Supreme Court No. 91697-7

Court of Appeals No. 45687-II

SUPREME COURT OF THE STATE OF WASHINGTON

KITSAP TRANSIT,

Petitioner-Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent-Appellee,

and

AMALGAMATED TRANSIT UNION, LOCAL 1384,

Respondent-Appellee,

RESPONDENT-APPELLEE'S REPLY BRIEF

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I. COUNTER STATEMENT OF THE CASE

A. PERC Hearing Examiner Appropriately Finds Kitsap Transit Committed a Series of Unfair Labor Practices by Unilaterally Removing the Premera PPO Health Plan

Following a full evidentiary hearing, a hearing examiner with the Public Employment Relations Commission ("PERC") determined that Kitsap Transit committed a series of Unfair Labor Practices ("ULP") stemming from the unilateral removal of the only PPO-type health plan available to Amalgamated Transit Union, Local 1384 ("ATU") members. The Examiner determined that through a series of steps, unbeknownst to ATU at the time, the employer manufactured a set of conditions under which Premera, which had been the long-standing PPO carrier for Kitsap Transit, was forced to withdraw its renewal bid for the 2011 plan year. AR 1887-1893. With these events coming relatively late in the calendar year and ATU having no knowledge of them, Kitsap Transit was unable to secure a suitable alternative resulting in the loss of any PPO option at the start of 2011. AR 1879-1881.

To remedy the ULP, the Examiner ordered Kitsap Transit to, among other things, take the following actions:

> [2]a. Restore the status quo ante by reinstating a health insurance plan with benefit levels substantially equivalent to the December 31, 2010 Premera PPO plan or implementing another plan option as agreed upon by the union.
> [2]b. Make bargaining unit employees who were on the Premera PPO plan in 2010 or who documented their desire to switch to the Premera PPO plan in 2011 whole by paying these employees the premium savings (difference in cost of the 2011 Premera and Group Health plans, minus employee contribution rates as described in the

> collective bargaining agreement), plus interest, from the time the employer terminated the Premera PPO plan on January 1, 2011, until the time that the employer either: 1) restores a comparable PPO plan option, 2) reaches a negotiated agreement with the union on health benefit plans, or 3) implements health benefits as determined by an interest arbitration award.

AR at 1905-06 (emphasis omitted).

B. Commission Upholds ULP Findings but Modifies the Remedy

On appeal by Kitsap Transit, the Commission wholly agreed with the Examiner that Kitsap Transit had committed several ULPs and affirmed all of the Examiner's findings of fact and conclusions of law. AR 1986. However, without making any specific findings or conclusions of its own, in the body of its decision the Commission determined that reinstating PPO coverage could prove "impossible" and that the Examiner's monetary remedy was considered "punitive," which is not permissible under the statute. AR 1984-1985. As such, the Commission modified paragraph 2 of the Examiner's order by striking subsection (a) in its entirety and rewriting subsection (b) such that the employer only had to reimburse ATU's members the difference between what would have been paid under the Premera PPO plan less any payments made under the HMO plan for all medical expenses. AR 1986.

C. Superior Court Refuses to Supplement the Record and Affirms the Commission

Subsequent to the Examiner's decision and order, but proceeding the Commission's final decision, Kitsap Transit informed ATU during bargaining for a successor collective bargaining agreement that it had

located a comparable PPO plan that it was willing to offer. CP 184-187. The parties eventually agreed to a new PPO plan through a ratified collective bargaining agreement, which was equivalent to the one lost through Premera. CP 186-187. On a petition for review, ATU introduced this new evidence because it directly contradicted the Commission's determination in its decision that restoring a substantially equivalent PPO plan could be "impossible." CP 176-183. ATU argued that the Commission acted arbitrarily and capriciously and contrary to the record when it determined compliance with Paragraph (2)(a) of the Examiner's Order was impossible, especially in light of the new evidence. CP 29-56; 163-175. It also contended the Commission erred in concluding the make whole damage award in Paragraph (2)(b) was "punitive." The Superior Court denied ATU's motion, however, and affirmed the Commission. CP 408-411.

