

NO. 71019-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

EVERETT COMMUNITY COLLEGE
(COMMUNITY COLLEGE DISTRICT NO. 5),

Appellant

v.

PUBLIC EMPLOYMENT RELATIONS
COMMISSION and AMERICAN FEDERATION
OF TEACHERS WASHINGTON, LOCAL 1873,

Respondents

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2019/07/21 P.M. 4:49

Jon Howard Rosen, WSBA #7543
THE ROSEN LAW FIRM
705 Second Avenue, Suite 1200
Seattle, Washington 98104-1798
(206) 652-1464
Attorneys for Respondent
American Federation of Teachers
Washington, Local 1873

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II COUNTERSTATEMENT OF THE CASE 2

III. STANDARD OF REVIEW 7

IV. ARGUMENT 11

A. THERE IS SUBSTANTIAL EVIDENCE IN THE ADMINISTRATIVE RECORD SUPPORTING PERC’S FINDINGS ON REMAND FROM THE SUPERIOR COURT 11

1. What is skimming? 11

2. The College has failed to prove that the educational planners were not performing work exclusive to the AFT Everett bargaining unit. 13

3. Appellant has failed to prove that PERC’s credibility assessments are based on speculation or that its findings somehow run afoul of RCW 34.05.461(3). 20

4. Appellant’s reading of PERC’s findings on remand is narrow and constrained and fails to diminish the effect of the substantial evidence in the record supporting the finding. 26

5. The College has failed to prove that there is a lack of substantial evidence supporting PERC’s findings regarding the balancing test or that PERC erred in concluding that Appellant was guilty of a “skimming” violation. 29

a.	What was the employer’s previously established operating practice as to the work in question, i.e. had non-bargaining unit personnel performed such work before?	31
b.	Did the transfer of work involve a significant detriment to the bargaining unit members (as by change in conditions of employment or significantly impairing job tenure or reasonably anticipated work opportunities)?	32
c.	Was the employer’s motivation solely economic?	32
d.	Has there been an opportunity to bargain generally about the changes in existing practices?	34
e.	Was the work fundamentally different from regular bargaining unit work in terms of nature of duties, skills or working conditions?	35
B.	THE TRIAL COURT DID NOT ERR IN AWARDING AFT EVERETT ATTORNEY’S FEES PURSUANT TO RCW 49.48.030	36
C.	RESPONDENT IS ENTITLED TO RECOVER ITS ATTORNEY’S FEES INCURRED IN RESPONDING TO THIS APPEAL	42
V.	CONCLUSION	42

TABLE OF AUTHORITIES

CASES

<i>AWR Construction, Inc. v. Washington State Department of Labor and Industries</i> 152 Wn. App. 479, 217 P.3d 349 (Div. 1, 2009)	21
<i>Brown v. Scott paper Worldwide Company</i> 143 Wn.2d 349, 20 P.3d 921 (2001)	41
<i>Chandler v. Office of Insurance Commissioner</i> 141 Wn. App. 639, 173 P.3d 275 (Div. 1, 2007)	8
<i>City of Bellevue v. International Association of Fire Fighters, Local 1604</i> 119 Wn.2d 373, 831 P.2d 738 (1992)	8
<i>City of Pasco v. Public Employment Relations Commission</i> 119 Wn.2d 504, 833 P.2d 381 (1992)	9, 29
<i>City of Seattle v. Public Employment Relations Commission</i> 160 Wn. App. 382, 249 P.3d 650 (Div. 1, 2011)	12, 29
<i>Cohn v. Department of Corrections</i> 78 Wn. App. 63, 895 P.2d 857 (1995)	40
<i>Cohn v. Georgia-Pacific Corporation</i> 69 Wn. App. 709, 850 P.2d 517 (Div. 1, 1993)	41, 42
<i>Ehman v. Dept. of Labor and Industries</i> 33 Wn.2d 584, 206 P.2d 787 (1949)	7
<i>Freeburg v. City of Seattle</i> 71 Wn. App. 367, 859 P.2d 610 (Div. 1, 1993)	10
<i>Hansen v. City of Tacoma</i> 105 Wn.2d 864, 719 P.2d 104 (1986)	37

<i>Heinmiller v. Dept. of Health</i> 127 Wn.2d 595, 903 P.2d 433 (1995)	7
<i>International Association of Fire Fighters, Local 46 v. City of Everett</i> 146 Wn.2d 29, 42 P.3d 1264 (2002)	37, 42
<i>Irondale Community Action Neighbors v. Western Washington Growth Management Hearings Board</i> 153 Wn. App. 513, 262 P.3d 81 (2011)	9
<i>McIntyre v. Washington State Patrol</i> 135 Wn. App. 594, 141 P.3d 75 (Div. 2, 2006)	38, 40
<i>Morgan v. Kingen</i> 166 Wn.2d 526, 210 P.3d 995 (2009)	42
<i>Ongom v. Staet of Washington, Dept. Of Health, Office of Professional Standards</i> 124 Wn. App. 935, 104 P.3d 29 (Div. 1, 2005)	9, 23
<i>Pacific Topsoils, Inc. V. Washington State Dept. of Ecology</i> 157 Wn. App. 629, 238 P.3d 1201 (Div. 2, 2010)	41
<i>Peninsula School District No. 401 v. Public School Employees of Peninsula</i> 130 Wn.2d 401, 924 P.2d 13 (1996)	11
<i>Premera v. Kreidler</i> 133 Wn. App. 23, 131 P.3d 930 (Div. 1, 2006)	8, 22
<i>Public School Employees of Quincy v. Public Employment Relations Commission</i> 77 Wn. App. 741, 893 P.2d 1132 (Div. 2, 1995)	30
<i>Queets Band of Indians v. State</i> 102 Wn.2d 1, 682 P.2d 909 (1984)	41

<i>Renton Education Association v. Public Employment Relations Commission</i> 101 Wn.2d 435, 680 P.2d 40 (Div. 1, 1984)	8
<i>Sommer v. Dept. of Social and Health Services</i> 104 Wn. App. 160, 15 P.3d 664 (Div. 1, 2001)	7
<i>Straub v. Department of Public Welfare</i> 31 Wn.2d 707, 198 P.2d 817 (1948)	22
<i>Sweitzer v. Industrial Insurance Commission</i> 116 Wash. 398, 199 P.2d 724 (1921)	22
<i>Trachtenberg v. Dept. of Corrections</i> 122 Wn. App. 491, 93 P.3d 217 (Div. 1, 2004)	39, 40, 41
<i>University of Washington v. Washington Federation of State Employees</i> 175 Wn. App. 251, 303 P.3d 1101 (Div. 1, 2013)	8, 25, 29
<i>Yakima Police Patrolmen’s Association v. City of Yakima</i> 153 Wn. App. 541, 222 P.3d 1217 (Div. 2, 2009)	8

OTHER AUTHORITY

<i>AFT Washington v. Everett Community College</i> Decision 10392 (PECB, 2009)	15
<i>Amalgamated Transit Union Local 1384 v. Kitsap Transit</i> 2007 WL 1666676, Decision 9667-PECB (2007)	12
<i>City of Snoqualmie</i> Decision 9892-A (PECB, 2009)	31
<i>City of Winslow</i> Decision 3420-A (PECB, 1990)	15

