findings in addition to those of the examiner which it adopted. While this court's review is to the administrative record itself and not the trial court's decision, it is worth noting that the trial court findings are incorrect in several material respects.

The trial court's Finding of Fact 2 referenced the Commission certification of the SEIU bargaining unit. The referenced description of the Commission description of the SEIU unit by the court neglects to reflect that the SEIU unit description specifically *excluded employees already in other bargaining units*, such as the SPTs who were already in the WFSE unit.<sup>25</sup>

In Finding of Fact 7, the trial court found that the only reference to the University's attempting to bargain the configurations of the WFSE and SEIU bargaining units in the case pleadings appeared in a "bare reference" in the WFSE's post hearing brief to the examiner.<sup>26</sup> In fact, the WFSE's

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<sup>24</sup> TR. 174:24 through 176:4; AR 10-335 to 337.

<sup>25</sup> CP 1 at page 2, lines 12-14. This is significant because the University argued that when reclassified, the employees came within the Commission's description of the SEIU bargaining unit.

<sup>26</sup> CP 1 at page 4, lines 4-8.

amended complaint repeatedly alleged the University's persistent insistence that the employees go from the WFSE unit to the SEIU unit. The following are a few examples from the complaint.

In paragraph 3.10 of the Complaint, the WFSE alleged that the University had advised it of

“the contemplated reclassification of the specimen processing techs and specimen processing leads in [the] WFSE bargaining unit to the clinical laboratory tech 1 and 2 positions in SEIU's bargaining unit.”<sup>27</sup>

In paragraph 3.14 the WFSE alleged that

“Based on Mr. Pisano's [the University's Labor Relations Director] letter, it was clear that he was describing the University's position that the employees in question be reclassified back to clinical lab techs in SEIU's bargaining unit.”<sup>28</sup>

The WFSE further alleged that

“In fact, it appears to have been the University's decision to return the specimen techs to SEIU's bargaining unit from even before the commission upheld the Hearing Examiner's decision finding the UW had committed a ULP with regard to that same group [a reference to the previous unfair labor practice violation].”<sup>29</sup>

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<sup>27</sup> AR3-130 (Complaint ¶ 3.10).

<sup>28</sup> AR3-131 (Complaint ¶ 3.14).

<sup>29</sup> AR3-132-133 (Complaint ¶ 3.23).

The complaint also alleged that

“the WFSE believes the UW never had any intention of bargaining anything but placement of the specimen processing technicians back into the SEIU bargaining unit.”<sup>30</sup>

The WFSE complaint further alleged this restriction by the University on bargaining that the bargaining units be re-configured constituted a refusal to bargain.<sup>31</sup> Finally, the complaint alleged, that “[t]he UW’s bad faith bargaining, which constitutes a refusal to bargain, interfered with the representational relationship between the WFSE and the specimen processing techs represented by the WFSE at Harborview Medical Center.”<sup>32</sup>

#### **V. Summary of Argument.**

*RCW 41.80.070 Bargaining Units—Certification*, confers exclusive authority in the Commission to determine appropriate units of employees for collective bargaining. The WFSE sufficiently pled in its complaint that the University’s insistence that the union agree to reconfigure the bargaining units it and SEIU were certified to represent, both interfered with employee rights and constituted a refusal to bargain (by conditioning the bargaining of wages on that agreement). Based on these allega-

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<sup>30</sup> *Id.*

<sup>31</sup> AR3-133 (Complaint ¶ 3.24). These allegations are significant because the University argued that the WFSE had not sufficiently pled the allegation upon which the Commission eventually upheld the violations that the University attempted to reconfigure the bargaining units.

<sup>32</sup> AR3-133 (Complaint ¶ 3.25).

tions, the Commission staff appropriately issued a preliminary ruling in accordance with Commission rules identifying these two causes of action in *RCW 41.80.110(1)(e)*(employer refusal to bargain) and *(a)*(employer interference with employee rights guaranteed by *RCW Ch. 41.80*). The Commission's decision finding the University guilty of these two violations was consistent with the Commission's rule limiting the causes of action to those identified in the preliminary ruling.

The record contained much evidence, consistent with the allegations in the complaint, that the University insisted that for the University to agree the employees in the SPT classification would be reallocated to the higher paying CLT job classification, WFSE would have to agree that they would "transfer" from the WFSE bargaining unit to the SEIU unit. Much of this evidence, cited in the Statement of Facts, was documentary and not disputed. This evidence was more than legally sufficient to support the Commission's additional finding that during the course of the parties negotiations, the University proposed and insisted that once the employees in the SPT classification were reclassified to the CLT classification (with its higher pay), the employees would be transferred from the WFSE to the SEIU bargaining unit. (Commission Finding 12) The Commission's decision in this regard is amply supported by the record.

The Commission's decision that it has the exclusive authority to determine the configuration of bargaining units under *RCW 41.80.070* and that by attempting to configure bargaining units of its employees the University committed an unfair labor practice, is not arbitrary and capricious. The statute specifically provides that "the commission ... shall decide ... the unit appropriate for certification [for collective bargaining and representation]." The evidence that the University insisted the WFSE agree to a reconfiguration of its bargaining unit and the bargaining unit of SEIU is undeniable. This conduct constituted both inappropriate bargaining (refusal to bargain) and an interference with the right of University employees regarding their collective bargaining and representation rights guaranteed by *RCW Ch. 41.80*.

## **VI. Argument.**

### **A. The Commission was acting within a specific grant of authority and in an area of its expertise and its decision is entitled to considerable judicial deference.**

*RCW Ch. 41.80* grants PERC express and broad authority to determine both appropriate bargaining unit configurations and unfair labor practices.

*RCW 41.80.070(1)* grants the express and exclusive authority to PERC to "decide ... the [bargaining] unit appropriate for certification."

“PERC has been established to decide the appropriate bargaining unit when there is a disagreement between the public employer and employees regarding the selection of a bargaining representative.” *International Ass’n of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 29 Wash. App. 599, 601, 630 P.2d 470, 471 (Wash. App., 1981)

In addition, “The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders...” *RCW 41.80.120*. This statute grants PERC broad express authority to determine unfair labor practices.

The standard of judicial deference requires that a party challenging the decision in an adjudicatory proceeding show the reviewing court that the order is invalid for one of the reasons set forth in *RCW 34.05.570(3)*.<sup>33</sup>

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<sup>33</sup> (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied; (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; (d) The agency has erroneously interpreted or applied the law; (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; (f) The agency has not decided all issues requiring resolution by the agency; (g) A motion for disqualification under *RCW 34.05.425* or *34.12.050* was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion; (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or (i) The order is arbitrary or capricious.

*DeLacey v. Clover Park School District*, 117 Wn. App. 291, 295, 69 P.3<sup>rd</sup> 877 (2003) and *Apsotolis v. City of Seattle*, 101 Wn. App. 300, 304, 3 P.2<sup>nd</sup> 198 (2000). As shown herein, the University has not done that.<sup>34</sup>

The standard of judicial review of PERC unfair labor practice decisions was enunciated in *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. *City of Pasco v. PERC*, 119 Wn.2d 504, 506, 833 P.2d 381 (1992). RCW 34.05.570(3)(d) permits relief from an agency order if the agency erroneously interpreted or applied the law. *Pasco*, 119 Wn.2d at 507. Under the error of law standard, the court may substitute its interpretation of the law for that of PERC. *Public Sch. Employees v. PERC*, 77 Wn. App. 741, 745, 893 P.2d 1132, review denied, 127 Wn.2d 1019, 904 P.2d 300 (1995). See also *Pasco*, 119 Wn.2d at 507 ('[W]here an agency is charged with the administration and enforcement of a statute, the agency's interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous.') (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992)). The court may also grant relief from an agency order if it finds that the order 'is not supported by evidence that is substantial when viewed in light of the whole record before the court ...' RCW 34.05.570(3)(e).

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RCW 34.05.370(3).

<sup>34</sup> Clearly, given PERC's express authority in these two areas, PERC's decision in this case that by attempting to bargain a new configuration of a bargaining unit the University committed an Unfair Labor Practice did not exceed PERC's jurisdiction. Although cited in the University's appeal, this ground was not argued by the University's in the trial court and has apparently been abandoned.

*City of Pasco*, at 458.

In reviewing administrative action, “this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency.” *Tapper v. Employment Sec. Dep’t*, 122 Wash.2d 397, 402, 858 P.2d 494 (1993). This court applies a substantial evidence standard to an agency’s findings of fact but reviews de novo its conclusions of law. *Premera v. Kreidler*, 133 Wash. App. 23, 31, 131 P.3d 930 (2006).

*Yakima Police Patrolmen’s Ass’n v. City of Yakima*, 153 Wash. App. 541, 552, 222 P.3d 1217, 1224 (2009)

While any factual issues are to be resolved under the substantial evidence test set forth in RCW 34.05.370(3) (e), the court has said “[a]s to the legal component, we recognize PERC’s interpretation of collective bargaining statutes is ‘entitled to substantial weight and great deference.’” *International Ass’n of Fire Fighters*, 119 Wn.2d at 382.” *City of Pasco*, at 470.

