Supreme Court No. 91697-7
Court of Appeals No. 45687-7-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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Kitsap Transit, Respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

Kitsap Transit seeks review of the decision of Division Two of the Court of Appeals, filed April 14, 2015, in *Amalgamated Transit Union, Local 1384 v. Kitsap Transit & the Public Employment Relations Commission,* 2015 WL 1730693 (Wash. App. Div. 2, April 14, 2015) (No. 45687-7-II. *See* Appendix ("App.") at 1-9.

III. ISSUES PRESENTED FOR REVIEW

Whether the Court should accept discretionary review of the decision of the Court of Appeals, Division II, where:

1. Contrary to this Court's direction, the Court of Appeals failed to accord deference to the expertise of the Public Employment Relations Commission ("Commission" or "PERC"), and instead substituted its judgment for that of the Commission on the question of the appropriate remedy for an unfair labor practice.

2. The Court of Appeals' determination regarding what constitutes an appropriate remedy for the unfair labor practice is contrary to the substantial public interest in allowing the part-time Commission to use its expertise in labor relations to impose remedies focused on the public goal of encouraging bargaining, rather than the purely private interests of individual employees.

3. The Court of Appeals' determination that the case should be remanded to the Commission for further fact-finding negatively impacts the substantial public interest in timely and final resolution of matters by administrative agencies, as reflected in RCW § 34.05.062(2).

IV. STATEMENT OF THE CASE

A. Kitsap Transit Lawfully Bargains with the Teamsters and Machinists to Change Health Insurance Plans.

Kitsap Transit negotiates five labor contracts: a vehicle maintenance contract with the Teamsters and the Machinists, a facilities-maintenance contract, a worker/driver contract negotiated with the Teamsters, and Routed and ACCESS contracts negotiated with ATU. AR 661[1]. In 2010, all Kitsap Transit employees had the choice of two health insurance plans: a Premera preferred provider option ("PPO") plan or a Group Health HMO plan. AR 667 at 6-17; AR 154, 436. Group Health's benefit levels were "richer" than Premera's. AR 439-40, 491.

From 2009, Kitsap Transit faced serious financial challenges. AR 661-64, 1723 *et seq.* The Teamsters' bargaining representative told Kitsap Transit management that the Teamsters could offer a PPO plan at a lower price. *Id.*; AR 592, 595, 600; AR 674 at 16-24; AR 596-97; AR 615 at 16-21; *see also,* AR 618. During negotiations with the Teamsters and Machinists in September 2010, Kitsap Transit offered to pay those

[1] The "AR" references in this brief are to the Administrative Record. *See* CP 27 (Certification of Record).

represented employees an incentive to switch to a less costly plan. AR 609. The Teamsters and Machinists voted in favor of the incentive and lower-cost plan. AR 609, 1759, 676-77. While the Teamsters tried to find a comparable PPO plan for all Kitsap Transit employees, the Teamsters and Machinists ultimately chose a Machinists' plan, which was not available to employees outside of the two units. AR 747, 599-601.

B. Kitsap Transit Cannot Maintain a PPO Plan for ATU.

When it appeared that the Machinists and Teamsters groups were going to switch to the Teamsters plan, Kitsap Transit's insurance broker asked if Premera would continue providing its PPO plan for the 59 ATU members on the plan. AR 368, 434-36, 461-62, 1085. Around September 29, 2010, Premera conveyed that it would not provide coverage for ATU because more than 50% of the ATU group were in Group Health. AR 1086, 680-81, 463-64. After that, Premera was never willing to cover the ATU employees alone. AR 464 at 2-8.

While the Teamsters were exploring whether their plan could be extended to ATU, Kitsap Transit asked the broker to find a comparable PPO for ATU. AR 1086-89, 680-83. Based on their communications, Kitsap Transit believed that the broker would be able to find a comparable PPO option for ATU. AR 685-86, 1088-89, 1100-02.

On November 4, the broker reported that he was out of options. AR 475-77, 1117-23. As soon as Kitsap Transit learned that it may not be able to offer a PPO plan to ATU for 2011, Kitsap Transit informed ATU. AR 691, 1124. ATU responded, "Please confirm that Premera will continue to be available (or another carrier at the same benefit level) if employees do not want to switch." AR 1126.

Kitsap Transit did not stop trying to bargain a solution with ATU. *E.g.*, AR 1181-87. ATU insisted that Kitsap Transit had "the ability to return to the status quo but [had] refused to do so." AR 1181. On the contrary, Premera was no longer an option, as a result of bargaining between Kitsap Transit and bargaining units that resulted in agreements to select different insurance. AR 1086-87, 1118-23. As of February 14, 2012, the last hearing day before the PERC Hearing Examiner, Kitsap Transit was still bargaining with ATU to find another PPO plan. AR 773.