<i>Clover Park School District</i>	
Decision 2560-B (PECB, 1988)	33
<i>Community College District 10</i>	
Decision 9677 (PSRA, 2007)	36
<i>Kitsap Transit</i>	
Decision 9667 (PECB, 2007)	33
<i>Seattle Police Management Association v. City of Seattle</i>	
1992 WL 753329, Decision 4164-PECB (1992)	12
<i>South Kitsap School District</i>	
Decision 472 (PECB, 1978)	12
<i>Spokane County Fire District No. 9</i>	
Decision 3482-A (PECB, 1991))	33
<i>Teamsters Local 763 v. City of Snohomish</i>	
2007 WL 453254, Decision 9569-PECB (2007)	12
<i>Washington State University</i>	
Decision 9613-A (PSRA, 2007)	15
<i>Westinghouse Electric Corp.</i>	
150 NLRB No. 136, 150 NLRB 1574, 58 LRRM (BNA) BNA 1257, 1965 WL 16357 (N.L.R.B.)	33

STATUTES

RCW 28B.52	11
RCW 28B.52.073	5
RCW 28B.52.073(1)(e)	29
RCW 34.05.070(1)(a)	9

RCW 34.05.461(3)	20
RCW 34.05.570(3)(e)	10
RCW 34.05.574(3))	39
RCW 35.05.570(1)(a)	25
RCW 35.05.570(3)	10, 25
RCW 41.06	40
RCW 41.06.170(2)	41
RCW 41.06.220	40
RCW 41.56	11
RCW 41.64	41
RCW 41.64.130	41
RCW 49.48.030	6, 37, 38, 39, 40, 42, 44
RCW 49.60.040(3)	41

COURT RULES

RAP 18.1	42
--------------------	----

OTHER

Washington Administrative Law Practice Manual Section 10.05[C]	8, 9
---	------

I: INTRODUCTION

In 2010 Everett Community College, the Appellant, unilaterally reduced the number of counselors it employed by 50%, from ten to five, by firing four and reassigning one to teaching. At the same time it created a new job classification called educational planners and filled it with five individuals, three of whom had not been employed by the College in the past. It assigned four of these educational planners to the counseling offices where they worked side-by-side with the remaining counselors doing counselor work and the fifth to the Diversity and Equity Center also to fill the job of the fifth removed counselor. The counselors are all members of the bargaining unit represented by Respondent. Respondent filed an Unfair Labor Practice Charge before the Washington Public Employment Relations Commission which ruled that by “skimming” bargaining unit work Appellant committed an unfair labor practice.

Despite the best efforts of Appellant to find fault with the Public Employment Relations Commission’s decision that it violated state labor law its arguments challenging PERC’s findings as insubstantial and its conclusions as legally unsound are unpersuasive. Because Appellant Everett Community College has failed to carry its burden of proving either

a lack of substantial evidence to support PERC's findings or that PERC's conclusions are legally flawed its appeal should be denied and the superior court's order denying the Petition for Review and awarding attorney's fees should be affirmed in its entirety. Additionally, Respondent's request for attorney's fees responding to this appeal should be granted.

II. COUNTERSTATEMENT OF THE CASE

Everett Community College and AFT Everett¹ have had a collective bargaining relationship that goes back more than forty years. During this period of time the parties have periodically collectively bargained a succession of agreements covering a bargaining unit comprised of instructors, counselors, and library/media specialists. CP 169, 577. This dispute between the parties involves the counselors. It is not a new dispute but one that Respondent thought had been resolved more than six years ago when the parties entered into a Memorandum of Understanding.

The parties had agreed back in January 2008 that while staff and administrators outside of the bargaining unit could provide "entry advising"

¹ Respondent has been identified in the pleadings by Appellant as the American Federation of Teachers Washington, Local 1873, while this reference is descriptive, in fact, its name was changed several years ago to AFT Everett and we will use either that designation or refer to it as Respondent.

to new students or those returning after a break in their education such entry advising was limited to “routine information” which is “essentially facts and information that can be found in College publications (i.e., college catalogue, quarterly schedule, curriculum guides).” . Any advising beyond the provision of such routine information was within the exclusive domain of the faculty.² This arrangement was memorialized in a Memorandum of Understanding signed by College President David Beyer and then AFT Everett President Thomas Gaskin on January 10 and 11, 2008. CP 407-08.

On April 2, 2010 Dr. Beyer, the President of Everett Community College, met with almost all of the counselors in the bargaining unit for the purpose of advising them that he was making sweeping changes to the program. CP 354 (Exh. 14 – videotape). These changes, which he referred to as “restructuring,” included reducing the number of full-time counselors employed by the College from ten to five³ and employing “ed planners to provide educational planning, course management, and

² “The faculty’s advising role is to provide advising beyond routine information.” CP 407.

³ Four full-time temporary counselors, Evelyn Henriques, John Meyer, Belle Nishioka, and Sandy Nisperos had been notified on March 17, 2010 that their contracts were being terminated effective the end of Spring quarter, June 11, 2010. CP 315-18. March 17 was the date that the faculty was notified of the April 2 meeting with Dr. Beyer. CP 344. A tenured counselor, Janice Lovelace, was reassigned to a teaching position in the College’s Psychology Department commencing the 2010-2011 academic year. CP 565-66.

academic advising services in support of mandatory advising.” CP 345. This restructuring plan was not presented to the bargaining unit as a proposal for discussion but rather as a *fait accompli*. Dr. Beyer repeated over and over again that the decision to restructure the counseling department, terminate the four full-time temporary counselors and hire educational planners was his decision. He repeated that the reorganization plan is “what I choose to do” and that it “was a decision I made.” CP 354. These statements were convincingly testified to by witnesses Earl Martin, Gina Myers and Deanna Skinner. CP 458, 476-77, 532-33, 543-44. Even Dean Castorena acknowledged that Dr. Beyer’s decision was final.⁴

The College hired three new employees and reassigned two non-bargaining unit employees to fill the new educational planner positions.⁵ CP 688. Commencing in September 2010 these five educational planners were assigned to do the jobs that were previously performed by bargaining unit counselors.

4 Q. And when it was presented it was presented as a final decision having been made by President Beyer, correct?

A. Correct. At that March meeting – or April meeting. CP 701

5 The College negotiated with another union to place the educational planners within its bargaining unit. CP 588.

Jason Pfau, hired to be an educational planner, replaced the laid off John Meyer as the Opportunity Grant Specialist.⁶ CP 351, 359, 553, 700-01. Jennifer Melbo replaced Janice Lovelace as the Diversity Specialist in the College's Diversity and Equity Center. CP 350, 353, 369, 371, 372, 552, 569-570, 699-700. The three other educational planners, Nancy Kolosseus, Cathy May and Linda Summers, were assigned to the Counseling, Advising and Career Center replacing full-time tenured counselors Earl Martin, Gina Myers, and Deanna Skinner who were reassigned to perform the work of laid off bargaining unit counselors Nishioka, Nisperos and Henriques. CP 349, 551-55.

It is abundantly clear from the examples of entry advising identified in the Memorandum of Understanding reached in 2008 that the educational planners were assigned work in 2010 greatly in excess of the "routine information" listed in the MOU to which non-bargaining unit members are limited. Under settled PERC precedent assigning the historical and exclusive bargaining unit work to employees outside of the bargaining unit is a violation of RCW 28B.52.073 and is referred to as "skimming."

⁶ Opportunity Grants are cash stipends given to qualified students under a State of Washington program. CP 373-397, 398-402.