Both the Washington Legislature and Supreme Court have recognized that public employee labor relations policy is best managed by creating an expert administration, giving it extensive jurisdiction to fashion equitable remedies, and severely limiting judicial review. That is the scheme in Washington. RCW 41.58.005(1), (3); *In re Case E-368*, 65 Wn.2d 22, 28, 395 P.2d 503 (1964) (citing *Phelps Dodge Corp. v. National Labor Relations Bd.*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941)).

\* \* \*

The sole purpose of the Public Employees' Collective Bargaining Act is to implement '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.' RCW 41.56.010; *City of Yakima v. International Ass'n of Fire Fighters*, 117 Wn.2d 655, 671, 818 P.2d 1076 (1991) PERC is the exclusive body created to carry out this purpose. RCW 41.58.005(3).

\* \* \*

The reviewing court may not substitute its judgment for PERC's, contrary to the general rule. *Metro. Seattle*, 118 Wn.2d at 634. When discretion is conferred on an agency by statute for the express purpose of accomplishing the goals of particular legislation, the matter is 'peculiarly' for the agency to decide. *Id.* This is the case in labor relations. *Id.*

*Pasco Housing Authority v. PERC*, 98 Wn. App. 809, 810-813, 991 P.2d 1177 (2000).

The Commission's Decision in this case must be accorded considerable deference since it involves issues peculiarly within the Commission's authority and expertise.

**B. The finding by the Commission that the University insisted on transferring some of its employees from a bargaining unit represented by the WFSE to one represented by another union is amply supported by evidence in the record.**

Factual findings will be upheld on appeal if they are supported by substantial evidence. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Substantial means 'in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.' *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d

154, 157, 776 P.2d 676 (1989). Our review is confined to examining the record for the requisite evidence. *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). We conclude that the Commission's findings are supported by substantial evidence. The factual findings are, therefore, verities on appeal. *Id.*

*Pasco Housing Authority*, 98 Wn. App. at 810.

When considering contradictory orders of PERC and the hearing examiner, Washington courts have followed the rule used by the federal courts that the standard of review remains the same even where the N.L.R.B. and the administrative law judge make contrary findings. See *International Ass'n of Firefighters, Local 469 v. PERC*, 38 Wn. App. 572, 576, 686 P.2d 1122 (1984). Thus, "[t]he deference accorded fact findings runs in favor of the Board, but the administrative law judge's findings as part of the record must be weighed along with other opposing evidence, against the evidence supporting the Board's decision." *Id.* (quoting *N.L.R.B. v. Brooks Cameras, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982)).

*City of Pasco*, at 459.

Since neither party challenges the examiner's findings which the Commission adopted, the only issue is whether the finding added by the Commission in its decision is supported by substantial evidence in the administrative record. This court does not review the findings of the trial court, which were unnecessary. See *King County Water Dist. 54 v. King County Boundary Review Board*, 87 Wn.2d 536, 543, 554 P.2d 1060 (1976).

Because PERC is entitled to substitute its findings for those of the hearing examiner, it is the PERC findings that are relevant on appeal. *City of Federal Way v. Public Employment Relations Comm'n*, 93 Wash. App. 509, 511–12, 970 P.2d 752 (1998). This court “review[s] challenges to the factual findings for substantial evidence in light of the whole record, i.e., evidence sufficient to persuade a fair-minded person of their truth.” *City of Federal Way*, 93 Wash. App. at 512, 970 P.2d 752. The substantial evidence standard is deferential; it does not permit a reviewing court to substitute its view of the facts for that of the agency if substantial evidence is found. Washington Administrative Law Practice Manual § 10.05[C] at 10–29 (2008).

*Yakima Police Patrolmen's Ass'n*, 153 Wash. App. at 552-553.

Whether a party has failed to negotiate in good faith, although involving a substantial factual component, is a mixed question of law and fact. See *Penntech Papers, Inc. v. N.L.R.B.*, 706 F.2d 18, 23 (1st Cir.), cert. denied, 464 U.S. 892, 104 S. Ct. 237, 78 L. Ed. 2d 228 (1983).

*City of Pasco*, at 469.

A reviewing court must uphold an agency's determination of fact “unless the court's review of the entire record leaves it with the definite and firm conviction that a mistake has been made.” *Renton Educ. Ass'n*, 101 Wash.2d at 440, 680 P.2d 40. When reviewing questions of law, the court may substitute its determination for that of the agency. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wash.2d 450, 458, 938 P.2d 827 (1997). But because PERC's members have considerable expertise in labor relations, the court gives substantial weight to PERC's interpretations of the collective bargaining statutes. *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wash.2d 373, 381, 831 P.2d 738 (1992). Where an administrative decision involves a mixed question of law and fact, “the court does not try the facts de novo but it determines the law independently of the agency's decision and applies it to facts as found

by the agency.” *Renton Educ. Ass’n*, 101 Wash.2d at 441, 680 P.2d 40.

*City of Seattle v. Public Employment Relations Com’n*, 160 Wash. App. 382, 388-389, 249 P.3d 650, 653 (2011).

The University asserted [and the trial court found] that the Commission’s Finding of Fact 12 was not supported by substantial evidence. The WFSE asserts that the record more than supports the Commission’s finding.

In Finding 12, the Commission found:

12. During the course of negotiations described in Finding of Fact 7 and 8, the employer proposed and insisted that once the employees in the Specimen Processing Technician classification were reallocated to the Clinical Laboratory Technician position, those employees would be transferred to the bargaining unit of employees represented by the SEIU.<sup>35</sup>

For a number of years, even after having been found guilty of an unfair labor practice and rather than comply with the unfair labor practice finding and return the employees to the SPT classification, the University continued to insist that the employees in the SPT classification be classified as CLTs in the SEIU unit. The employees were not returned to the WFSE bargaining unit until June 2007, in eventual compliance with the

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<sup>35</sup> AR. 27-1160.

Commission's decision,<sup>36</sup> which had found the University guilty of an unfair labor practice for "skimming" the work from the WFSE bargaining unit.<sup>37</sup>

An October 4, 2007 letter from the University notified the WFSE that the University was proposing to once again reclassify the SPTs to the CLT classification and put them in the SEIU unit.<sup>38</sup> The Commission's finding that the University initiated the proposal to transfer the employees to the SEIU unit is certainly supported by this evidence.

The record also supports the rest of the Commission's finding that the University continued to insist on this position in all its dealings with the union on the subject over the next several months.

In a November 27, 2007 response to several intervening union requests to meet regarding the SPT employees' compensation, the University responded that it would meet with the union *if* the union had any creative solution *consistent with the interests of the University* which it specif-

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<sup>36</sup> PERC Decision 8878, Exhibit 1; AR. 11-653.

<sup>37</sup> In fact, in the June 18, 2007 letter notifying it that the employees were being returned in compliance with PERC's decision, the University had forewarned of their reclassification back to the CLT class by advising the WFSE in the same letter that it was re-evaluating the employees' work to see if they were properly classified. Exhibit 38; AR. 11-939.

<sup>38</sup> Exhibit 35; AR. 11-826.

ically described as being the re-classification of the employees to the CLT classification in the SEIU unit.<sup>39</sup>

In April 2008, the University told the employees in the SPT classification of its intent to reclassify them to the CLT classification and place them in the SEIU unit.<sup>40</sup>

In the parties' bargaining session on June 5, 2008, the University repeated its position that the SPTs needed to be reclassified and transferred to the SEIU unit.<sup>41</sup>

This evidence in the record more than adequately supports the Commission's Finding of Fact 12, that the University challenges and the trial court found unsupported by the record. The Commission's decision is supported by substantial evidence in that a fair minded person could agree with the Commission's Finding of Fact 12 based on a review of the evidence in the entire administrative record.

**C. The Commission did not violate its own rules regarding the scope of the proceedings based on the causes of action summarized in the preliminary ruling.**

The Commission is charged by statute with determining unfair labor practices alleged of state agencies and institutions subject to the provi-

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<sup>39</sup> Ex. 44, AR.11-946.

<sup>40</sup> Ex. 48, AR.11-951 and TR. 356:1 through 361:13 (AR. 10-518 to 523).

<sup>41</sup> TR. 174:24 through 176:4; AR. 10-335 to 337.

sions of *RCW Ch. 41.80*.

*RCW 41.80.120. Unfair labor practice procedures--Powers and duties of commission*

(1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders . . .

*RCW 41.80.110* provides in pertinent part:

(1) It is an unfair labor practice for an employer:

(a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter;

\* \* \*

(e) To refuse to bargain collectively with the representatives of its employees.<sup>42</sup>

The Commission has adopted a set of rules regarding the processing of unfair labor practice complaints under the statutes it administers. *WAC Ch. 391-45. WAC 391-45-110(2)* provides that if the allegations in an unfair labor practice complaint state one or more causes of action specified in the rule and in *RCW 41.80.110*, the commission will issue a preliminary ruling summarizing the allegation(s). The ruling “limits the causes of action before an examiner and the commission.” *WAC 391-45-110(2)(b)*.

The preliminary ruling process discussed in *King County*, Decision 9075-A, cited by the University to the trial court, was re-examined and

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<sup>42</sup> The duty includes the duty to bargain in good faith. See *The Developing Labor Law*, Ch. 13.

explained by the Commission in light of changes to the rule in *Northshore Utility District*, Decision 10304-A (2009). In that decision, the Commission noted the requirement that a complaint by a party have “a clear and concise statement of the facts constituting the alleged unfair labor practice, including time, place, date, and participants in occurrence.” See also *Community College District 6*, Decision 9753-A (2008). The WFSE complaint clearly met all these requirements.