D. The Court of Appeals Vacates the Commission Decision and Remands the Matter back to PERC

The Court of Appeals agreed with ATU that the superior court erred in failing to remand the matter back to the Commission for additional fact finding based on the new evidence.[1] Additionally, it was determined that the Commission erroneously interpreted the law in modifying the Examiner's Order and in issuing a new order that failed to effectuate the purposes and policy of chapter 41.56 RCW.[2] The matter has now been

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[1] *Amalgamated Transit Union, Local 1384 v. Kitsap Transit Transit,* No. 45687-7-II, 2015 Wash. App. LEXIS 775, at 2 (Wash. App. Div. 2, April 14, 2015).
[2] *Id.*

remanded back to the Commission to receive new evidence and issue an Order consistent with the terms of the Court of Appeals decision.[3]

II. ARGUMENT TO DENY PETITION FOR REVIEW

A. The Court of Appeals Correctly Vacated the Commission's Modified Order and Remanded the Case to PERC to Issue an Appropriate Remedial Order

ATU and Kitsap Transit are governed by chapter 41.56 RCW. The statute makes it an "unfair labor practice for an employer or union "to refuse to engage in collective bargaining."[4] "Collective bargaining" is defined in the statute to mean:

> Collective bargaining means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer...[5]

Thus, the duty to bargain extends to "wages, hours and working conditions." In its decision herein, the Commission properly described the general duty to collectively bargain:

> Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. ... The collective bargaining obligation requires that the employer

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[3] *Id.* at 27.
[4] RCW 41.56.140; RCW 41.56.150.
[5] RCW 41.56.030(4).

> maintain status quo for all mandatory subjects of bargaining, except when such changes are made in conformity with the statutory collective bargaining obligation or the terms of a collective bargaining agreement.[6]

The Washington State Supreme Court has taken notice of the fact that the purpose of the PECBA "is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right."[7] With that goal in mind, when an employer commits a ULP by failing to engage in collective bargaining, the PECBA grants PERC the authority to remedy the violation(s) in order to protect the purpose of the statute.

The Court of Appeals properly recognized that the *purpose of the statute could not be upheld* through the Commission's modified remedy. Kitsap Transit violated the law by unilaterally removing an important and negotiated benefit, equivalent to a loss of wages. Under RCW 41.56.160, the Commission is statutorily obligated to issue appropriate remedial orders in such situations to effectuate the goal of collective bargaining, which prohibits an employer from unilaterally modifying the terms and conditions of employment absent agreement by the union or as otherwise allowed by law. In failing to restore the status quo, not making employees whole, and not compensating employees for the damages suffered, the Commission's remedy was statutorily defective and required modification.

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[6] AR 1975.

[7] *Municipality of Metro. Seattle v. Pub. Emp't Relations Comm'n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992); citing *City of Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991).

B. The Court of Appeals Decision Does Not Conflict with Any Decision of this Court or, For That Matter, of Any Courts.

1. The Determination of Legal Rights is Ultimately the Province of the Courts, Not PERC.

In *Pasco Police Officers' Assoc. v. City of Pasco*, the Supreme Court described the appropriate standard of review of PERC rulings:

> Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. *City of Pasco*. RCW 34.05.570(3) 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 School 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 ("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).[8]

This Court has already considered, and rejected, the notion that PERC is the final arbiter, or owed absolute deference, over questions of public sector labor law.[9] "Naturally, PERC must define and interpret the language in [public sector collective bargaining statutes] in order to carry out its functions. Every administrative agency must interpret the law in order to enforce or to follow it. It is a quantum leap in logic, however, to jump from the fact that PERC is empowered to prevent unfair labor

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[8] 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

[9] *See State ex. Rel. Graham v. Northshore Sch. Dist.*, 99 Wn.2d 232, 662 P.2d 38 (1983).

practices to the conclusion that PERC is the exclusive decider of public labor law questions."[10] While the Commission is owed "great weight and substantial deference"[11] in its interpretation of chapter 41.56 RCW, "[t]he declaration of legal rights and interpretation of legal questions is the province of the courts and not of administrative agencies."[12]