PERC held a hearing on November 30 and December 1, 2010 on AFT Everett's Unfair Labor Practice Charge. On August 5, 2011 the hearing examiner assigned to the case found that the College was guilty of "skimming," i.e., assigning bargaining unit work to employees outside the bargaining unit.⁷ CP 782-800. The hearing examiner ordered both injunctive and affirmative relief including a return to the status quo ante that existed prior to the violation. CP 796-98. The College appealed to the full Commission which denied its appeal on September 21, 2012. CP 853-55. Thereafter the College sought review in the Superior Court for Snohomish County. After the Commission provided supplemental findings, CP 116-30, as requested by the court, on September 10, 2013 the court denied the College's Petition for Review and awarded Respondent attorney's fees pursuant to RCW 49.48.030 for work performed in the superior court. CP 107-14. The College filed a timely appeal in this Court.

⁷ Two other claims made by AFT Everett were rejected by the hearing examiner. Those claims were not appealed and are not relevant to this matter.

III. STANDARD OF REVIEW

While superficially accurate -- case law says what Appellant claims -- Appellant's recitation of the standard of review in its Brief is incomplete, omitting important considerations on appeal while also turning statutory language inside out to suit its argument.

The College correctly defines substantial evidence as "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises" and that such evidence must be "viewed in light of the whole record," *Heinmiller v. Dept. of Health*, 127 Wn.2d 595, 605, 607, 903 P.2d 433 (1995). However, there is more.

A finding of substantial evidence does not require the reviewing court to weigh the evidence to determine its sufficiency but, rather, find only that the evidence is greater than "a mere scintilla." *Ehman v. Dept. of Labor and Industries*, 33 Wn.2d 584, 595-97, 206 P.2d 787 (1949); 112 Wash. 426, 432, 192 P. 1009 (1920); *Sommer v. Dept. of Social and Health Services*, 104 Wn. App. 160, 172, 15 P.3d 664 (Div. 1, 2001) ("There must be 'substantial' evidence as distinguished from 'a mere scintilla' of evidence. . .").

Moreover, PERC's "interpretation of the collective bargaining statutes 'is entitled to substantial weight and great deference' in view of its expertise in the area of collective bargaining." *University of Washington v. Washington Federation of State Employees*, 175 Wn. App. 251, 259, 303 P.3d 1101 (Div. 1, 2013) citing *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382, 831 P.2d 738 (1992).

"When reviewing factual issues, the substantial evidence standard is highly deferential to the agency fact finder. When an agency determination is based heavily on factual matters that are complex, technical, and close to the heart of the agency's expertise, we give substantial deference to agency views." *Chandler v. Office of Insurance Commissioner*, 141 Wn. App. 639, 648, 173 P.3d 275 (Div. 1, 2007) ("But courts will not weigh the evidence or substitute our judgment regarding witness credibility for that of the agency.") citing *Premera v. Kreidler*, 133 Wn. App. 23, 32, 131 P.3d 930 (Div. 1, 2006). "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." *Yakima Police Patrolmen's Association v. City of Yakima*, 153 Wn. App. 541, 553, 222 P.3d 1217 (Div. 2, 2009) citing *Washington Administrative*

Law Practice Manual, Section 10.05[C] at 10-29 (2008). “A reviewing court must uphold an agency’s determination of facts ‘unless the court’s review of the entire record leaves it with a definite and firm conviction that a mistake has been made.’” *City of Seattle v. Public Employment Relations Commission*, 160 Wn. App. 382, 388, 249 P.3d 650 (Div. 1, 2011) citing *Renton Education Association v. Public Employment Relations Commission*, 101 Wn.2d 435, 440, 680 P.2d 40 (Div. 1, 1984). As will be shown below there is no room for any such “definite and firm conviction that the Commission made a mistake.”

Moreover, it is statutorily mandated that the College has the burden of demonstrating the invalidity of the Commission’s actions. RCW 34.05.570(1)(a); *Irondale Community Action Neighbors v. Western Washington Growth Management Hearings Board*, 153 Wn. App. 513, 529, 262 P.3d 81 (2011). The “substantial evidence” test requires the court to

“view ‘the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the fact-finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.’”

Ongom v. State of Washington, Dept. of Health, Office of Professional

Standards, 124 Wn. App. 935, 949, 104 P.3d 29 (Div. 1, 2005) citing *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (Div. 1, 1993).

Appellant asserts at page 13 of its Brief that “the court may sustain the factual findings made by the agency only if they are supported by evidence that ‘is substantial when viewed in light of the whole record before the court’,” citing RCW 34.05.570(3)(e) (emphasis as in Appellant’s Brief). However, that sentence twists the meaning of the statute in a way other than how it was written by the legislature. Rather than as suggested by Appellant RCW 35.05.570(3) reads in relevant part:

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . (e) the order is not supported by evidence that is substantial . . .”

What Appellant does here is misplace the burden and the emphasis. A court does not sustain the factual findings made by PERC only if they are supported by evidence that is substantial, as stated by Appellant; rather it “shall grant relief from an agency order in an adjudicative proceeding only” if it is not supported substantial evidence. This distinction, although perhaps subtle, is consistent with the statute and case law and assures that the burden is on the challenging party to prove a lack of any substantial

evidence rather than requiring the responding party to prove the existence of substantial evidence. The College cannot sustain this burden since there is a surfeit of evidence upon which PERC relied and from which it made reasonable inferences, as will be shown below.

Finally, RCW Chapt. 28B.52, being remedial in nature, “is entitled to a liberal construction to effect its purpose of implementing the right of public employees to join and be represented by labor organizations.” A liberal construction requires that the coverage of the Act provision “be liberally construed and that its exceptions be narrowly confined.” See *Peninsula School District No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996) (internal citations omitted) (referring to the analogous RCW Chapt. 41.56, the Public Employees’ Collective Bargaining Act).

IV. ARGUMENT

A. THERE IS SUBSTANTIAL EVIDENCE IN THE ADMINISTRATIVE RECORD SUPPORTING PERC’S FINDINGS ON REMAND FROM THE SUPERIOR COURT.

1. What is skimming?

Skimming is a labor law term meaning bargaining unit work that is transferred to employees of the same employer who are outside of the

existing bargaining unit. It is distinguished from “subcontracting” or “contracting out,” terms that are used where unit work will be performed by employees of another employer. *Teamsters Local 763 v. City of Snohomish*, 2007 WL 453254, Decision 9569-PECB, p.2 (2007); *See also, Amalgamated Transit Union Local 1384 v. Kitsap Transit*, 2007 WL 1666676, Decision 9667-PECB, p.2 (2007) (“Both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees may be mandatory subjects of bargaining. . . .The public employer must bargain the transfer of bargaining unit work to employees outside of the unit. . . .’Skimming’ has the same effect on a bargaining unit, and invokes the same duty to bargain, as the ‘contracting out’ of bargaining unit work.” (Citations omitted)); *Seattle Police Management Association v. City of Seattle*, 1992 WL 753329, Decision 4164-PECB, pp. 5-9 (1992).⁸

⁸ The *Seattle Police Management Association* provides an excellent history of the development of skimming violations. The genesis of the concept was at the National Labor Relations Board, although the Board does not use the term, and the federal cases that interpret the National Labor Relations Act. As far as can be found the first reference to a skimming violation is in *South Kitsap School District*, Decision 472 (PECB, 1978) although that term is not used in the decision. That the Commission considers the decisions of the National Labor Relations Board persuasive when interpreting similar provisions in Washington statutes is no different than what Washington courts typically do. See *City of Seattle v. Public Employment Relations Commission*, 160 Wn. App. at 388-89.