The preliminary ruling merely identifies which of the causes of action in *RCW 41.80.110* e.g. refusal to bargain, interference, discrimination, etc, if any, are sufficiently supported by specific allegations in the complaint. In this case, the grounds in the preliminary ruling were a refusal to bargain and interference with employee rights.<sup>43</sup> These were the grounds eventually sustained by the Commission.<sup>44</sup>

In support of its argument to the trial court that the Commission had violated its own rule regarding the scope of unfair labor practice proceedings the University cited *Washington State University*, Decision 9614-A (2007).<sup>45</sup> That case was actually not decided on the basis of the scope of the preliminary ruling, but on the union’s lack of proof. In refusing to de-

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<sup>43</sup> AR. 4-136. June 10, 2008 Preliminary Ruling related to these allegations on appeal.

<sup>44</sup> AR. 27-1149-1163.

<sup>45</sup> University’s Trial Brief at p. 15 line 6. CP 20.

cide the union's claim that the employer conducted itself in a manner frustrating bargaining, the Examiner had stated "I do not need to proceed to an analysis of the third element [employer's conduct that frustrates bargaining] because the union did not prove it had requested bargaining."

The amended complaint filed by the WFSE in this case and served on the employer, alleged employer interference with employee rights and the employer's refusal to bargain.<sup>46</sup> The complaint set forth the facts upon which the allegations were based in six pages of detailed narrative allegations. The gist of the complaint was that while the WFSE wanted to bargain the compensation for the employees in the SPT job classification, the employer persisted in its fixed and historic position of attempting to get the WFSE to agree to modify the WFSE and SEIU bargaining units by reclassifying the SPT employees as CLTs and putting them and their work in the SEIU unit. The complaint alleged this constituted refusal to bargain and interference violations.

The Preliminary Ruling on the amended complaint<sup>47</sup> (and the subsequent Amended Preliminary Ruling adding the circumvention charge based on the second amended complaint)<sup>48</sup> alleged causes of action for in-

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<sup>46</sup> AR. 3-128-135.

<sup>47</sup> AR. 2-126-127.

<sup>48</sup> AR. 4-136-137.

interference with employee rights in violation of *RCW 41.80.110(1)(a)* and refusal to bargain in violation of *RCW 41.80.110(1)(e)* by failing or refusing to meet and negotiate with the exclusive bargaining representative concerning wages for the specimen laboratory technicians. The University filed detailed answers to both amended complaints in which it admitted it attempted to get the two unions to agree to modify the units and that it sent communications to the WFSE in response to the WFSE demands to bargain that the WFSE would need to agree to reclassify the SPTs as CLTs in the SEIU unit.<sup>49</sup>

The WFSE appeal to the Commission from the Examiner's decision refusing to find the University guilty of these charges, specifically preserved the issue of the University's insistence in bargaining unit configuration by alleging, "[t]he University's position throughout all of this time has been to insist in the exact same action for which they had been found guilty in a ULP, modification of the WFSE bargaining unit. The employee's bargaining rights have been neither something the WFSE felt it could bargain nor something it was willing to bargain despite the University's persistence."<sup>50</sup>

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<sup>49</sup>AR. 5-138-145 and AR 9-155-159.

<sup>50</sup>AR. 23-110, Appeal from Order of Dismissal Paragraph 2, p2 (AR 23-111) lines 15-18.

On the other hand, the subject of the wages of the employees in the SPT classification, which the WFSE wanted to bargain, is a mandatory subject of bargaining.

With regard to the topics about which the employer and the union representative bargain, issues that address ‘wages, hours and other terms and conditions of employment’ are ‘mandatory’ subjects about which the parties *must* bargain. *Klauder v. San Juan County Deputy Sheriffs’ Guild*, 107 Wn.2d 338, 341, 728 P.2d 1044 (1986); *see also N.L.R.B. v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349, 78 S. Ct. 718, 722, 2 L. Ed. 2d 823 (1958) (examining NLRA).

*Pasco Police Officers’ Ass’n v. City of Pasco*, 132 Wash.2d 450, 460, 938 P.2d 827 (1997).

The Commission decision identified the issue of whether the University’s adhering to its position that the employees be transferred to a different unit was unlawful.<sup>51</sup> The Commission also summarized the WFSE argument as “WFSE asserts that the Examiner committed reversible error by not making a finding that the employer failed to bargain in good faith the effects of its reallocation decision because the employer entered into negotiations with the fixed position of transferring the employees to the SEIU bargaining unit.”<sup>52</sup> The Commission further stated “... even when an employer assigns new duties to a bargaining unit position and then reallo-

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<sup>51</sup> AR. 27-1150 (Issue No. 2).

<sup>52</sup> AR. 27-1156.

cates that position to a new classification, the position still remains in the historical bargaining unit, and an employer may not unilaterally move employees to a different bargaining unit, nor may it move them after negotiating to impasse.”<sup>53</sup> The Commission concluded that the University committed a refusal to bargain violation prescribed by RCW 41.80.110(1)(e) (the ground in the preliminary ruling) when it attempted to bargain the configuration of the WFSE and SEIU bargaining units.<sup>54</sup>

The detailed complaint, the preliminary ruling, and the appeal to the Commission all consistently alleged the University’s breach of its duty to bargain by insisting on bargaining a reconfiguration of the WFSE (and the SEIU) bargaining unit(s).

In support of its decision, the Commission added Finding of Fact 12 that the employer had insisted that once the SPT’s were reallocated to CLTs, that they would be transferred to the SEIU bargaining unit. This finding is more than supported by the evidence in the record, including several written communications from the University. *Supra*.

A unit clarification petition is a procedure for resolving ambiguities when there have been changes in the responsibilities of some members of a bargaining unit. *Union Electric Co.*, 217 N.L.R.B. 666, 667 (1975). Such peti-

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<sup>53</sup> AR. 27-1157.

<sup>54</sup> Conclusion of Law 6; AR 27-1161.

tions are authorized by our statute, RCW 41.56.060, and by rule, WAC 296-132-151:[footnote omitted]

Whenever a disagreement occurs on whether or not positions are to be included or excluded from the bargaining unit, the public employer or the bargaining representative may petition the department to conduct a representation hearing to resolve the matter.

*International Ass'n of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 29 Wash. App. 599, 601-602, 630 P.2d 470, 472 (1981).

At the heart of the Commission's decision is the statement that "[t]he configuration of bargaining units is a function the Legislature delegated solely to this Commission."<sup>55</sup> PERC, not the employer, and/or the employee representative, has exclusive authority to determine the configuration of bargaining units. See *RCW 41.80.070(1)*, *Supra*. The subject is not one that the parties may bargain and by its insistence on bargaining the issue, the University committed an Unfair Labor Practice, as the Commission held.<sup>56</sup>

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<sup>55</sup> AR 27-1156.

<sup>56</sup> Although not argued in its brief, the University's appeal from the Commission decision also suggested that the Commission's decision is in error because the University had attempted to file a clarification petition regarding this issue. PERC's ruling that the University's Clarification Petition should be dismissed as untimely was consistent with PERC's rules regarding such petitions. *WAC 391-35-020(3)* permits the filing of a clarification petition because of a change in circumstances. "Employees or position may be removed from an existing bargaining unit in a unit clarification proceeding filed *within a reasonable time* period after a change of circumstances altering the community of interest of the

Parties may only insist to impasse on subjects which are deemed to be mandatory subjects of bargaining under the appropriate statute. They may not go to impasse (or seek interest arbitration) on subjects which are deemed to be “permissive” or “illegal” subjects. *Klauder vs. San Juan County*, 107 Wn.2d 338 (1986). A party that takes a non-mandatory subject to impasse violates its good faith obligation, and commits an unfair labor practice under RCW 41.56.140(4) or RCW 41.56.150(4). *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989).

*Snohomish County v. Snohomish County Deputy Sheriff's Association*, Decision 8733-A (2005).

The Commission’s decision that the University committed refusal to bargain and interference violations was within the scope of the preliminary ruling and was therefore consistent with the Commission’s rules.

**D. The Commission did not act arbitrarily or capriciously or commit an error of law in determining that the University committed refusal to bargain and interference violations by insisting on reconfiguring bargaining units of its employees.**

Under the error of law standard, the court may substitute its interpretation of the law for that of PERC’s. *Bellevue v. International Ass’n of Fire Fighters, Local 1604*, 119 Wash.2d 373, 382, 831 P.2d 738 (1992). However, because of its expertise in the area of collective bar-

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employees or positions.” This provision is consistent with general labor law principles. The Commission decision that the University’s clarification petition, filed several years after the circumstances (change of work) that the University argued justified a clarification of the WFSE and SEIU bargaining units, was a correct application of the Commission’s rule. That decision [*University of Washington*, Decision 10263 (PSRA, 2008)] was not appealed by the University and it may not challenge it now.

gaining, PERC's interpretation of the collective bargaining statutes "is entitled to substantial weight and great deference." *Bellevue*, at 382, 831 P.2d 738.