"Agencies enjoy substantial freedom in developing remedies;"[13] however, the Administrative Procedures Act ("APA") specifies that a "court shall grant relief from an agency order"[14] if the agency erroneously interpreted or applied the law, acted arbitrarily and capriciously, or made factual findings unsupported by substantial evidence. "It is the well-established law in this state, as well as in other jurisdictions, that modifications of administrative orders by a court of review are limited to acts that are arbitrary or capricious, or where the tribunal proceeded on a fundamentally wrong basis, or beyond its power under the statute."[15]

This Court has taken notice of the fact that the purpose of the PECBA "is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right."[16] With that goal in mind, when an employer commits an unfair labor practice by failing to engage in

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[10] *State ex. Rel. Graham*, 99 Wn.2d at 240.
[11] *City of Vancouver v. Pub. Emp't Relations Comm'n*, 180 Wn. App. 333, 347, 325 P.3d 213 (2014).
[12] *State ex. Rel. Graham*, 99 Wn.2d at 240.
[13] *Municipality of Metro. Seattle*, 118 Wn.2d at 634.
[14] RCW 34.05.570(3).
[15] *In re Case E-368*, 65 Wn.2d 22, 29, 395 P.2d 503 (1964).
[16] *Municipality of Metro. Seattle*, 118 Wn.2d at 633; citing *City of Yakima*, 117 Wn.2d at 670.

collective bargaining, the PECBA grants PERC the authority to remedy the violation(s) in order to protect the purpose of the statute. To that end, RCW 41.56.160 expressly authorizes and requires the Commission to issue remedial orders following ULP findings, noting:

> (1) The Commission is empowered and ***directed*** to prevent any unfair labor practice and ***to issue appropriate remedial orders...***
>
> (2) If the Commission determines that any person has engaged in or is engaging in an unfair labor practice, the Commission *shall issue* and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, ***and to take such affirmative action as will effectuate the purposes and policy of this chapter***, such as the payment of damages and the reinstatement of employees.[17]

The phrase "appropriate remedial orders" has been interpreted by this Court to mean "those [orders] necessary to effectuate the purposes of the collective bargaining statute and to make PERC's lawful orders effective."[18] To achieve this goal, the Court of Appeals has observed:

> [the] function of the remedy in an unfair labor practice case is to restore the situation, as nearly as possible, to that which would have occurred but for the violation. The remedy *must* help restrain violations and remove or avoid the consequences of the violations.[19]

2. The Court of Appeals Properly Exercised its Review Authority in Vacating the Commission's Decision

While subtly acknowledging the well-established principles

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[17] RCW 41.56.160 (emphasis supplied).
[18] *Municipality of Metro. Seattle,* 118 Wn.2d at 633.
[19] *Municipality of Metro. Seattle v. Pub. Emp't Relations Comm'n*, 60 Wn. App. 232, 240, 803 P.2d 41 (1991) (overruled on other grounds) (emphasis supplied).

concerning judicial review of agency decisions, the petitioner unsuccessfully attempts to recast the *rule of judicial deference* of agency decisions into a mandate of absolute deferral by the courts to agency determinations.[20] When such an effort is rejected, it is clear that the Court of Appeals decision in this matter squares precisely with other Court decisions on this topic. As such, the petition fails to meet its burden under RAP 13.4(b)(1) to show that the Court of Appeals ruling conflicts with a decision of the Supreme Court, or any other court for that matter.

The petitioner has failed to identify any way in which the Court of Appeals ruling conflicts with any other court decision, let alone one issued by the Supreme Court. The Court of Appeals afforded PERC substantial deference in crafting remedies, but it ultimately determined the remedy imposed by the Commission failed to uphold statutory requirements. The standard advocated by the petitioner would effectively nullify key provisions of the APA and, ironically, run contrary to previous actions taken by this Court in reviewing, and overturning, agency decisions.

In *Local 2916 Int'l Assoc. of Fire Fighters v. Public Emp't Rel. Comm'n*[21], this Court affirmed a superior court order reversing a

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[20] Although petitioner asserts in its briefing that "[c]ourts are required to defer to PERC" all of the cases cited in support of this alleged proposition contradict this position and acknowledge that any deference is not absolute. *See Municipality of Metro. Seattle v. Pub. Emp't Relations Comm'n, supra*; *City of Yakima v. Int'l Ass'n of Fire Fighters, supra*; *Pasco Hous. Auth. v. State, Pub. Emp't Relations Comm'n*, 98 Wn. App. 809, 991 P.2d 1177 (2000); *Pub. Emp't Relations Comm'n v. City of Kennewick*, 99 Wn.2d 832, 664 P.2d 1240 (1983).