As the College correctly contends, where a skimming violation is alleged the PERC hearing examiner first makes a determination as to whether the transferred work was bargaining unit work and then applies a five part balancing test. Based on the substantial evidence in this case the Commission properly adopted the hearing examiner's conclusion that a skimming violation occurred.

2. The College has failed to prove that the educational planners were not performing work exclusive to the AFT Everett bargaining unit.

The College repetitively argues that there is no substantial evidence that work assigned to a newly constituted group of employees it identified as "education [sic] planners" was exclusive to Respondent bargaining unit. It is clearly wrong. While Respondent does not dispute, and has never disputed, that individuals other than those in the bargaining unit can provide routine information to new and returning students the record is replete with evidence that the remainder of the considerable amount of -- and ever-increasing -- student advising responsibilities belongs to the bargaining unit counselors (and sometimes other faculty bargaining unit members).

The parties memorialized that clear understanding of the practice in

a Memorandum of Understanding in which the parties agreed “that advising students is one of the core responsibilities of faculty members” and that while both bargaining unit and non-bargaining unit employees can and do provide “routine information about college services and educational programs” to new and returning students that “[t]he faculty advising role is to provide advising beyond the routine information” to those new and returning students and to all continuing students.⁹ CP 407-408. There was clear and convincing, let alone substantial, evidence presented to the hearing examiner allowing her and later PERC and the superior court to find that the advising work that the educational planners were doing greatly exceeded the permissible bounds of “entry advising of routine information.” The activities of the educational planners went well beyond what was deemed permissible by the parties as set forth in the MOU.

In addition to the striking similarities between the core responsibilities of the counselors as set forth in the collective bargaining agreement and the job description¹⁰ of educational planners there was

⁹ The MOU states in its first paragraph “The Union understands, however, that advising includes a broad range of activities and that College staff and administrators appropriately perform some of those activities.” (Emphasis added.) Thus, this document, signed by both College president Beyer and the then president of AFT Everett, recognizes that while “some” of the advising activities can be performed by College staff and administrators the great bulk of the work is exclusively the province of the bargaining unit.

¹⁰ Appellant argues at pp. 16-17 of its Opening Brief as it has both before the Commission

compelling credible testimony from each of the remaining tenured counselors Earl Martin, CP 449-56, 470-76, Gina Myers, CP 528-31, 537, Deanna Skinner, CP 539-41, 547-48, Christine Sullivan, CP 548-57, and Janice Lovelace¹¹, CP 564-70, about educational planners doing counselor work. Additionally, the record reviewed by the hearing examiner, PERC and the superior court includes snapshots of pages from the College's website identifying and describing the roles of the counselors and the educational planners. CP 347-53, 369-70, 425-28. CP 371 is an email from Dean Castorena concerning one of the educational planners, Jennifer

in its appeal to it and in superior court that "PERC does not rely on job descriptions as conclusive evidence of an employee's duties and responsibilities." It then cites three cases, none of which involve unfair labor practices but, rather, are representation/unit clarification cases. Stuningly, there are no references to job descriptions in any of these cases as Appellant asserts. There *is* a reference to job *titles* in the *Everett Community College* case where the PERC Executive Director wrote that "when interpreting statutes, making unit determinations, and resolving representation issues, the Commission is not controlled or governed by *titles* given to a particular position. . . . [and] examines the actual duties of employees when determining whether a position is included or excluded from a bargaining unit." *AFT Washington v. Everett Community College*, Decision 10392 (PECB, 2009) (emphasis added). Neither the *Washington State University*, Decision 9613-A (PSRA, 2007), nor *City of Winslow*, Decision 3420-A (PECB, 1990), decisions cited by Appellant discuss the reliance on job descriptions as conclusive evidence of an employee's duties and responsibilities. There is nothing even remotely close to any such discussion. In any event, as Appellant itself notes, the hearing examiner acknowledged that "PERC does not rely solely on the job descriptions and other such documents about positions: in her analysis. Likewise, on remand PERC noted that "[w]hile the Commission does not typically rely exclusively on job descriptions, the educational planner job description (Exhibit 32) and the January 10, 2008 Memorandum of Understanding (Exhibit 30) in this case support the testimony of the Union witnesses." There certainly is no evidence – or argument – that PERC relied "solely" on the educational planner job description in determining their duties. Appellant's argument is without basis, at best, and disingenuous, at worst.

¹¹ Dr. Lovelace was transferred effective September 2010 to a teaching position. CP 565.

Melbo, in which the Dean announces that Ms. Melbo's "special population focus will be serving students of color, returning women and LGBTQ students" and that her office "is located in the Diversity and Equity Center." This of course is exactly what Janice Lovelace was doing in her role as a counselor before she was transferred to a teaching position. CP 372 is an email exchange between Ms. Melbo and Dr. Lovelace in which Ms. Melbo describes some of the counselor work which was assigned to her¹² and asks Dr. Lovelace some questions to assist her in her new role.

Most significant, perhaps, is the testimony on cross-examination of Respondent's Dean of Student Development and Diversity Advocacy, Christina Castorena. In her testimony, Dean Castorena, the administrator for both counselors and educational planners, acknowledges that the planners were hired to replace the terminated counselors and to perform the work historically performed by the counselors within the bargaining unit. Dean Castorena testified on cross-examination:

- Q. The demand for advising and counseling has increased along with the student enrollment increase, has it not?
- A. Yes. For all services.
- Q. You have gone down from ten counselors to five counselors this year?

¹² "I'm working out of the D&E [the Diversity and Equity Center where Dr. Lovelace worked] and one of my responsibilities include [sic] working with the College Success Foundation Scholars."

- ...
- A. Yes.
- Q. So significantly more students, all wanting as much or more advising and counseling as before, correct?
- A. Correct.
- Q. And the counselors work pretty darn hard prior to this year, did they not?
- A. Very hard-working group.
- Q. So who's doing the work, the five counselors that are no longer here?
- A. Who's doing – the counselor work – educational planners and not assumed counselor duties and responsibilities. They're not doing personally counseling, academic advising. What has happened is – particularly for the counseling, advising and career center, for the two counselors that are there – what has happened is, you know, they are providing counseling services on an appointment basis. And what's happening is that we're finding that their appointments are booked out.
- Q. Well, they've always been booked out, haven't they?
- A. Well, yeah, there has always been a need for counseling so that hasn't changed.
- Q. And now it's just worse. The bar has dropped in counseling, the counselors and advising – the counselors used to do that at the CACC until this year, correct?
- A. Counselors did drop-in advising as well as counseling services.
- Q. Appointments. Okay. And now they only do appointments, correct?
- A. Correct. The counselors in the counseling advising career center.
- Q. Used to have five counselors, five busy counselors in the CACC. And now you have two, correct?
- A. Correct.
- Q. And they don't do any drop-in advising, correct?
- A. Correct.

- Q. And now their work is being done by two of the five counselors that were in the CACC, correct?
- A. Right.
- Q. And you had a counselor in diversity and equity center last year, correct?
- A. Correct.
- Q. And that was –
- A. Janice Lovelace.
- Q. – Janice Lovelace. She's teaching now so she's not there to do counseling anymore, correct?
- A. Correct.
- Q. And you have Jennifer Melbo, one of the education planners, sitting at her old desk in our old office, correct?
- A. No.
- Q. Close though, has the center moved?
- A. Yes, the center has moved. She's physically located in the diversity and equity center.
- Q. And Gina Myers, who was in the CACC, is now in the Rainier Learning Center, correct?
- A. Correct.
- Q. Sitting at the desk that Sandy Nisperos sat at?
- A. Correct.
- Q. Doing work with the same populations as Sandy Nisperos, correct?
- A. Yeah. As far as my understanding, as I mentioned, I no longer supervise that counselor.
- Q. And Jason Pfau is assigned to the opportunity grant work, correct?
- A. Correct.
- Q. Now, he's not a counselor?
- A. Correct.
- Q. So he doesn't do counseling?
- A. Correct.
- Q. But that job was mainly an administrative job, wasn't it? I mean, the counseling was, and advising was, not an important portion but it was a small percentage, correct?