*Public School Employees of Quincy v. Public Employment Relations Com'n*, 77 Wash. App. 741, 745, 893 P.2d 1132, 1135 (1995).

Substantial weight is given to an agency's interpretation of the statutes it administers that are within the agency's specialized expertise. *Schneider v. Snyder's Foods, Inc.*, 116 Wash. App. 706, 716, 66 P.3d 640 (citing *Manke Lumber Co. v. Diehl*, 91 Wash. App. 793, 802, 959 P.2d 1173 (1998)), *review denied*, 150 Wash.2d 1012, 79 P.3d 446 (2003). We uphold an agency's interpretation if it is a plausible construction of the statute or rule. *Schneider*, 116 Wash. App. at 716, 66 P.3d 640 (citing *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wash. App. 495, 518, 919 P.2d 602 (1996)). Although we give due deference to the specialized knowledge and expertise of the administrative agency, such deference does not extend to agency actions that are arbitrary, capricious, and contrary to law. *Schneider*, 116 Wash. App. at 716, 66 P.3d 640.

"Under the arbitrary and capricious standard, we will reverse only if an agency action was 'willful and unreasoning, and taken without regard to the attending facts or circumstances.'" *Schneider*, 116 Wash. App. at 716, 66 P.3d 640 (quoting *ITT Rayonier, Inc. v. Dalman*, 122 Wash.2d 801, 809, 863 P.2d 64 (1993)). Evaluating whether an agency's decision was arbitrary and capricious involves evaluating the evidence considered by the agency in making its decision. *Schneider*, 116 Wash. App. at 716-17, 66 P.3d 640 (citing *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wash.2d 690, 695, 658 P.2d 648 (1983)).

" 'Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.'" *Schneider*, 116

Wash. App. at 717, 66 P.3d 640 (quoting *Pierce County Sheriff* 98 Wash.2d at 695, 658 P.2d 648).

*Westberry v. Interstate Distributor Co.*, 164 Wash. App. 196, 207-208, 263 P.3d 1251, 1256 – 1257 (2011)

Except as otherwise provided in this chapter, the matters subject to bargaining include wages, hours, and other terms and conditions of employment, and the negotiation of any question arising under a collective bargaining agreement.

*RCWA 41.80.020*

The statute does not allow for bargaining regarding employees representation rights, including the configuration of bargaining units of employees. That is an issue PERC is specifically charged with determining. RCW 41.80.110. For years, the University was insistent that the WFSE agree that the SPT positions in the WFSE bargaining unit be reallocated to CLT positions and that the CLT positions be in a bargaining unit represented by another union, SEIU. The University was attempting to bargain the representation rights of employees established by *RCW 41.80* and the configuration of bargaining units established by PERC. The chapter specifically empowers PERC to establish and modify bargaining units.

The University argued to the trial court that by adopting the examiner's finding that although it had engaged in hard bargaining, it had bar-

gained in good faith regarding wages for the SPTs, it was arbitrary and capricious for the Commission to then find that the University committed a refusal to bargain violation by attempting to bargain the configuration of the WFSE and SEIU units. This argument assumed that the two findings were inconsistent, which is not the case.

While it is true the WFSE argued that the University's conduct as a whole constituted bad faith, both the examiner and the Commission disagreed. The WFSE has not challenged the decision that it was just hard bargaining. However, the Commission also found that by injecting an impermissible subject, the configuration of the units, the University had committed a refusal to bargain violation.

The University's argument suggests that finding the University's general conduct in bargaining was only "hard bargaining" precludes a finding that its specific conduct in insisting that the parties bargain a modification of the two units could not in and of itself be a violation. Such is not the case.

In certain circumstances, the failure to ratify a collective bargaining agreement may be an unfair labor practice. This Commission has previously recognized that parties are, upon request, obligated to execute a written agreement, and a refusal to sign a contract incorporating agreed upon terms is a per se violation of the act. *Naches Valley School District*, Decision 2516-A (EDUC,

1987), *cited with approval in Shoreline School District*, Decision 9336-A (PECB, 2007). *See also Mason County*, Decision 2307-A (PECB, 1986), *reversed on other grounds, Mason County v. Public Employment Relations Commission*, 54 Wn. App. 36 (1989). Similarly, a party that is dissatisfied with the results of negotiations after its offer is accepted commits an unfair labor practice violation if it seeks to retrench from its offer and bring other issues to the bargaining table. *Island County*, Decision 857 (PECB, 1980).

In determining whether an unfair labor practice has occurred, this Commission examines the totality of circumstances when analyzing conduct during negotiations. *Shelton School District*, Decision 579-B (EDUC, 1984). A party may violate its duty to bargain in good faith either by one per se violation, such as a refusal to meet at reasonable times and places, by refusing to make counter proposals, or through a series of questionable acts which, when examined as a whole, demonstrate a lack of good faith bargaining, but by themselves would not be a *per se* violation. *Snohomish County*. Decision 9834-B (PECB, 2008).

*Mason County*, Decision 10802-A (PECB, 2011)

In this case, the Commission found that the University violated its duty to bargain by insisting on bargaining a subject not appropriate for negotiation.<sup>57</sup>

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<sup>57</sup> The WFSE believes that the University succeeded in confusing the trial court by referencing the “self recognition” of bargaining units, where the parties may agree on the employer’s recognition of a unit and a representative, something not permitted under the provisions of RCW 41.80. The University attached a copy of Snohomish County Decision 9540-A, a decision under RCW 41.56, not RCW 41.80 to the Reply brief as Attachment B. Even in that case the Commission distinguished between an employer’s removing work for a bargaining unit versus altering a bargaining unit configuration by removing employee classifications from a unit. The Commission has previously held on the basis that RCW 41.80.010(1) permits only PERC to determine bargaining units that “Chapter 41.80 RCW does not allow for voluntary recognition.” *State-Early Learning*,

The University also argued that the Commission made an error of law in its application of the federal court's decision in *Boise Cascade v. NLRB*, 860 F.2d 471 (D.C., 1988) which held that an employer's unilateral change in a bargaining unit configuration is a refusal to bargain violation.

In addition to Washington law, this court [and PERC] look to federal decisions construing the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 which are persuasive when interpreting similar provisions in the Washington statutes. *Pasco Police Officers' Ass'n*, 132 Wash.2d at 458–59, 938 P.2d 827.

*City of Seattle v. Public Employment Relations Com'n* 160 Wash. App. 382, 389, 249 P.3d 650, 653 (2011)

This case concerns a dispute argued before PERC. 'In contested cases, ... [PERC] ... considers, whenever possible, precedent established by the [National Labor Relations Board].' Jane R. Wilkinson, *Practice and Procedure Before the Washington State Public Employment Relations Commission*, 24 Gonz. L. Rev. 213, 217-18 (1989). Washington courts follow this practice as well and consider decisions of the National Labor Relations Board (N.L.R.B.) construing the National Labor Relations Act (NLRA) persuasive but not controlling authority in interpreting state labor acts which are similar or based on the NLRA. *Nucleonics Alliance v. Washington Pub. Power Supply Sys.*, 101 Wn.2d 24, 33, 677 P.2d 108 (1984); *Public Sch. Employees*, 77 Wn. App. at 745.

*City of Pasco*, 132 Wn.2d at 458-459

The court in *Boise Cascade v. NLRB*, 860 F.2d 471 (D.C., 1988)

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Decision 9880-A, (PSRA, 2008).

stated that “neither an employer nor a union has the unilateral power to modify the scope of the bargaining unit as determined by the Board [NLRB], whether following bargaining to impasse or otherwise.” 860 F.2d at 475. This holding was cited with approval in *Local 666, International Alliance of Theatrical Sage Employees and Moving Pictures Machine Operators of the United States and Canada (AFL-CIO) v. NLRB*, 904 F.2d 47 (1990) wherein the court held that the scope of a bargaining unit can never be changed unilaterally and that the concern in *Boise Cascade* was not that two unions might have jurisdiction over the same functions (work), but that the employer could remove the employees [from a unit] at its whim.

The University argues that since the CLT job classification is one which is included in the SEIU unit, it could reconfigure the two units (WFSE and SEIU) by reclassifying the employees. This was a position it had insisted on since 2003, despite having earlier been found guilty of a refusal to bargain violation for implementing that change. PERC’s reliance on *Boise Cascade* is consistent with *RCW 41.80* and one of the basic tenets of labor law.

PERC’s authority to decide a unit appropriate for the purposes of collective bargaining is similar to that of the NLRB. *See* 29 U.S.C. 159. A unit determination by the NLRB involves of necessity a large measure of informed discretion, *Packard Motor Car Co. v. NLRB*, 330 U.S. 485,

91 L. Ed. 1040, 67 S. Ct. 789 (1947), and must be upheld absent a clear abuse of this discretion. *Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195, 46 A.L.R. Fed. 391 (7th Cir. 1977); *Stop & Shop Cos. v. NLRB*, 548 F.2d 17 (1st Cir. 1977); *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352 (9th Cir. 1970). Likewise, our Supreme Court has previously ruled that an administrative agency's appropriate unit finding must be upheld absent a clear abuse of discretion. *Association of Capitol Powerhouse Eng'rs v. State*, 89 Wn.2d 177, 183, 570 P.2d 1042, 95 A.L.R.3d 1090 (1977).