[21] 128 Wn.2d 375, 907 P.2d 1204 (1995).

determination by PERC that it had jurisdiction to consider an unfair labor practice complaint. In reaching this determination, the Supreme Court followed the well-recited principle that while it generally accords considerable deference to PERC's interpretation of the law it administers, "as an administrative agency, PERC has no more authority than is granted to it by the Legislature."[22] Thus, "[d]etermining the extent of that authority is a question of law, which is a power ultimately vested in this court."[23] Similarly, in *Int'l Assoc. of Fire Fighters, Local Union 1052 v. Public Emp't Rel. Comm'n*[24], the Supreme Court vacated a superior court order upholding a PERC ruling, remanding the matter back to PERC, upon finding that the agency failed to properly employ the balancing analysis in assessing whether a subject of bargaining was mandatory. These decisions are in accord with the APA, which expressly permits a reviewing court to reverse an administrative agency order for any of a series of enumerated reasons.[25]

The petitioner advocates for a position in which only the Commission would have the authority to determine the appropriate remedy to effectuate the purpose of the collective bargaining law; however, this positon runs expressly contrary to the above-stated law and previous actions by this Court. There is not a single citation to any passage in the Court of Appeals decision suggesting that what the Court did in this case was to simply select a "better" or "more effective" remedy, as now argued by

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[22] *Local 2916 Int'l Assoc. of Fire Fighters*, 128 Wn.2d at 379.
[23] *Id.*
[24] 113 Wn.2d 197, 778 P.2d 32 (1989).
[25] RCW 34.05.570(3).

petitioner. As noted by the Court of Appeals, it expressly understood that the "means" by which the Commission may select to uphold the purpose and policy of the collective bargaining statute is to be accorded considerable deference. Nevertheless, it is for the courts to determine whether the "ends" required by the legislature concerning the Commission's remedial obligations were, in fact, accomplished through its order. In this situation those ends were not satisfied. In such a circumstance, the courts are not required to defer to the agency's determination when any finding or order fails to adhere to legislative directives in the statute.

In this situation, the Court of Appeals appropriately determined that no deference was warranted to the Commission's decision because that decision failed to carry out the statutory mandate in chapter 41.56 RCW. In particular, the statute mandates that the Commission "issue appropriate remedial orders" that "will effectuate the purposes and policy of this chapter, such as the payment of damages...."[26] The Commission's expertise in crafting remedies is only owed deference when the selected remedy arguably carries out the purpose of the chapter and there is only a question of gradation in terms of the remedy's effectiveness. That is not this case. If the order does not fulfill the requirements of RCW 41.56.160, not only are the courts not bound to defer to such a determination, there is in fact a legal obligation by the courts to modify the remedy in order to carry out this statutory mandate, which is precisely what happened herein.

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[26] RCW 41.56.160.

The Commission's order failed to carry out that statutory requirement for several reasons. For one, ATU's members were not put back into a position that they would have occupied but for the employer's unlawful act. A vital purpose of the collective bargaining law is to prevent changes in mandatory subjects of bargaining absent an express agreement between the parties through the process of good faith negotiations.[27] By relieving the employer of this duty, the Commission failed to carry out this statutory mandate, which the Court of Appeals corrected.

Secondly, ATU's members were financially harmed, and the employer reaped an unlawful financial gain, as a result of the Commission's modified Order. The statute *requires* the Commission to take any affirmative action necessary, including the payment of damages, to effectuate the purposes and policy of the collective bargaining chapter. The Court of Appeals appropriately recognized that such a mandate could not be carried out, by definition, unless Kitsap Transit was required to pay restitution on all of the premium savings it achieved by its unlawful elimination of the Premera PPO plan.