- A. It was mostly an administrative function, yes.
- Q. And that's what John Meyer, one of the full-time temporary counselors, did before Mr. Pfau was hired, correct?
- A. John was the opportunity grant counselor.
- Q. And you never discussed these – this restructure with the union before it was presented to the counselors on April 2, 2010, did you?
- A. No, I did not.
- Q. Okay. And as far as you know no administrator did, correct?
- A. Correct.
- Q. And when it was presented it was presented as a final decision having been made by President Beyer, correct?
- A. Correct. At that March meeting – or April meeting.
- Q. Now, on this job description, Exhibit 32 [AR 279-285], there really isn't one of the 15 items of the – leave out other duties as assigned for now. There isn't anything that the counselors weren't expected to do when they were all working here last year, isn't that correct?
- A. So your question is of these 14 –
- Q. Of these 15 items?
- A. – were counselors also performing these?
- Q. Yeah.
- A. Yes, as well as many other nonacademic employees.
- Q. The nonacademic employees did the rote informational dissemination work, correct?
- A. Yes, they did the kind of the entry advising, telling students how you become a student, what degrees and programs we offer here. What the processes are for enrollment, how they register, yes.
- Q. Cathy May, when she was put in the position in February, I believe you said, that was just sort of a trial run. She was temporary, there was really no full definition of what she was going to do, isn't that correct?

- A. There was a job description so there was no educational planner/transfer specialist job description, so it was real clear what her responsibilities were. But yes, you are correct, it was a position that I believe went through June 30th that year.
- Q. But it wasn't even clear that education planners were going to be added to the mix. That decision hadn't been finally made at that time, had it?
- A. Correct.
- Q. You understand as an experienced administrator that the college cannot make unilateral changes in the collective bargaining agreement without – let me rephrase that.
You can't make unilateral changes in a collective bargaining agreement because of budgetary concerns?
- A. Correct.
- Q. So when the education planners are doing transfer work, diversity and equity work, and opportunity grant work, foster youth work, faculty liaison work, they're dealing more than with entry students, correct?
- A. Correct.

CP 697-703.

3. Appellant has failed to prove that PERC's credibility assessments are based on speculation or that its findings somehow run afoul of RCW 34.05.461(3).

Appellant's reliance on RCW 34.05.461(3) is misplaced. Only those findings based "substantially" on credibility are required to be so identified by the statute. Appellant is assuming, without any basis in fact or reference to the record, that the examiner was guided "substantially" by the

credibility or demeanor of witnesses. There is simply no support for the Appellant's assumption.¹³ A fair reading of the statutory language supports, if not mandates, a conclusion that not every finding based on credibility need be so identified. Moreover, there was no need for the hearing examiner, or the Commission, to be substantially guided by the credibility or demeanor of witnesses. There was considerable evidence presented at the hearing, as more fully described above and below, supporting the claim of skimming.

The Appellant argues at p. 20 of its Brief that PERC's credibility determination regarding the testimony of Dean Castorena is arbitrary and not supported by substantial evidence. In order for the Appellant to carry its burden of proof that PERC's "determination is arbitrary" it is necessary for it to show that PERC's action was "willful and unreasonable" and "made without consideration and without regard for the facts and circumstances." *AWR Construction, Inc. v. Washington State Department of Labor and Industries*, 152 Wn. App. 479, 489, 217 P.3d 349 (Div. 3, 2009). This

¹³ Indeed, PERC on remand notes that the examiner "did not make specific credibility determinations" but that "the text of her decision supports an inference that she found the Union's witnesses more credible as to what work the counselors and the educational planners perform." CP 118. PERC then goes on to say that the educational planner job description and the MOU support the testimony of the witnesses. *Id.*

definition of “arbitrary and capricious” has long been embraced by the Washington Supreme Court.

These terms when used in this connection [judicial review of an administrative determination], must mean willful and unreasoning action, action without consideration and in disregard of the facts and circumstances of the case. Action is not arbitrary or capricious when exercised honestly and upon due consideration, where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.

Straub v. Department of Public Welfare, 31 Wn.2d 707, 723, 198 P.2d 817 (1948), citing *Sweitzer v. Industrial Insurance Commission*, 116 Wash. 398, 199 P.2d 724, 725 (1921). That PERC’s determination was adverse to the Appellant does not render it arbitrary.

Appellant unpersuasively argues at pp. 18-20 of its Brief that the testimony of Respondent’s several witnesses should have been discounted by the Commission and now should be discounted by this court because it was, in Appellant’s characterization, “self-serving, non-specific speculation.” The time is long past for Appellant to argue questions of admissibility or, for that matter, of weight.¹⁴ None of the testimony upon which PERC relies was admitted over any objections and the hearing

¹⁴ “We will not weigh the evidence or substitute our judgment regarding witness credibility for that of the agency.” *Premera v. Kreidler*, 133 Wn. App. at 32.

examiner, PERC, and the superior court were entitled to give full weight to that testimony. Moreover, the testimony of the AFT Everett witnesses and the inferences drawn therefrom were consistent with PERC's experienced and expert view of "reality" in the workplace. That PERC relied on the testimony of individuals working side by side and in daily contact with the non-bargaining unit members sitting at the desks and in the offices of the terminated counselors is entitled to great weight.¹⁵ It also was highly reasonable for PERC to consider Dean Castorena's testimony that counseling work was substantially increasing, CP 697-98,¹⁶ in drawing an inference that the educational planners, working side-by-side with the

15 The evidence is not to be examined in a piecemeal manner or out of context. Rather, each fact must be viewed as a part of the whole record. Nowhere is there any authority, as Appellant seems to suggest, that PERC cannot draw "inferences and assumptions" as part of its review of the entire record before it. The inferences are particularly apt as the hearing examiner made it clear that she was analyzing the skimming claim "[f]rom all the evidence presented." Indeed, as the Court in *Ongom* recognizes, drawing reasonable inferences is an integral part of fact-finding and must be viewed in a light most favorable to Respondent. *Ongom v. State of Washington, Department of Health, Office of Professional Standards*, 124 Wn. App., at 949.

16 Q. The demand for advising and counseling has increased along with the student enrollment increase, has it not?

A. Yes. For all services.

Q. You have gone down from ten counselors to five counselors this year?

...

A. Yes.

Q. So significantly more students, all wanting as much or more advising and counseling as before, correct?

A. Correct.

counselors – a number given the same titles as the counselors,¹⁷ would be performing bargaining unit work given the fact that the number of bargaining unit counselors had been slashed a full 50 percent.

Appellant’s argument that counselor Christine Sullivan’s testimony does not support the findings of the Commission is myopic and fails to take into consideration that the record needs to be looked at as a whole. To say that Ms. Sullivan “never testified she worked directly with education planners” is disingenuous. While she may not have used these exact words the strong and reasonable inference is clearly there and is supported by more than substantial evidence. CP 549-55. That Ms. Sullivan worked with the education planners directly is confirmed not only by her testimony but by pages from the Appellant’s own website, CP 347-48, 349, which describe the Counseling, Advising and Career Center as being comprised of Ms. Sullivan, another full-time counselor – Brett Kuwada, the five educational planners, and an administrative assistant. They are all in the same building, on the same floor and in the same area to which students were invited by the Appellant to “simply walk in during the hours we are open.” CP 348.