*International Ass'n of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 29 Wash. App. 599, 602, 630 P.2d 470, 472 (1981).

The University argued that it was not trying to alter the two units but was only trying to respect and preserve PERC's descriptions of the two units. Of course, the fact that the University had just been found guilty of skimming the bargaining unit work from the WFSE unit is entirely inconsistent with this claim. The University also contended that it couldn't have employees in the same job class in different unions or that such a situation would subject it to jurisdictional disputes. However, the University had at least 59 situations of employees in the same job class in *at least* two (and sometimes three) different unions. In fact, the SPT job class was common to both the WFSE and SEIU units.<sup>58</sup>

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<sup>58</sup> Ex. 10; AR 11-750-759.

Although the SEIU unit description was otherwise broad enough to have included the CLT job class as well, when it was created [while the first unfair labor practice was pending], the unit description specifically excluded employees already in other units, such as the employees in the SPT positions in the WFSE unit.

It is hornbook labor law that once a bargaining unit performs work, that work becomes bargaining unit work. Bargaining unit work includes work historically performed by bargaining unit employees. *Int'l Union of Operating Engr's, Local 286*, Decision 8078 (PECB, 2003) 2003 WL 21419638 (citing *City of Spokane*, Decision 6232 (PECB, 1998)); *Int'l Assoc. of Fire Fighters, Local 2876*, Decision 7064-A (PECB, 2001) 2001 WL 1076552 (citing *Int'l Bhd. of Electrical Workers, Local 483*, Decision 6601 (PECB, 1999) 1999 WL 143606). "Once an employer assigns bargaining unit employees to perform a category of work, that work attaches to the unit and becomes bargaining unit work." *Int'l Union of Operating Eng'rs, Local 286*, Decision 8078 at 6 (citing *City of Spokane*, Decision 6232).

The work performed by the SPT employees belonged to the WFSE unit, and the employees performing that work were part of the unit, unless

and until PERC modified the unit based on a timely filed clarification petition. Their inclusion in the unit was not a subject for bargaining.<sup>59</sup>

PERC did not erroneously apply the provisions of *RCW 41.80* in holding that the University committed an Unfair Labor Practice by its insistence that the WFSE agree to modify its (and SEIU's) unit and the bargaining rights of the employees in the unit.

**VI. Conclusion:**

The decision of the trial court should be reversed and the Commission decision should be affirmed.

DATED this 24<sup>th</sup> day of April, 2012.

Respectfully submitted,

YOUNGLOVE & COKER, P.L.L.C.



Edward Earl Younglove III, WSBA #5873  
Attorney for Appellant

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<sup>59</sup> In fact, the University recently reallocated the employees in the SPT classification to the CLT classification. It also filed a clarification petition with the Commission for it to determine what unit the employees appropriately belong in. University of Washington, 24602-C-12-1488 (see Appendix B) pending a decision on the petition, the employees appropriately remain in the WFSE unit. This is the process the University should have followed since 2003.

# APPENDIX A

JUL 13 2006

STATE OF WASHINGTON

WFSE-HQ

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON FEDERATION OF	)	
STATE EMPLOYEES	)	CASE 18662-C-04-1203
	)	
For clarification of an existing	)	DECISION 9391 - PSRA
bargaining unit of employees of:	)	
	)	
UNIVERSITY OF WASHINGTON	)	ORDER CLARIFYING
	)	BARGAINING UNIT

Younglove Lyman & Coker, P.L.L.C., by Edward Earl Younglove III, Attorney at Law, for the union.

Attorney General Rob McKenna, by Paul A. Olsen, Assistant Attorney General, for the employer.

The Washington Federation of State Employees (union) filed a unit clarification petition with the Commission on June 30, 2004, concerning certain individuals employed by the University of Washington (employer) at Harborview Hospital. The union sought accretion of part-time employees into an existing bargaining unit represented by the union. Hearing Officer Sally B. Carpenter held a prehearing conference on November 9, 2005. The parties filed written stipulations on April 5, 2006.

ISSUE

The sole issue before the Executive Director is: "Should the parties' stipulation to accrete the disputed individuals to the existing bargaining unit be accepted?" Acting under WAC 391-35-020, the Executive Director accepts the parties' stipulations and modifies the bargaining unit represented by the union to include

those employees who qualify as classified employees by reason of a recent amendment of WAC 251-04-035. Specifically, employees working more than 350 hours in any period of 12 consecutive months are now included in the bargaining unit.

#### APPLICABLE LEGAL PRINCIPLES

The Personnel System Reform Act of 2002 (PSRA) established a new collective bargaining system for state employees. RCW 41.80.005(6) limits the coverage of the PSRA, however, to classified employees covered by the State Civil Service Law, Chapter 41.06 RCW. The adoption of rules implementing Chapter 41.06 RCW was, and remains, a function delegated to the Washington Personnel Resources Board (WPRB) and/or the Director of the Department of Personnel. RCW 41.06.150; 41.06.160. At the time the PSRA was enacted, the civil service rules excluded employees working for a state institution of higher education for less than 1050 hours in a 12-month period from all rights under Chapter 41.06 RCW.

The PSRA delegates the determination and modification of bargaining units of state civil service employees to the Public Employment Relations Commission.<sup>1</sup> RCW 41.80.070 includes a specific "avoidance of excessive fragmentation" precept.

Even before the PSRA was enacted, Commission precedents concerning the unit placement of part-time employees had been codified in its rules, as follows:

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<sup>1</sup> RCW 41.80.070 took effect on June 13, 2002. Amendments to RCW 41.06.150 and 41.06.340 that were effective on the same date deleted a delegation of unit determination authority to the Washington Personnel Resources Board and shifted the unit determination task to the Commission.

WAC 391-35-350 UNIT PLACEMENT OF REGULAR PART-TIME EMPLOYEES EXCLUSION OF CASUAL AND TEMPORARY EMPLOYEES.

(1) It shall be presumptively appropriate to include regular part-time employees in the same bargaining unit with full-time employees performing similar work, in order to avoid a potential for conflicting work jurisdiction claims which would otherwise exist in separate units. *Employees who, during the previous twelve months, have worked more than one-sixth of the time normally worked by full-time employees, and who remain available for work on the same basis, shall be presumed to be regular part-time employees.* For employees of school districts and educational institutions, the term "time normally worked by full-time employees" shall be based on the number of days in the normal academic year.

(2) It shall be presumptively appropriate to exclude casual and temporary employees from bargaining units.

(a) Casual employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to have had a series of separate and terminated employment relationships, so that they lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.

(b) Temporary employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.

(3) The presumptions set forth in this section shall be subject to modification by adjudication.

(emphasis added). Against a full-time standard of 40 hours per week, the one-sixth test makes employees eligible for inclusion in bargaining units if they work 348 or more hours in a year.

Because eligibility for collective bargaining rights under the PSRA is directly tied to "classified" employee status under Chapter 41.06 RCW, the Commission adopted the following special rule:

WAC 391-35-356 SPECIAL PROVISION -- STATE CIVIL SERVICE EMPLOYEES. (1) For employees covered by chapter 41.06 RCW who work less than full-time, it shall be presumptively appropriate to include those employees in the same bargaining unit with full-time employees performing similar work.

(2) The presumption set forth in this section is intended to avoid excessive fragmentation and a potential for conflicting work jurisdiction claims which would otherwise exist in separate units of full-time and less than full-time employees.

(3) The presumption set forth in this section shall be subject to modification by adjudication.

Thus, the WPRB and Director of Personnel retain the primary responsibility for deciding who has rights under Chapter 41.06 RCW.

The Commission's rule regulating modification of existing bargaining units includes:

WAC 391-35-020 TIME FOR FILING PETITION -- LIMITATIONS ON RESULTS OF PROCEEDINGS.

TIMELINESS OF PETITION

(2) A unit clarification petition concerning . . . status as a regular part-time or casual employee under WAC 391-35-350, is subject to the following conditions:

(b) . . . the existence of a valid written and signed collective bargaining agreement will bar the processing of a petition filed by a party to the agreement unless the petitioner can demonstrate, by specific evidence, substantial changed circumstances during the term of the agreement which warrant a modification of the bargaining unit by inclusion or exclusion of a position or class.

LIMITATIONS ON RESULTS OF PROCEEDINGS

(4) Employees or positions may be added to an existing bargaining unit in a unit clarification proceeding:

(a) Where a petition is filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions . . .

(emphasis added). Commission precedent recognizes changes of administrative or judicial interpretation as "changes of circum-

stances" warranting a unit clarification. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), review denied, 96 Wn.2d 1004 (1981).

The Commission can dispense with a full hearing process when parties stipulate to bargaining unit modifications, and their stipulations do not contravene the applicable statute or rules. *State - Liquor Control*, Decision 8787 (PSRA, 2004).

### ANALYSIS

The stipulations filed by these parties on April 5, 2006, are sufficient to constitute a basis for a ruling, and nothing has come to the attention of the Commission staff or Executive Director that contradicts the propriety of the proposed accretion.