Kitsap Transit is correct that the Commission is to be afforded considerable deference in *the means* it chooses to carry out its statutory mandate. But, this is not a case in which there is a dispute over which "means" best effectuated the purpose of the chapter. The point made by the Court of Appeals was that the modified order issued by the Commission *in*

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[27] *See King County*, Decision 10547-A (PECB, 2010), *citing City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655, 818 P.2d 1076 (1991).

no way fulfilled the ends required by the legislature in RCW 41.56.160. This is not a mere "word play" on the part of the Court of Appeals; rather, it aptly summarizes the precise situation in which *deference is not owed* to an administrative agency when its remedy fails to carry out a statutory mandate. Ultimately, it is the province of the courts to "say what the law is" and enforce legislative declarations when the agency fails in this regard, as occurred here.

C. The Public Interest is Not Undermined Through the Court of Appeals Requiring the Payment of Damages to Remedy an Unfair Labor Practice or Remanding the Case to PERC.

1. The Petitioner Has Failed to Identify Any Substantial Public Interest in Jeopardy as a Result of the Court of Appeals Decision

a) A Basis for Discretionary Review Includes a Showing that a Substantial Public Interest is at Issue

The Supreme Court only accepts petitions for discretionary review if the decision falls under one of the following criteria:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.[28]

The term "public interest" is defined in Black's Law Dictionary as "the general welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake in."[29]

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[28] RAP 13.4(b)(1-4).
[29] Black's Law Dictionary 1244 (7th ed. 1999).

While the Supreme Court does not appear to have adopted an explicit definition as to what constitutes "substantial public interest," review has been parsimoniously granted on this basis typically in cases affecting all similarly situated individuals in future matters or where there is confusion over the application of judicial precedent on a class of persons or cases that could impair a matter of public concern.[30]

b) There is no Substantial Public Interest in this Matter, Which Only Required the Assessment of the Appropriate Level of Damages in This Particular Case

As framed by the Court of Appeals, the fundamental question at issue in this case was whether the "Commission erroneously interpreted and applied the provisions of chapter 41.56 RCW when it declined to order Kitsap Transit to make ATU's members whole for the damages inflicted by its unfair labor practices...."[31] While the guidance and analysis offered by the Court of Appeals would expectedly influence PERC in some future cases, at its core the decision is simply about two parties, a ULP committed by the employer, and an assessment as to how to appropriately monetize the damages suffered by ATU's members in this particular matter. There is no new rule that has been promulgated by the Court of Appeals to apply to all future ULP cases, nor is the decision likely to upend the rights of all similarly situated parties in subsequent cases. The petitioner has not even

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[30] *See State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005) (determining that a case involving sentencing of drug offenders has the potential to affect every sentencing proceeding in Pierce County after a particular date); *In re Marriage of Ortiz*, 108 Wn.2d 643, 740 P.2d 843 (1987) (assessing whether escalation clauses in child support awards applied retroactively or not).

[31] *Amalgamated Transit Union, Local 1384*, 2015 Wash. App. LEXIS 775, at *2.

made a threshold showing of a public interest that is even remotely impinged upon through the Court of Appeals decision, let alone a public interest that could be considered "substantial."

2. There is No Substantial Public Interest in Permitting PERC to Choose Remedies that Are Inconsistent with Statutory Directives and Contrary to the Agency's Own Standard Remedies

a) ULP Remedial Orders Routinely Include a Requirement that an Employer Restore the *Status Quo Ante* and Make Employees Whole, Including the Payment of Damages

The State courts have repeatedly noted that PERC is to be provided considerable discretion in fashioning remedies; however, in exercising this charge the Commission has been directed to consider that the remedial aspects of PECBA "should be liberally construed to effect its purpose" when crafting orders to remedy ULP violations.[32] While the Commission is given authority to issue appropriate orders, it has been tasked to craft such awards in ways that "are consistent with the purposes of the act, and that are necessary to make [its] orders effective...."[33]

Consistent with this charge, the Commission has, on numerous occasions, commented on its remedial power and what it considers to be a "standard remedy" for a unilateral change ULP violation in contrast to what it considers "extraordinary remedies." "The standard remedy for an unilateral change unfair labor practice violation includes ordering the offending party to cease and desist and, if necessary, to restore the *status*

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[32] *Local Union No. 469, Int'l Assoc. of Fire Fighters v. City of Yakima*, 91 Wn.2d 101, 109, 587 P.2d 165 (1978).
[33] *Municipality of Metro. Seattle*, 118 Wn.2d at 634-35.