C. Procedural History.

1. PERC Hearing Examiner Decision.

On June 1, 2011, ATU filed an unfair labor practice complaint with the PERC. AR 41-74. ATU alleged, in part, that Kitsap Transit made an unlawful unilateral change by removing the PPO plan option without providing ATU with an opportunity to bargain. AR 41-59. Kitsap Transit denied that it unlawfully unilaterally made a change to a mandatory subject of bargaining; rather, it contended that it engaged in

lawful actions with respect to employees not in the ATU bargaining unit (unrepresented employees and employees represented by the Machinists and Teamsters) in order to attain savings with respect to their healthcare benefits. AR 98-101; 1841-45. As a result, while Kitsap Transit was fully committed to maintaining a comparable PPO plan for ATU employees, no insurer was willing to provide a plan to cover that group. AR 1845-51. Kitsap Transit thus raised a "business necessity defense" to the unfair labor practice charge; *i.e.,* that it was impossible for it to continue to provide ATU employees with the Premera PPO plan. AR 112.

Following a hearing, the PERC Hearing Examiner concluded that Kitsap Transit had refused to bargain by unilaterally discontinuing the Premera PPO plan (Conclusion of Law No. 3) and rejected Kitsap Transit's business necessity defense. AR 1869-70, 1982-93, 1904. The Hearing Examiner imposed the following remedy:

> 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.
>
> 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 1905-06.

2. The Commission Overturns the Hearing Examiner's Remedy.

Kitsap Transit appealed to the full Commission. AR 1911-14. The Commission agreed with the Hearing Examiner on the merits, but found that the remedy was punitive: "The remedy ordered by the Examiner is not purely remedial in nature; therefore, we modify the remedy." AR 1973. In addition, the Commission concluded, based on the evidence in the record, that it could be impossible for Kitsap Transit to reinstate a comparable PPO plan. AR 1984-85. The Commission modified the remedy to require Kitsap Transit to "reimburse the employees 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.

3. Thurston County Superior Court Affirms the PERC's Remedy and Rejects ATU's Effort to Introduce New Evidence.

ATU filed a petition for review of the remedy with the Thurston County Superior Court. CP 6. ATU did not assign error to any of the

findings of fact. CP 5-6. In conjunction with the filing of its reply brief to the superior court, ATU filed a Motion to Submit New Evidence in which it asked the court to either accept new evidence or remand the matter for the PERC to consider new evidence. CP 176-82. Specifically, ATU asked the court to consider a November 2013 declaration from ATU's President asserting that the employer was able to find a PPO plan to offer as early as November 2012, that a comparable PPO Plan was implemented in summer 2013, and that the PPO plan agreed to the parties in October 2013 has "long been made available to employers extending back to the time this ULP was committed." CP 187. ATU argued that this evidence undermined one of the Commission's rationales for modifying the remedy (*i.e.,* that the implementing a comparable PPO plan may have been impossible). AR 178-80.

By Order dated November 15, 2013, the court denied the motion to submit new evidence. CP 409. The court affirmed the decision of the PERC and dismissed the petition for review. CP 411. ATU appealed both orders of the superior court.

4. The Court of Appeals Reverses the Superior Court's Decision and Remands to PERC.

Division II held that the superior court erred when it denied ATU's motion to remand the matter back to the Commission for further fact-finding. App. at 2. The court concluded that the evidence "related to the

validity of the Commission's decision at the time if was taken," and that ATU was under no duty to have discovered or presented the evidence earlier. *Id.* at 5. It also held that 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 . . . ." *Id.* at 2, 9. It thus reversed the superior court's decision upholding the Commission's order and remanded the matter to the Commission for further proceedings consistent with its opinion. *Id.* The court's guidance included that a make-whole remedy "requires damages payments based on the premium differentials," and that "the Commission must order those payments unless compliance would prove impossible." *Id.* at 8.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals Substituted its Judgment for That of PERC With Respect to the Appropriate Remedy, Contrary to Multiple Decisions of This Court.

1. Courts are required to defer to PERC in the area of remedies.

PERC derives its power to fashion appropriate remedies from RCW § 41.56 (Public Employees' Collective Bargaining Act) and RCW § 41.58 (Public Employment Labor Relations Act, the statute that created the Commission). *Municipality of Metro. Seattle v. Pub. Emp't Relations Comm'n,* 118 Wn.2d 621, 633, 826 P.2d 158 (1992). The purpose of the

Public Employees' Collective Bargaining Act is to implement "the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers." RCW § 41.56.010; *City of Yakima v. Int'l Ass'n of Fire Fighters,* 117 Wn.2d 655, 671, 818 P.2d 1076 (1991). PERC is the exclusive body created to carry out this purpose. RCW § 41.58.005(3).