On October 21, 2003, the WPRB amended its WAC 251-04-035 to read as follows:

WAC 251-04-035 EXEMPTIONS. The provisions of this chapter do not apply to positions listed in RCW 41.06.070 and to the following:

(2) The following definitions are hereby established as the criteria for identifying positions occupied by student, part-time or temporary employees, and part-time professional consultants that are exempt from the provisions of this chapter.

(a) Students employed by the institution at which they are enrolled . . . .

(b) Students participating in a documented and approved programmed internship . . . .

(c) Students employed through . . . work/study programs.

(d) Persons employed to work one thousand fifty hours or less in any twelve consecutive month period from the original date of hire or October 1, 1989, whichever is later. . . .

(i) *Employees . . . exempt under WAC 251-04-035(2)-(d) . . . who work more than three hundred fifty hours in any twelve consecutive month period from the original date of hire or January 1, 2004, whichever is later, exclusive of overtime or time worked under subsection (2)(a) of this subsection, may be included in an appropriate bargaining unit for purposes of collective bargaining, as determined by the public employment relations commission. . . .*

(emphasis added). That amendment took effect January 1, 2004.<sup>2</sup>

The parties agree that employees who work between 350 hours annually (the new threshold for civil service status) and 1050 hours annually (the former minimum for civil service status) should be included in the existing bargaining unit. That accretion will particularly address the anti-fragmentation policy enunciated in RCW 41.80.070. The stipulations supplied by the parties are thus incorporated into the findings of fact set forth below.

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<sup>2</sup> This should not be read as suggesting any doubt as to whether the WPRB action was arbitrary or otherwise questionable. Prior to the enactment of the PSRA, RCW 41.06.070 contained exclusionary language that is of interest here:

RCW 41.06.070 EXEMPTIONS . . . .

(2) The following classification, positions, and employees of institutions of higher education and related boards are hereby exempted from the coverage of this chapter:

. . . .  
 (b) *Student, part-time, or temporary employees, and part-time professional consultants, as defined by the Washington personnel resources board, employed by institutions of higher education and related boards; . . . .*

(emphasis added). The PSRA deleted paragraph (2)(b) from RCW 41.06.070, and so arguably repealed the statutory basis for excluding part-time employees from civil service rights.

FINDINGS OF FACT

1. The University of Washington is a state institution of higher education within the meaning of RCW 41.80.005(10).
2. The Washington Federation of State Employees is an employee organization within the meaning of RCW 41.80.005(7).
3. The union is the exclusive bargaining representative of a bargaining unit encompassing all nonsupervisory classified employees of the employer listed by position title in Attachment A to the stipulations of the parties.
4. In conformity with a civil service rule in effect when the bargaining unit described in paragraph 3 of these findings of fact was last modified, the bargaining unit had historically included only those employees working more than 1050 hours during any 12-month period.
5. By action taken on October 21, 2003, and effective on January 1, 2004, the Washington Personnel Resources Board amended the civil service rules to make part-time employees who work more than 350 hours during any consecutive 12-month period eligible for collective bargaining rights.
6. The parties stipulate that the rule amendment described in paragraph 5 of these findings of fact was a significant change of circumstances, and that it is now appropriate to include part-time employees in the bargaining unit represented by the union if they both: (a) work more than 350 hours per year, measured from June 30, 2004, or their original date of part-time employment with the employer, whichever is later; and (b) perform work similar to the work performed by the employees in

- the existing bargaining unit, and (c) are not now represented, nor could they be accreted to another employee organization, as defined in RCW 41.80.005(7).
7. The parties stipulate that the number of individuals within the group described in paragraph 6 of these findings of fact fluctuates from time to time, but recently approximated 95 employees.
  8. The parties stipulate that the individuals within the group described in paragraph 6 these findings of fact do not include students.
  9. The parties stipulate that if an individual works more than 350 hours during any period of time when the individual is not enrolled in classes, the individual is not a student during that period.
  10. The parties stipulate that the union's petition in this case was filed within a reasonable period of time after the modification of WAC 251-04-035.
  11. The parties stipulate that the part-time employees proposed for inclusion in the bargaining unit described in paragraph 3 of these findings of fact share duties, skills, working conditions, and a community of interest with employees in the existing bargaining unit.
  12. The parties stipulate that no other employee organization represents any classified employees of the employer, that no other employee organization is known to claim or be seeking to represent any of the part-time employees at issue in this

proceeding, and that no other cases pending before the Commission could affect the composition of the bargaining unit.

13. The parties stipulate that the proposed accretion will not create any stranding of employees or fragmentation of bargaining unit configurations.
14. The parties stipulate that the Commission has jurisdiction to determine whether the disputed individuals proposed to be accreted can be included in the bargaining unit.
15. No other facts have been discovered or brought to the attention of the Commission staff or Executive Director that calls into question the propriety of the proposed accretion described in these findings of fact.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-35 WAC.
2. The stipulations submitted by the parties in this proceeding appear to conform with the amendment of WAC 251-04-035(d)(1) adopted by the Washington Personnel Resources Board effective on January 1, 2004.
3. The part-time employees described in paragraph 6 of the foregoing findings of fact are employees within the meaning of RCW 41.80.005(6), who are properly categorized as "regular part-time employees" under the rules and precedents of the Public Employment Relations Commission.

4. The regular part-time employees described in paragraph 3 of these conclusions of law are eligible for collective bargaining rights under Chapter 41.80 RCW.
5. The existing bargaining unit of nonsupervisory classified employees represented by the union is properly clarified, under RCW 41.80.070, to include the regular part-time employees described in paragraph 3 of these conclusions of law.

ORDER

1. The description of the existing bargaining unit is modified to read as follows:

All full-time and regular part-time nonsupervisory classified employees of the University of Washington working at Harborview Hospital, excluding members of the governing board, employees excluded from the coverage of Chapter 41.06 RCW, students, employees covered by other collective bargaining agreements, confidential employees, and supervisors.

2. Employees who work for the employer more than 350 hours during any consecutive 12-month period are included in that unit as regular part-time employees.

Issued at Olympia, Washington, on the 11<sup>th</sup> day of July, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-35-210.

# APPENDIX B



**PUBLIC EMPLOYMENT RELATIONS COMMISSION**  
 112 Henry Street NE, Suite 300, Olympia WA 98506  
 Mail: PO Box 40919, Olympia WA 98504-0919  
 Phone: (360) 570-7300 Fax: (360) 570-7334  
 E-mail: [filing@perc.wa.gov](mailto:filing@perc.wa.gov)

*Assigned PERC  
 Case No. 24602-C-12-048*

**PETITION FOR CLARIFICATION OF BARGAINING UNIT**

Form C-1 (9/2010)

Amended Petition In Case \_\_\_\_\_

Filing Instructions: [www.perc.wa.gov/Forms/C-1-inst.pdf](http://www.perc.wa.gov/Forms/C-1-inst.pdf)

Applicable Rules: Chapters 10-08, 391-08 and 391-35 WAC

**1. PARTIES** The employer and/or employee organization seek clarification of an existing bargaining unit.

**EMPLOYER** University of Washington

Contact Person Mark Yamashita, AAG Telephone 206-616-7935 Ext. \_\_\_\_\_

Address P.O. Box 359475 Fax 206-543-0779

City, State, ZIP Seattle, WA 98195-9475 E-Mail marky3@u.washington.edu

**EMPLOYEE ORGANIZATION** \_\_\_\_\_

Contact Person \_\_\_\_\_ Telephone \_\_\_\_\_ Ext. \_\_\_\_\_

Address \_\_\_\_\_ Fax \_\_\_\_\_

City, State, ZIP \_\_\_\_\_ E-Mail \_\_\_\_\_

**2. BARGAINING UNIT**

Department or Division Involved Harborview MC Number of Employees in Unit 1031

Bargaining History This bargaining relationship has existed since \_\_\_\_\_

Description of Bargaining Unit \_\_\_\_\_

On a separate sheet of paper, describe the existing bargaining unit, with inclusions, exclusions, contract page or certification decision number.

Collective Bargaining Agreement Status

Agreement is attached;

Agreement is on file with PERC; OR

The parties are currently in negotiations.

**3. OTHER INTERESTED ORGANIZATIONS** Indicate one.

- No other organization is known which claims or may claim to represent the employees involved in the petition; OR
- ADDITIONAL SHEETS ARE ATTACHED identifying other employee organizations which claim or may claim to represent the employees involved in the petition.

**4. IDENTIFICATION OF DISPUTED POSITIONS** For each position, classification, or group of employees at issue, list the following:

Title or Description	Number of Employees	Now Included or Excluded	Party Seeking Change	Reason for Change
Specimen Processing Technician	24	WFSE	Employer	SPTs need to be reclassified to CLTs because of recent employee initiated reallocation assessment. CLTs are in a different bargaining unit represented by a different bargaining representative, SEIU 925.
Specimen Processing Tech Lead	8	WFSE		

*If needed, build or continue the above list on separate sheets of paper and attach to this petition.*

**5. AMENDMENT OF CERTIFICATION** (Pursuant to WAC 391-35-085)

The petitioning party asks to have an existing bargaining unit certification amended because of a change of circumstances such as a change in the name of the employee organization or the name of the employer. Positions cannot be added to or removed from the bargaining unit through this certification amendment process.

**6. OTHER RELEVANT FACTS** Indicate if applicable.

If needed, other relevant facts are set forth on separate sheets of paper attached to this petition.