quo; make employees whole; post notices of the violation; publicly read the notice; and order the parties to bargain from the *status quo*."[34] "The purpose of ordering a return to the status quo is to ensure the offending party is precluded from enjoying the benefits of its unlawful act and gaining an unlawful advantage at the bargaining table."[35]

In contrast, "extraordinary remedies" are reserved for situations involving egregious or repetitive misconduct, including in some cases dilatory tactics if it constitutes a pattern of conduct showing a patent disregard of a party's good faith bargaining obligations.[36] The typical extraordinary remedy is awarding attorneys' fees and costs.[37] Less common extraordinary remedies include totally voiding a labor agreement, ordering.

Both categories of remedies can include monetary damages.[38] In the case of standard remedies, a make whole remedy is a form of monetary damages. "Generally, a 'make whole' remedy requires any wages, benefits, or working conditions that were lost or unlawfully modified as a result of the employer's unilateral act to be restored or reinstated."[39]

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[34] *University of Washington*, Decision 11499-A (PSRA, 2013) *citing State – Department of Corrections*, Decision 11060-A; *Kitsap Transit*, Decision 11098-B citing *City of Anacortes*, Decision 6863-B (PECB, 2001).

[35] *Kitsap County*, Decision 10836-A (PECB, 2011) citing *Lewis County*, Decision 10571-A (PECB, 2011).

[36] *See PUD 1 of Clark County*, Decision 3815-A (PECB, 1992).

[37] *See e.g. City of Bremerton*, Decision 6006-A (PECB, 1998); *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *PUD 1 of Clark County*, Decision 3815 (PECB, 1991); *City of Kelso*, Decision 2633 (PECB, 1988).

[38] *City of Tukwila*, Decision 10536-B (PECB, 2010). As noted by the Court of Appeals, the remedial provisions of chapter 41.56 RCW and the NLRA are similar, with the notable exception that RCW 41.56.160(2) specifically empowers the Commission to order monetary damages. *Compare* RCW 41.56.160 *with* 29 U.S.C. § 160(a), (c).

[39] *Kennewick Public Hospital District 1*, Decision 4815-A (PECB, 1996), citing *METRO*, Decision 2845-A (PECB, 1988).

b) The Remedy Selected by the Commission Conflicted with Statutory Requirements and the Agency's Own Guidance on its Remedial Authority

Contrary to the position of the petitioner, vacating the Commission's order does nothing to undermine the public goal of promoting collective bargaining or permitting the agency to craft appropriate remedies. In fact, the Court of Appeals decision only serves to clarify and enhance the Commission's remedial power to ensure that appropriate remedial orders are issued to effectuate the purpose of the collective bargaining statute.

The petitioner argues that while the statute authorizes the payment of damages to remedy a ULP, the imposition of such damages is not mandatory; therefore, by requiring damages in this case the Court of Appeals has somehow usurped the role of the Commission in contravention of some unstated public interest. This argument is nonsensical for two reasons. For one, both the Courts and the Commission have repeatedly determined that when an unlawful unilateral change in a mandatory subject of bargaining is committed by an employer, the standard remedy includes a restoration of the status quo and a requirement to make the employees whole, which both by statute and case precedent expressly includes the ability to order monetary damages. The only way some public interest could potentially be impaired here is if PERC itself had determined that monetary damages, or requiring the employer to restore the status quo, were somehow inconsistent with the goals of chapter 41.56 RCW. In fact, the opposite is true, as both the courts and Commission have repeatedly determined that

such remedies are not only appropriate, but are considered the "standard" remedies in cases of this nature.

Second, while monetary damages are not obligatory in every case, the Court of Appeals clearly explained why they were vital here because without them, the purpose and policy of the statute could not, by definition, be carried out. The health insurance payments to Premera were a form of wages that had been agreed upon in a collective bargaining agreement between ATU and Kitsap Transit. By unilaterally removing the plan, Kitsap Transit unlawfully withheld those wages, which wages have to be restored to remedy their unlawful removal. The evidence also demonstrated that the removal of the Premera plan caused actual damage to ATU's members and their families through the loss of the Premera medical provider network. The only way to rectify that past harm is through damage payments.