Accordingly, PERC "enjoy[s] substantial freedom in developing remedies." *Metro.,* 118 Wn. 2d at 634-35. As this Court explained in *Arnett v. Seattle General Hospital,* 65 Wn.2d 22, 29, 395 P.2d 503 (1964) (citation omitted), "[t]he relation of remedy to policy is peculiarly one for the administrative agency and its special competence, at least the agency has the primary function in this regard . . . ." In other words, "PERC thus has authority to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful." *Metro.,* 118 Wn.2d at 634-35.

This Court and Washington appellate courts have recognized repeatedly that labor relations are best managed by giving the Commission extensive authority to fashion equitable remedies, and "severely limiting judicial review." *Pasco Hous. Auth. v. State, Pub. Emp't Relations*

Comm'n, 98 Wn. App. 809, 813, 991 P.2d 1177 (2000); *Arnett,* 65 Wn.2d at 28 (citation omitted)). This "limited" review means that, if there was an unfair labor practice, Washington appellate courts will affirm unless the remedy is clearly outside the Commission's power. *Pub. Emp't Relations Comm'n v. City of Kennewick*, 99 Wn.2d 832, 841, 664 P.2d 1240 (1983) ("a superior court has jurisdiction to engage in a *limited* judicial review to determine whether the remedial order is enforceable").

2. The Court of Appeals improperly substituted its judgment for that of PERC.

After giving a nod to the standard of deference granted to the Commission in the area of remedies, the Court of Appeals ignored that standard in expounding its opinion regarding what remedy would best effectuate the purposes of the Public Employees' Collective Bargaining Law. App. at 6. In addition, the court chastised PERC for its determination that the Hearing Examiner's remedy was not consistent with the policy and purposes of the law. *Id.* In so doing, the Court of Appeals stepped well beyond the bounds of limited review directed by this Court, and instead substituted its judgment for that of the Commission.

In determining that it need not defer to PERC's chosen remedy, the Court of Appeals asserted that, "while we owe deference to the *means* the Commission employs to accomplish its statutory duties, we owe no deference in determining whether the Commission's remedial choices

accomplish the *ends* the legislature required the Commission's remedial powers to serve." *Id.* at 6. The Court of Appeals' rationale is little more than word play. The remedy chosen by the Commission to address an unfair labor practice is a key element of its enforcement mandate, which cannot be severed from its policy judgment. As this Court said in 1964, "The relation of remedy to policy is peculiarly a matter for administrative competence, and the rule is that courts must not enter the allowable area of the board's discretion." *Arnett,* 65 Wn.2d at 28 (citation omitted); *accord, State ex rel. Wash. Fed'n of State Emp., AFL-CIO v. Bd. of Trs. of Cent. Wash. Univ.,* 93 Wn.2d 60, 69, 605 P.2d 1252 (1980) ("The relation of remedy to policy is peculiarly a matter of administrative competence."); *see also Bellevue v. Int'l Ass'n of Fire Fighters,* 119 Wn.2d 373, 381, 831 P.2d 738 (1992) ("Because of the expertise of PERC's members in labor relations, ... the courts of this state give 'great deference' to PERC's decisions and interpretations of the collective bargaining statutes."); *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 506, 833 P.2d 381 (1992) ("where 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").

The "ends" served by the Public Employees' Collective Bargaining Act are set forth in the law:

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

RCW § 41.56.010. This Court has recognized: "The Legislature has delegated to PERC the delicate task of accommodating the diverse public, employer and union interests at stake in public employment relations." *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Comm'n,* 113 Wn.2d 197, 203, 778 P.2d 32 (1989). *See also, City of Kennewick,* 99 Wn.2d at 837 ("RCW § 41.56 established the Commission as the forum for implementing the legislative goal of peaceful public employment relations."). The Commission is empowered to choose which "means" (*i.e.*, remedies) it believes will best "effectuate the purposes and policy of this chapter." RCW § 41.56.160(2). That is, the Commission, not the courts, has the expertise to decide what "means"/remedy best serves the "end"/purpose of "promot[ing] the continued improvement of the relationship between public employers and their employees . . . ." RCW § 41.56.010.

Based on its expertise in labor relations, the Commission decided that the remedy imposed by the Hearing Examiner was punitive. CP 21.[2] The Commission explained that "it is not the role of the Commission to grant as remedies that which could not be obtained at the bargaining table." *Id.* In other words, while ATU was free to demand in bargaining the payment as wages of all savings resulting from the elimination of the Premera PPO plan, AR 701, 1163, 1170-71, it could not impose that result. *See* RCW § 41.56.030 (while parties are required to "confer and negotiate in good faith, . . ." "neither party shall be compelled to agree to a proposal or be required to make a concession"); *see also, Int'l Ass'n of Fire Fighters, Local 4033 v. Island County Fire District 1,* 2007 WL 4111402, at *3 (Wash. Pub. Emp't Relations Comm'n 2007) ("the obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives. . . .").