**7. AUTHORIZED SIGNATURES**

FOR EMPLOYER

Print Name Mark Yamashita Title AAG

Signature [Signature] Date 2/23/12

FOR EMPLOYEE ORGANIZATION

Print Name \_\_\_\_\_ Title \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

**Addendum**

2. Bargaining Units

Two different bargaining units represented by two different bargaining representatives are involved. Specimen Processing Technicians and Specimen Processing Technician Leads in the Specimen Processing Division of the Department of Laboratory Medicine working at Harborview Medical Center are included in the Harborview bargaining unit represented by WFSE. Clinical Laboratory Technicians, also in the Department of Laboratory Medicine, working at Harborview and other areas of the University are in the Healthcare Professional and Laboratory Technicians bargaining unit represented by SEIU 925.

3. Other Interested Organizations:

SEIU Local 925 Healthcare Professional and Laboratory Technician (HCPLT) Unit Contact: Dornie MacKenzie Address: 1914 N. 34 <sup>th</sup> Street, Suite 100 Seattle, WA 98103 Tel: 206-322-3010 Ext. 317 Fax: 206-547-5581 Email: dornie@seiu925.org	WFSE – AFSCME Council 28 Harborview Bargaining Unit Contact: Gladys Burbank Address: 1212 Jefferson Street SE #300, Olympia, WA 98501 Tel: (360) 352-7603 Fax: (360) 352-7608 Email: gladys@wfse.org
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4. Identification of Disputed Positions

As a result of the recent employee requested allocation assessment, the University has determined that employees occupying Specimen Processing Technician (SPT) job classification series should be reallocated to the Clinical Laboratory Technician (CLT) job classification series. Reallocation has taken place and the parties now petition PERC to determine whether the employees presently determined to be in the CLT job class series should be removed from the WFSE bargaining unit, and included in the SEIU 925 bargaining unit.

6. Other Relevant Facts

This is the University's second attempt at a unit clarification concerning the disputed positions. The first attempt, Case No. 24318-C-11-1469, was dismissed by PERC as premature. In light of PERC Decision 11259 (PSRA, 2011), in which the Commission stated that once the work is reallocated and after effects bargaining between the WFSE and the University is completed, the unit clarification petition could then be appropriate. The reallocation was implemented on February 1, 2012. The parties have bargained the effects of the reallocation. Based upon the PERC's rules, this petition is timely filed, as it involves a question concerning the allocation of employees or positions claimed by two or more bargaining units.

The current collective bargaining agreement contains a Memorandum of Understanding in which the University will conduct a work analysis of the SPTs in accordance with its process, the Union will not dispute or appeal the results of the reallocation, and the University will file a unit

clarification petition with PERC for determination of which bargaining unit the employees in the CLT classification belong. See Attachment A.

The current reallocation was begun by request of the employees in the SPT job classifications at Harborview in the Specimen Procurement Division of the Department of Laboratory Medicine. The employees submitted information concerning their job duties, and the Compensation Office of the University of Washington Human Resources Department conducted a review under Article 47.3 of the collective bargaining agreement. The result of that assessment was that the employees are performing work in the CLT classification series, and they should therefore be reallocated to job classes in the CLT series.

The University and the bargaining units representing its employees have mutually relied on a job classification system to determine the question of which bargaining unit an employee holding a specific job classification belongs, and what should be their compensation. Furthermore, the Executive Director in Decision 11083 (PSRA, 2011), recently decided in June of 2011, ratified the use of classification titles as a means to define the composition of a bargaining unit at the University of Washington that included the CLT series. A description of the job classes, which the WFSE and the University have acknowledged are included in the Harborview bargaining unit, is an attachment to the current bargaining agreement. See Attachment B.

The list of job classifications in the Harborview bargaining unit does not include the CLT job class series. In 2004, PERC certified SEIU 925 to represent the University's non-supervisory laboratory technical employees as a part of its Healthcare Professionals and Laboratory Technician bargaining unit. Decision 8392-B (PSRA, 2004). The collective bargaining agreement between SEIU 925 and the University reflects the parties' understanding that SEIU 925 represents the CLT job class series.

The reallocation of the Harborview SPTs to the appropriate CLT classification would create a change in representation between the Harborview bargaining unit represented by WFSE and the HCPLT unit represented by SEIU 925. Both SPT series and CLT series have always been under the auspices of and managed by the University of Washington's Department of Laboratory Medicine. The Department of Laboratory Medicine was established in the School of Medicine at the University of Washington in 1969. Dr. Paul Strandjord, the founding Chair, was given the charge to integrate the clinical laboratories at the University Hospital (now UWMC) and Harborview Medical Center, and to eliminate duplication of services wherever such could be accomplished without compromising the quality of patient care or educational programs of the school. Within the Department of Laboratory Medicine, the Specimen Procurement Division shares one Chair, one Director, one Administrator, and one Manager. To this day, the technicians at both sites handle specimens from both medical centers and transfer specimens between them to facilitate efficient laboratory operations. Laboratory Medicine clinical laboratory technicians working in various locations in the University system, with the exception of SPTs working at Harborview, are represented by SEIU 925. The employees reallocated to CLT job classification at Harborview share a closer community of interest with other laboratory technical employees in the HCPLT bargaining unit than they share with the rest of the employees in the Harborview bargaining unit.

Dual representation also results in a potential jurisdictional conflict between the WFSE and the SEIU in how work is assigned across Laboratory Medicine. The University asks PERC to resolve this conflict by deciding which one of the two bargaining representatives should represent the Harborview technicians and leads if they are reallocated to a position represented by SEIU 925.

**MEMORANDUM OF UNDERSTANDING  
REGARDING THE DISPOSITION OF CERTAIN PENDING  
UNFAIR LABOR PRACTICE PROCEEDINGS**

**1. Specimen Technicians**

The Employer will proceed with its internal reallocation process for those employees subject to the proceedings appealed by the Employer. The Union will not oppose the results of the Employer's process as long as such is consistent with its usual and customary practices.

Should the results of the Employer process be that a Unit Clarification petition ought to be submitted to PERC, the Employer will do so with all reasonable haste.

**2. Custodians and Trades Shift Differentials**

The Employer reserves its rights to appeal an unfavorable decision by PERC regarding custodian and trade shift differentials, should that decision contain, in the Employer's opinion, material errors in Law.

The Employer agrees that it will implement any such decision of the PERC during the course of an appeal. Should the Employer prevail in the appeal, it will not be required to continue any practices it had initiated as a result of the PERC decision.

**ATTACHMENT A**

8580	PATIENT CARE TECHNICIAN	B0	8
8542	PLANT COMMUNICATIONS COORDINATOR	BI	43
8503	PROGRAM ASSISTANT (Bioengineering Only)	BI	35
8527	RESEARCH AIDE 1 (Bioengineering Only)	BI	31
8528	RESEARCH AIDE 2 (Bioengineering Only)	BI	37
8529	RESEARCH TECHNOLOGIST 1 (Bioengineering Only)	BI	35
8530	RESEARCH TECHNOLOGIST 2 (Bioengineering Only)	BI	40
8517	SEAMSTRE	BI	25
8500	SECRETARY (Bioengineering Only)	BI	33
8502	SECRETARY LEAD (Bioengineering Only)	BI	39
8501	SECRETARY SENIOR (Bioengineering Only)	BI	36
8509	SNACK BAR LEAD	BI	30
8550	SPRINKLER MAINTENANCE WORKER	BI	34
8561	STOCKROOM ATTENDANT 1	BI	30
8562	STOCKROOM ATTENDANT 2	BI	32
8551	TRANSPORTATION HELPER	BI	30
8553	TRUCK DRIVER 1	BI	35G
8554	TRUCK DRIVER 2	BI	39G
8552	TRUCK DRIVER LEAD	BI	42G
8547	UTILITY WORKER 1	BI	29
8548	UTILITY WORKER 2	BI	33
8546	UTILITY WORKER LEAD	BI	36
8558	WAREHOUSE WORKER 1	BI	32G
8560	WAREHOUSE WORKER 2	BI	34G
8559	WAREHOUSE WORKR LEAD	BI	35G
8513	WASHROOM EQUIPMENT OPERATOR 1	BI	25
8514	WASHROOM EQUIPMENT OPERATOR 2	BI	29
8556	WASTE COLLECTOR	BI	40G
8534	WINDOW WASHER	BI	32
8535	WINDOW WASHER LEAD	BI	35
<b>CUSTODIAL SUPERVISORS BARGAINING UNIT</b>			
8776	CUSTODIAN SUPERVISOR 1	BI	33
8777	CUSTODIAN SUPERVISOR 2	BI	37
<b>HARBORVIEW MEDICAL CENTER BARGAINING UNIT</b>			
8696	ALCOHOLISM THERAPIST 1	B0	56
8711	ANESTHESIOLOGY TECHNICIAN 1	BA	10
8712	CARDIAC MONITOR TECHNICIAN	BI	36
8635	CASHIER 1	BI	28
8636	CHECK STAND OPERATOR	BI	23
8641	COOK	BI	30
8642	COOK LEAD	BI	33
8639	COPY MACHINE OPERATOR	BI	24
8640	COPY MACHINE OPERATOR LEAD	BI	28
8658	CUSTODIAN	BI	27
8659	CUSTODIAN LEAD	BI	31
8680	DIETARY UNIT AIDE	BK	01
8678	DIETARY UNIT CLERK	B0	01
8713	ELECTROCARDIOGRAPH TECHNICIAN 1	B0	13