The petitioner also seeks fault in the Court of Appeals reliance on this Court's decision in *Moore v. Health Care Auth.*[40] by claiming it creates some private administrative remedy that should not otherwise be available; however, the petitioner simply misunderstands the application of this Court's decision in *Moore* to the case at hand. While *Moore* did involve a class action lawsuit by individual employees concerning the loss of health benefits, the Court of Appeals' reliance on this case was for the more limited question of how to properly monetize the loss of health benefits in the form of monetary damages. Thus, while the procedural posture of the two cases

[40] 181 Wn.2d 299, 332 P.3d 461 (2014).

was quite different, the same question over damage payments was presented to the Court of Appeals in this case. The parade of horribles listed by the petitioner that relying on *Moore* will turn PERC into a "class-action courtroom..." is simply without merit because the position misunderstands how the Court of Appeals utilized *Moore* in this case. While the fundamental legal question in this case involved an issue over the unlawful removal of a bargained-for health insurance plan, much of the damage suffered was to the individual ATU members who personally dealt with the loss of a preferred medical plan and access to vital health care services that, in some cases, had been relied on for decades.

3. Remanding the Matter Back to the Commission for Additional Fact-Finding and Issuance of a Final Remedy In No Way Impairs and Substantial Public Interest

The irony of the petitioner's final, albeit abbreviated, argument should not be lost on this Court, in which the petitioner seeks to fault the Court of Appeals for remanding the matter back to the Commission to issue a final order. In its earlier argument, the petitioner finds considerable fault in what it perceives as the lack of deference that the Court of Appeals showed toward the Commission's modified order. Yet, rather than imposing a new remedy, which was within the Court of Appeals discretion, it remanded the case back to the Commission recognizing the Commission's "substantial expertise in labor law" and noting in "our system of separated powers, the Commission has the primary responsibility for crafting

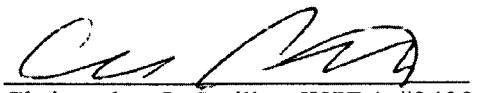
remedies."[41] Ultimately, through this course of action, the Commission will likely have the final say on the remedy.

The final point raised by the petitioner that remanding the matter back to the Commission for additional fact finding "seriously undermines the public interest" is, at best, curious since such a procedure is expressly contemplated and proscribed for in the APA.[42] The statute authorizes a court on a review petition to remand a matter back to the agency for further fact finding if new evidence becomes available relating to the validity of the agency action. Given its express allowance in the APA, it is unclear as to what public policy is seriously undermined by the Court of Appeals invoking a procedure specifically allowed for under the APA.

III. CONCLUSION

For the foregoing reasons, the Amalgamated Transit Union, Local 1384 respectfully requests that the Washington Supreme Court deny Kitsap Transit's Petition for Review.

RESPECTFULLY SUBMITTED this 12th day of June, 2015, at Seattle, Washington.



Christopher J. Casillas, WSBA #34394

[41] *Amalgamated Transit Union Local 1384*, 2015 Wash. App. LEXIS 775, at *26.
[42] RCW 34.05.562(2)(b).

DECLARATION OF SERVICE

I certify that on June 12, 2015, I caused to be filed via email and U.S. Mail the original of the foregoing *RESPONDENT/APPELLEE'S REPLY BRIEF*, and this *CERTIFICATE OF FILING & SERVICE* in the above-captioned matter. I further certify that on this same date, I caused to be served via Electronic Mail and U.S. Mail true and accurate copies of the same above-referenced documents on the party below:

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Attorney's for Petitioner-Appellant
Kitsap Transit

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

DATED at Seattle, Washington, this 12th day of June, 2015.

Silvia Bass, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Silvia Bass
Cc: Chris Casillas
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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Silvia Bass [mailto:SBass@clinelawfirm.com]
Sent: Friday, June 12, 2015 2:24 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Chris Casillas
Subject: Respondent-Appellee's Reply Brief:
Importance: High

Re: Kitsap Transit v. State of Washington Public Employment Relations Commission and Amalgamated Transit Union, Local 1384
Supreme Court No. 91697-7

Good afternoon:

Enclosed please find Respondent-Appellee's Reply Brief in the above matter.

Regards,

Silvia Bass

Silvia Bass, Legal Assistant
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