¹⁷ *E.g.*, Jason Pfau was given the same title as terminated counselor John Meyer and Jennifer Melbo, the Diversity Specialist and College Mentor Coordinator, doing the diversity and equity work that had been assigned to Dr. Lovelace. CP 349.

Indeed, Appellant is arguing this case as if the burden of proof is on Respondent and that the quantum is something akin to “beyond a reasonable doubt” or, at least, “clear and convincing” rather than Appellant having the burden of demonstrating a lack of substantial evidence. RCW 35.05.570(1)(a) and (3).

That PERC discounted Jennifer Howard’s testimony about educational planner duties because she was not their supervisor while, at the same time, discounting the testimony of their supervisor, Dean Castorena, is in no way illogical and without substance as argued by Appellant at p. 19 of its Brief. Certainly, PERC had ample grounds to conclude that Dean Castorena’s testimony on direct examination regarding the job duties of the educational planners was outweighed by the substantial evidence in the record such as the educational planner job description, the testimony of Respondent’s witnesses, the College’s own website, Dean Castorena’s testimony on cross-examination referred to above, and the Memorandum of Understanding.¹⁸

¹⁸ That PERC has expertise to make these findings is unquestioned. Case law, of course, requires that its interpretation of the collective bargaining statutes be given “substantial weight and great deference.” *University of Washington v. Washington Federation of State Employees*, 175 Wn. App., at 259.

4. Appellant's reading of PERC's findings on remand is narrow and constrained and fails to diminish the effect of the substantial evidence in the record supporting the findings.

Appellant's attempts to poke holes in PERC's findings after remand fail. Its readings of the findings are narrow, constrained and often, simply, wrong. Yet, even if there are some contradictions and inconsistencies the fact remains that there is substantial evidence to support the findings.

The basic error that Appellant makes in concluding that the findings are contradictory is its failure to focus on the import of PERC's very first finding

- 1.a. Bargaining unit counselors were responsible for a wide range of student advising activities, including the dissemination of routine information, while non-bargaining unit employees were limited to providing routine information.

CP 119. Everything that PERC found flows from this dichotomy.¹⁹

¹⁹ Appellant misreads PERC's supplemental findings. For example, it concludes that Finding 2(a) was meant by PERC to be part of the list of exclusive bargaining unit work that was performed by educational planners. However, it is much more reasonable to read 2(a) as being a preface to the list of intrusions into the exclusive domain of the bargaining unit. PERC was given a specific set of questions and responded to those questions in the format set by the superior court. Once again the College is taking evidence out of context rather than viewing it as part of the whole record as is required.

Thus, while findings 1(e) and 2(a) could be viewed in a vacuum as being contradictory as argued by the College at pp.22-24 of its Brief, because of the clear past practice set forth in the Memorandum of Understanding they are not. While the work may be similar, under the MOU non-bargaining unit members such as the educational planners can only perform those parts of the tasks which are “routine” and limited to a specific cohort of students²⁰ while the more complicated and advanced aspects of the tasks are reserved to the bargaining unit. CP 407-08.

An analogy might be instructive. Both nurses and surgeons perform many functions that are similar. They each don sterile caps, gowns, masks and booties prior to surgery; they vigorously scrub; they inspect the instruments that will be used during the surgery; they greet the patient and ask basic information to assure that they are performing the procedure on the correct individual; and they coordinate the use of the equipment such as scalpels and scopes. However, only the surgeon makes the incision; only the surgeon employs the instruments; only the surgeon determines when the surgery has been completed and the patient can be sutured.

²⁰ Those that are “new” or “returning after a break in their education.”

Likewise, PERC found many similarities in the nature of the counselor and educational planner jobs but found substantial evidence to distinguish what work overlapped and what was exclusively within the province of the bargaining unit employees.

Appellant's reliance on p.23 of its Brief on the Memorandum of Understanding as a document that lists work that was not exclusive to the bargaining unit misses the point. The MOU does list those tasks, of course, but PERC reasonably found that the MOU also makes it clear that permissible tasks must be limited to "routine information . . . essentially facts and information that can be found in College publication (i.e., college catalogue, quarterly schedule, curriculum guides). The MOU then goes on to say that it is the bargaining unit that provides advising beyond such routine information. There can be little question, based on the testimony of Dean Castorena on cross-examination and counselors Sullivan, Martin, Myers, Skinner and Lovelace, the pages of the College website, and substantial other evidence in the record all cited above, not the least of which is the educational planners' job description, that Appellant has failed to establish that the Commission was presented no substantial evidence

upon which it could find that the educational planners were performing bargaining unit work.

5. The College has failed to prove that there is a lack of substantial evidence supporting PERC's findings regarding the balancing test or that PERC erred in concluding that Appellant was guilty of a "skimming" violation.

The conclusion by the hearing examiner, PERC and the superior court that the College violated RCW 28B.52.073(1)(e) by skimming bargaining unit work previously performed by full-time tenured counselors and full-time temporary counselors, without providing an opportunity for bargaining, is entitled to deference and great weight, as noted above. The recent *University of Washington v. Washington Federation of State Employees* decision, 175 Wn. App. 251, *supra*, decided by this Court was not done so in a vacuum. It is just a recent reinforcement of the reluctance of the court to intrude upon the province of the Commission. See, *e.g. City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992); *City of Seattle v. Public Employment Relations Commission*, 160 Wn. App. 382, 388, 249 P.3d 650 (Div. 1, 2011) ("When reviewing questions of law, the court may substitute its determination for that of the agency. But because PERC's members have

considerable expertise in labor relations, the court gives substantial weight to PERC's interpretation of the collective bargaining statute."); *Public School Employees of Quincy v. Public Employment Relations Commission*, 77 Wn. App. 741, 745, 893 P.2d 1132 (Div. 2, 1995) (Citations omitted.)

This is not a complicated case. After considering all the evidence the hearing examiner, PERC and the superior court determined that it was evident that a skimming violation occurred. None had any trouble finding that the five part balancing test weighed heavily in favor of the conclusion that Appellant had violated AFT Everett's rights under state labor law by skimming bargaining unit work. Substantial evidence supports PERC's findings on remand.

The five questions that must be answered are:

- (1) What was the employer's previously established operating practice as to the work in question, *i.e.*, had non-bargaining unit personnel performed such work before;
- (2) Did the transfer of work involve a significant detriment to bargaining unit members (as by change in conditions of employment or significantly impairing job tenure or reasonably anticipated work opportunities);
- (3) Was the employer's motivation solely economic;

- (4) Had there been an opportunity to bargain generally about the changes in existing practices; and
- (5) Was the work fundamentally different from regular bargaining unit work in terms of nature of duties, skills or working conditions.

City of Snoqualmie, Decision 9892-A (PECB, 2009). As is clear from the record, there is substantial evidence to answer each of these questions in the affirmative and that each factor weighed, some heavily, in favor of the determination that a skimming violation occurred.

- a. What was the employer's previously established operating practice as to the work in question, i.e. had non-bargaining unit personnel performed such work before?