8714	ELECTROCARDIOGRAPH TECHNICIAN 2	B0	22
8649	ELECTRONICS TECHNICIAN 1	BI	38
8650	ELECTRONICS TECHNICIAN 2	BI	44
8688	FINANCIAL SERVICES COUNSELOR	BI	37
8633	FISCAL TECHNICIAN 1	BI	29
8634	FISCAL TECHNICIAN 2	BI	32
8646	FOOD SERVICE PORTER	BI	25
8644	FOOD SERVICE WORKER	BI	25
8645	FOOD SERVICE WORKER LEAD	BI	27
8662	GARDENER 1	BI	33
8663	GARDENER 2	BI	37
8708	HOSPITAL ASSISTANT	B0	03
8709	HOSPITAL ASSISTANT LEAD	B0	10
8682	HOSPITAL CENTRAL SERVICES TECH TRAINEE	B0	05
8683	HOSPITAL CENTRAL SERVICES TECHNICIAN 1	B0	10
8685	HOSPITAL CENTRAL SERVICES TECHNICIAN 2	B0	19
8684	HOSPITAL CENTRAL SERVICES TECHNICIAN LEAD	B0	26
8717	HOSPITAL DENTISTRY ASSISTANT SPECIALIST	B0	49
8652	INDUSTRIAL HYGIENIST 1	BI	52
8653	INDUSTRIAL HYGIENIST 2	BI	56
8654	LABORATORY HELPER	BI	24
8655	LABORATORY HELPER LEAD	BI	26
8656	LABORATORY TECHNICIAN 1	BI	27
8657	LABORATORY TECHNICIAN 2	BI	31
8647	LAUNDRY OPERATOR 1	BI	24
8648	LAUNDRY OPERATOR 2	BI	27
8707	LICENSED PRACTICAL NURSE	BI	38
8676	MAIL RATER	BI	33
8665	MAINTENANCE CUSTODIAN 1	BI	29
8710	MEDICAL ASSISTANT	BI	37
8681	MEDICAL TRANSCRIPTIONIST 1	B0	13
8700	MENTAL HEALTH PRACTITIONER	B0	59
8705	MENTAL HEALTH SPECIALIST 1	BI	36
8706	MENTAL HEALTH SPECIALIST 2	BI	40
8626	OFFICE ASSISTANT 1	BI	25
8627	OFFICE ASSISTANT 2	BI	28
8628	OFFICE ASSISTANT 3	BI	31
8637	OFFSET DUPLICATOR OPERATOR	BI	26G
8638	OFFSET DUPLICATOR OPERATOR LEAD	BI	29G
8672	ORDER SERVICE COORDINATOR	BI	32
8703	ORTHOPAEDIC TECHNICIAN 1	B0	39
8704	ORTHOPAEDIC TECHNICIAN 2	B0	46
8690	PATIENT SERVICES COORDINATOR	BI	37
8691	PATIENT SERVICES LEAD	BI	37
8689	PATIENT SERVICES REPRESENTATIVE	BI	34
8721	PATIENT SERVICES SPECIALIST 1-TRAINEE	BI	34
8722	PATIENT SERVICES SPECIALIST 2	BI	37
8723	PATIENT SERVICES SPECIALIST 3	BI	39
8725	PATIENT SERVICES SPECIALIST EDU-QA	BI	44
8724	PATIENT SERVICES SPECIALIST LEAD	BI	44

8692	PATIENT SERVICES SPECIALIST-CALL CENTER	BI	42
8698	REHABILITATION COUNSELOR 1	BI	54
8699	REHABILITATION COUNSELOR 2	BI	58
8625	RESEARCH ANALYST 1	BI	37
8702	RESPIRATORY CARE ASSISTANT	BA	25
8629	SECRETARY	BI	33
8643	SNACK BAR LEAD	BI	30
8693	SOCIAL WORK ASSISTANT 1	BA	38
8686	SPECIMEN PROCESSING TECHNICIAN	B0	13
8687	SPECIMEN PROCESSING TECHNICIAN LEAD	B0	25
8673	STOCKROOM ATTENDANT 1	BI	30
8674	STOCKROOM ATTENDANT 2	BI	32
8675	STOCKROOM ATTENDANT LEAD	BI	35
8716	SURGICAL TECHNOLOGIST	BA	47
8631	TELEPHONE COMMUNICATIONS OPERATOR	BI	26
	TELEPHONE COMMUNICATIONS OPERATOR-		
	HOSPITAL	BK	03
8670	TRUCK DRIVER 1	BI	35G
8671	TRUCK DRIVER 2	BI	39G
8667	TRUCK DRIVER LEAD	BI	42G
8624	UNIT SUPPLY INVENTORY CONTROL SPECIALIST	BI	41
8621	UNIT SUPPLY TECHNICIAN 1	BI	33
8622	UNIT SUPPLY TECHNICIAN 2	BI	35
8623	UNIT SUPPLY TECHNICIAN LEAD	BI	38
8668	UTILITY WORKER 1	BI	29
8669	UTILITY WORKER 2	BI	33
8660	WINDOW WASHER	BI	32
8661	WINDOW WASHER LEAD	BI	35
8630	WORD PROCESSING OPERATOR 2	BI	30

**HARBORVIEW MEDICAL CENTER SECURITY OFFICERS BARGAINING UNIT**

8770	CAMPUS SECURITY OFFICER	BI	41
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**LIBRARY BARGAINING UNIT**

8750	FISCAL TECHNICIAN	BI	29
8751	FISCAL TECHNICIAN 2	BI	32
8752	LIBRARY SPECIALIST 1	BI	40
8753	LIBRARY SPECIALIST II	BI	44
8754	LIBRARY TECHNICIAN I	BI	28
8755	LIBRARY TECHNICIAN II	BI	32
8756	LIBRARY TECHNICIAN III	BI	34
8757	LIBRARY TECHNICIAN LEAD	BI	36
8740	OFFICE ASSISTANT 1	BI	25
8741	OFFICE ASSISTANT 2	BI	28
8742	OFFICE ASSISTANT 3	BI	31
8746	PROGRAM ASSISTANT	BI	35
8747	PROGRAM COORDINATOR	BI	40
8743	SECRETARY	BI	33
8745	SECRETARY LEAD	BI	39
8744	SECRETARY SENIOR	BI	36



Rob McKenna

## ATTORNEY GENERAL OF WASHINGTON

University of Washington Division • Box 359475  
Seattle WA 98195-9475 • Phone (206) 543-4150 • Fax (206) 543-0779

### DECLARATION OF SERVICE

Michelle E. Doiron, under penalty of perjury under the laws of the State of Washington, declares as follows: I am a Legal Assistant for the University of Washington Division of the Washington State Attorney General's Office; I caused to be delivered the following documents in the manner and on the dates noted below: *Petition for Clarification of Bargaining Unit Regarding HMC Specimen Processing Technician Job Classification*, and *Declaration of Service*.

I further declare that such documents were properly addressed to:

*Via email and deposited for mailing first-class mail, postage paid, on February 24, 2012:*

Washington State  
Public Employment Relations Commission  
P.O. Box 40919  
Olympia, WA 98504-0919  
(filing@perc.wa.gov)

*Via email and deposited for mailing first-class mail, postage paid, on February 24, 2012:*

Dornie MacKenzie, Higher Ed. Director  
SEIU Local 925  
Healthcare Professional and Laboratory  
Technician Unit  
1914 N. 34<sup>th</sup> Street, Suite 100  
Seattle, WA 98103  
(dornie@seiu925.org)

Gladys Burbank, Labor Advocate  
WFSE-AFSCME Council 28  
Harborview Bargaining Unit  
1212 Jefferson Street SE #300  
Olympia, WA 98501  
(gladys@wfse.org)

DATED this 24<sup>th</sup> day of February, 2012 at Seattle, WA.

  
\_\_\_\_\_  
Michelle E. Doiron

## Gladys Burbank - Unit Clarification Petition

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**From:** Michelle Doiron <doirom@uw.edu>  
**To:** "filing@perc.wa.gov" <filing@perc.wa.gov>  
**Date:** 2/24/2012 4:16 PM  
**Subject:** Unit Clarification Petition  
**CC:** Mark Yamashita <marky3@u.washington.edu>, "dornie@seiu925.org" <dornie...>  
**Attachments:** UC Petition.PDF; Dec of Service- UC Petition.PDF

---

Dear Commission Clerk:

Please find attached a *Petition for Clarification of Bargaining Unit Regarding HMC Specimen Processing Technician Job Classification* and a *Declaration of Service*. Copies have been sent to all parties listed above via email and U.S. Mail.

Please let me know if you have any difficulty with the attachments and feel free to contact Assistant Attorney General Mark Yamashita, at 206-543-4150, with any questions.

Thank you,

Michelle Doiron, Legal Assistant  
Attorney General's Office  
UW Tower, 18th Floor; UW Mailbox 359475  
Seattle, Washington 98195  
Telephone: (206) 543-9234  
doirom@u.washington.edu

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