There is substantial evidence on the record of a long-standing past practice, memorialized in a Memorandum of Understanding executed by the College and the Union in 2008 and signed by David Beyer for the College, in which only bargaining unit members perform counseling work and that any advising done by non-bargaining unit members was solely for the dissemination of "routine information about college services and education programs." CP 407. To the extent any corroboration that the practice is necessary it is found in the testimony of Christine Sullivan where she confirms that the counselors did all advising and counseling except for routine information dissemination. CP 549-55. The reference at p.36 of

Appellant's Brief to cross-over duties listed in the MOU only reinforces the fact that those duties were limited to the dissemination of routine "information that can be found in college publications." CP 407. PERC's findings supporting its conclusion that the first factor weighs heavily in favor of finding a "skimming" violation are far from faulty and are supported by substantial evidence.

- b. Did the transfer of work involve a significant detriment to the bargaining unit members (as by change in conditions of employment or significantly impairing job tenure or reasonably anticipated work opportunities)?

As the hearing examiner noted and PERC found, the decision to employ educational planners had an "inarguably detrimental effect on the bargaining unit members, by taking away their positions and terminating the temporary counselors." CP 774. Appellant cannot deny that four counselors were terminated and one was transferred or that there was a substantial change in the duties of those that remained. Indeed, its argument at pp. 39-40 of its Brief regarding the lack detriment is sadly disingenuous. Four hard-working public servants lost their jobs and a fifth was involuntarily transferred to a wholly new position. This factor is clearly met, too.

- c. Was the employer's motivation solely economic?

The development of the employer motivation factor has become

muddled from decision to decision over time. In *Westinghouse Electric Corp.*, 150 NLRB No. 136, 150 NLRB 1574, 1576-77, 58 LRRM (BNA) BNA 1257, 1965 WL 16357 (N.L.R.B.) the National Labor Relations Board found that there was no unfair labor practice in part because “the recurrent contracting out of work here in question was motivated solely by economic considerations. . . .” *Id.* In *Clover Park School District*, Decision 2560-B (PECB, 1988) relying on the factors set out in *Westinghouse*, the Commission found that “[t]here is nothing in the record here to indicate that the School District’s motivation was solely economic.” *Clover Park School District, supra.* In *Spokane County Fire District No. 9*, Decision 3482-A (PECB, 1991) a few years later, the Commission stated that “[t]he employer’s motivation was, in large part, economic.” In *Kitsap Transit*, Decision 9667 (PECB, 2007), the hearing examiner explained that the intent of the question regarding whether the motivation was solely economic “is to determine whether the employer’s action was based solely on economic motives and not on, or combined with, some other improper motive.” The hearing examiner went on to write:

An employer’s decision to transfer bargaining unit work based solely on a cost saving analysis that considers only a unit’s bargained for wages would also be improper. An employer may not circumvent its contractual agreement on wages for a particular unit by transferring that unit’s work to another bargaining unit or to an unrepresented group.

Id. That the decision of the College was in part economic is undeniable. It was motivated to save money during an economic crisis. CP 487-88. However, as Appellant notes in its Brief at pp. 41-42 that the College “was also motivated by a desire to continue to provide services to students.” CP 126. Thus, Respondent acknowledges that if the criterion really requires that the employer act solely for economic reasons that this factor may not have been fully met. However, PERC and the courts are dealing with a “balancing test.” And even if the court should find that this factor does not weigh in favor of finding a violation that, nevertheless, the scales tip heavily in favor of such a conclusion.²¹

- d. Has there been an opportunity to bargain generally about the changes in existing practices?

There was no opportunity to bargain the change in practice. Dr. Beyer made it clear on April 2, 2010 that the restructure was not subject to negotiations or modification.

Whether you like it . . . cannot help it, that’s what I chose to do . . . that was the decision I made.

CP 354 (videotape); see also 458, 476-77, 532-33, 543-44. The hearing

²¹ Employers and labor organizations would benefit prospectively from a clarification by the Commission of its intent with regard to this factor.

examiner had ample evidence upon which to find that

On April 2, 2010 the employer present the union with a fait accompli when it announced it would implement its new structuring plan, which included educational planners performing bargaining unit work and the reassignment of full-time counselors to positions previously held by full-time temporary counselors.

CP 795. Likewise, the Commission in its supplemental findings is justified, based on the same evidence, in finding “[t]he employer did not provide the Union with an opportunity to bargain about the decision to remove work from the bargaining unit” and that this factor “weighs heavily in favor of requiring the employer to bargain its decision to remove work from the bargaining unit.” CP 129.

- e. Was the work fundamentally different from regular bargaining unit work in terms of nature of duties, skills or working conditions?

Lastly, as articulated by the hearing examiner, CP 795, the work assigned to the educational planners was not fundamentally different from the bargaining unit work in terms of the nature of the duties, the skills or the working conditions. The testimony of Dean Castorena, the job descriptions, and the testimony of AFT Everett’s witnesses all contain substantial evidence allowing both the hearing examiner and the Commission, CP 129, to find that this last factor “weighs heavily in favor of

requiring the employer to bargain its decision to remove work from the bargaining unit.” Additionally, Dean Castorena’s email announcing the hiring of Jennifer Melbo highlights the similarity in educational, training and work history between her, an educational planner, and the counselors within the bargaining unit. Compare CP 371 with CP 319-43. Similarly, PERC’s reasoning with regard to this factor is based on the substantial evidence it identifies in its supplemental findings. CP 127.

B. THE TRIAL COURT DID NOT ERR IN AWARDING AFT EVERETT ATTORNEY’S FEES PURSUANT TO RCW 49.48.030.

Respondent was entitled to recover its attorney’s fees expended in representing its members, obtaining a back pay award and securing that relief in superior court. It did so not under the theory that the College’s skimming violations were so egregious or repetitive as to warrant an extraordinary remedy. Such an award of attorney’s fees under the authority of the Commission’s inherent powers is used only sparingly. See, e.g., *Community College District 10*, Decision 9677 (PSRA 2007) (“Commission orders awarding attorney’s fees have usually been based on a pattern of repetitive illegal conduct or on egregious or willful bad acts by the respondent.”).

Rather, AFT Everett sought its fees in the superior court under the statutory authority of RCW 49.48.030 which reads:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

RCW 49.48.030. This statute has been broadly construed.

In *Hansen v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986), the Washington Supreme Court highlighted the fact that RCW 49.48.030 “provides reasonable attorney’s fees *in any action* in which a person is successful in recovering judgment for wages or salary owed.” *Id.* at 872 (emphasis in original). The Court expanded its holding in *Hansen* in *International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002). The *City of Everett* opinion first noted that “RCW 49.48.030 is a remedial statute, which should be construed liberally to effectuate its purpose.” *Id.* at 34. It then went on to hold that a union was entitled to recover the attorney’s fees it expended in successfully representing a member in an arbitration and recovering back wages for that

employee. The court held “that ‘action’ as used in RCW 49.48.030 includes grievance arbitration proceedings in which wages or salary owed are recovered.” *Id.* at 41. It also held “that the term ‘person’ in RCW 49.48.030 necessarily includes unions that bring actions on behalf of their members.” *Id.* at 36.

The court specifically declined “to address whether RCW 49.48.030 would apply to other types of administrative or quasi-judicial proceedings.” *Id.* at 43, fn. 11. While it does not appear that the Supreme Court has had an opportunity to address this issue since its declination, it was clearly addressed in *McIntyre v. State*, 135 Wn. App. 594, 141 P.3d 75 (Div. 2, 2006) in which Division 2 of the Court of Appeals found that a state patrol officer was entitled to recover her attorney’s fees after she ultimately prevailed in her challenge to her termination originating before the Personnel Appeals Board, like the Commission, an administrative tribunal. The court found that denying her attorney’s fees because she brought her action before the Personnel Appeals Board rather than going through grievance arbitration to be a distinction without a difference. The court rejected the attempt to distinguish between the two types of proceedings and noted that to do so “could discourage ‘the use of administrative

proceedings.”” *Id.* at 603-04. Similarly, here, the unfair labor practice charge filed by AFT Everett is “an action” under which attorney’s fees are recoverable in accordance with the broad construction of RCW 49.48.030. The superior court, however, limited its award of attorney’s fees in this case to those expended by Respondent in responding to and successfully challenging Appellant’s Petition for Review. Thus, the only issue on appeal is whether the superior court erred in awarding attorney’s fees for successful work expended in its court.

Appellant provides no authority for its argument that because the Court is sitting “in its appellate capacity” under the Administrative Procedures Act respondent has no right to recover its attorney’s fees. The cases upon which Appellant relies at p. 45 of its Brief are wholly inapposite. And its argument that RCW 34.05.574(3) authorizes fees “only to the extent expressly authorized by another provision of law” is undercut by the very existence of RCW 49.48.030 which is undeniably “another provision of law.”

Appellant’s reliance at p. 46 of its Brief on *Trachtenberg v. Dept. of Corrections*, 122 Wn. App. 491, 93 P.3d 217 (Div. 1, 2004) is unavailing. *Trachtenberg* is limited to its holding that RCW 49.48.030 does not apply to

the disciplinary review process of the State Personnel Appeals Board because of the purported specific limitation on remedies available to state employees who successfully use the process.²² Indeed, the Department of Corrections argued in *Trachtenberg* “that the limited purpose and scope of the board’s statutes and regulations will preclude application of RCW 49.48.030 to board disciplinary appeals.” *Id.* at 496.

Since *Trachtenberg* is so limited it does not apply to the judicial review of a PERC ruling.²³ Moreover, it is unlikely that the narrow holding in *Trachtenberg* would withstand scrutiny in a similar situation today. Neither *Trachtenberg* nor the case upon which it relies, *Cohn v. Dept. of Corrections*, 78 Wn. App. 63, 895 P.2d 857 (1995) correctly constructs RCW 41.06.220²⁴ when concluding that the legislature limited relief to the “enumerated remedies” – “back pay, sick leave, vacation accrual, retirement and OASEI credits.” Inexplicably, the courts failed to discuss the actual language of the statute which describes the employee rights and benefits as “including” the ones enumerated. Certainly, established statutory

22 “Because of the limitations placed on appeals to the Board, we conclude that the legislature did not intend RCW 49.48.030 to apply to disciplinary challenges before the Board.” *Trachtenberg* at 497.

23 *McIntyre v. The Washington State Patrol*, 135 Wn. App. 594, 141 P.3d 75 (2006) notes the narrow holding of *Trachtenberg*. *Id.* at 601.

24 This section of RCW Chapt. 41.06 was revised in 2011.

construction of the word “including,” let alone a liberal reading of such a remedial statute, would allow for relief other than that enumerated. *Brown v. Scott Paper Worldwide Company*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001) (RCW 49.60.040(3) contains the word “includes,” which is a term of enlargement.); *Queets Band of Indians v. State*, 102 Wn.2d 1, 4, 682 P.2d 909 (1984) (“Generally, in interpreting statutory definitions, ‘includes’ is construed as the term of enlargement while ‘means’ is construed as a term of limitation.”); *Pacific Topsoils, Inc. v. Washington State Dept. of Ecology*, 157 Wn. App. 629, 642, 238 P.3d 1201 (Div. 2, 2010) (“In statutory construction, ‘includes’ is a term of enlargement. . . .”)

Furthermore, since *Cohn* and *Trachtenberg* were decided RCW Chapt. 41.64 upon which both courts relied to some extent has been repealed in its entirety. Whereas RCW 41.64.130 provided for judicial review of Personnel Appeals Board decisions, this right to further scrutiny has been removed by the legislature and final appeal is to a Personnel Resources Board.²⁵

²⁵ “Decisions of the Washington personnel resources board on appeals filed after June 30, 2005, [subsequent to *Cohn* and *Trachtenberg*] shall be final and not subject to further appeals.” RCW 41.06.170(2).

C. RESPONDENT IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES INCURRED IN RESPONDING TO THIS APPEAL.

In accordance with RAP 18.1 AFT Everett requests that in accordance with RCW 49.48.030 the Court direct Appellant to pay its attorney's fees responding to the appeal relying on the same rationale discussed immediately above upon which the superior court awarded fees.

AFT Everett is entitled to an award of attorney's fees on appeal upon the affirmance of the order of the superior court denying Appellant's Petition for Review. *Cohn v. Georgia-Pacific Corporation*, 69 Wn. App. 709, 727, 850 P.2d 517 (Div. 1., 1993); see also *Morgan v. Kingen*, 166 Wn.2d 526, 540, fn. 2, 210 P.3d 995 (2009); *IAFF, Local 46 v. City of Everett*, 146 Wn.2d at 52.

V. CONCLUSION

There is an old Indian parable about six blind men each of whom touched a different part of an elephant that had wandered into a village. One man touch the ear and thought that the elephant was a fan; another touched its trunk and thought it a fountain; the third touched a leg and believed it to be a pillar; and so on. It took someone who was able to view

the entire animal to realize that while each of the blind men's conclusions contained some truth all were misled by only being able to touch a portion of its body.

Similarly, Appellant is asking us to touch bits and pieces of the record to conclude that there is not substantial evidence to support PERC's findings. However, it is wrong. Just like the different parts of the elephant need to be viewed not discretely but as an entire organism to get a true picture of what it is, the record is to be looked at as a whole and when it is it is abundantly clear that Everett Community College skimmed AFT Everett's bargaining unit work when it reduced the number of full-time counselors from ten to five and replaced the five lost positions with five individuals placed in a new classification called educational planners. Under the totality of the facts in the record it is inconceivable to conclude that these five educational planners were hired only to disseminate "routine information . . . that can be found in College publications "(i.e., college catalogue, quarterly schedule, curriculum guides)."

Appellant has failed to carry its burden of establishing that PERC erred when it entered findings of fact on remand and that the superior court

erred and misinterpreted or misapplied the law when it awarded attorney's fees to Respondent pursuant to RCW 49.48.030.

Because Appellant's arguments defy credulity the order of the superior court denying the Petition for Review and awarding attorney's fees should be affirmed and fees should be awarded to Respondent on appeal.

Respectfully submitted this 31st day of March, 2014.

THE ROSEN LAW FIRM

By:



Jon Howard Rosen, WSBA #7543

Attorney for Respondent

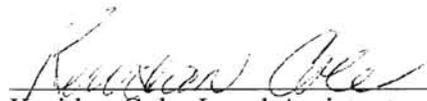
AFT, Local 1873

CERTIFICATE OF SERVICE

I, Keridan Cole, certify that I sent a copy of the foregoing Brief of Respondent to the Court of Appeals, Division 1, via facsimile (fax number: 206-389-2613) and a copy by email and Legal Messenger to Scott Majors, Office of the Attorney General (email: ScottM@atg.wa.gov) (delivery address: Office of the Attorney General, 3501 Colby Avenue, Suite 200, Everett, WA 98201) and a copy by U.S. First-Class mail to Mark S. Lyon, Office of the Attorney General, P.O. Box 40113, Olympia, WA 98504.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 31st day of March, 2014.



Keridan Cole, Legal Assistant

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 31 PM 4:49