The Court of Appeals gave no deference to the Commission's determination of the appropriate remedy. While it remanded the case to the Commission for imposition of a new remedy, it direction to the

[2] The Commission also concluded that an "extraordinary" remedy was not appropriate because, while it rejected Kitsap Transit's business necessity defense, the defense was not frivolous, and there was no "pattern of conduct showing a patent disregard for its good faith bargaining obligation." CP 20-21.

Commission is so prescriptive that, as a practical matter, the Commission will be left with no discretion to fashion a remedy. App. at 8 ("The "'most elementary conceptions of justice and public policy'" require that Kitsap Transit make ATU's members whole for the loss as best as possible; here, that requires damages payments based on the premium differentials.") (emphasis added); *see also id.* ("the Commission must order those payments unless compliance would prove impossible"). The Court of Appeals order removes from the Commission the broad discretion it is granted to apply its expertise to remedy violations of the bargaining statute that it oversees. *See Arnett,* 65 Wn.2d at 28.

B. The Court of Appeals Decision Impacts the Substantial Public Interest in Allowing PERC to Choose Remedies That Promote Public Bargaining Goals.

The Commission recognized that it is not the role of the Commission to grant as remedies that which cannot be obtained at the bargaining table. CP 21. It chose a remedy that it believed would "effectuate the purposes of the collective bargaining statute." *Id.* at 20. The Court of Appeals instead directed as an "appropriate remedy" one that was derived from a class action asserting claims on behalf of individual employees. While the Commission's standard remedy includes "making employees whole," *Wash. Fed'n of State Emps. v. Univ. of Wash.,* No. 24344-U-11-6238, 2013 WL 3322566, at *6 (Wash. Pub. Emp't Relations Comm'n, June 24, 2013), the mandate of the Commission is not to award

damages for individual employee claims. The Commission should be allowed to impose remedies it believes best serve the *public goal* of collective bargaining.

The purpose of the Public Employees' Collective Bargaining Act is to recognize and implement right of public employees to be represented by labor organizations and to participate in collective bargaining with respect to matters concerning their employment relations. *City of Yakima,* 117 Wn.2d at 671. The Commission is empowered to referee the good faith bargaining required by the statute and to issue remedies that will "effectuate the purposes and policies of [the law]." RCW § 41.56.160(2).

While the Commission is authorized to order remedies "such as the payment of damages," it is not required to do so. *See id.* Contrary to the Court of Appeals' opinion, it is certainly not "required" to impose the remedy found appropriate by this Court in the context of a class action by individual employees claiming individual damages for the unlawful denial of health benefits. *See* App. at 7-8 (*citing Moore v. Health Care Auth.,* 181 Wn.2d 299, 311-12, 332 P.3d 461 (2014)).

Moore was a class action lawsuit filed on behalf of part-time employees who were improperly denied health insurance benefits they were entitled to by statute. *Moore*, 181 Wn.2d at 302-04. The opinion by this Court addressed the proper measure of damages for the prevailing

class members. *Id.* The case before the Commission was not about individual entitlement to a particular health insurance plan; it was about whether the employer violated its duty to collectively bargain in good faith about changes to health insurance benefits. CP 1978; RCW § 41.56.150-160. The Commission thus issued a remedy that it considered appropriate to effectuate the purpose and policy of the law in response to an unlawful failure to collectively bargain regarding a change in "insurance plan options," where it also found that the employer's business necessity defense "was not frivolous" and there was no evidence of a pattern of disregarding the good-faith bargaining obligation. AR 1984.

The Commission's decision is consistent with long-standing federal recognition that labor laws are aimed at promoting public policy, as opposed to purely private interests. This Court has recognized that Washington's Public Employees' Collective Bargaining Act, RCW § 41.56, is substantially similar to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1976), (Pub.L.No. 74-198, 49 Stat. 449 (July 5, 1935, as amended). *State ex rel. Wash. Fed'n of State Emp., AFL-CIO,* 93 Wn.2d at 67-68. In construing state labor acts similar to the NLRA, decisions under that act, while not controlling, are persuasive. *Id.* (citing *Spokane Educ. Ass'n v. Barnes,* 83 Wn.2d 366, 375, 517 P.2d 1362 (1974); *Arnett,* 65 Wn.2d 22, 28, 395 P.2d 503 (1964)).

Like the Commission, the NLRB is empowered to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C.A. § 160 (emphasis added). Federal courts recognize that the NLRB is not providing a "private administrative remedy," but is acting in the public interest to prevent unfair labor practices and ensure overall industrial harmony through efficient use of Board resources. *See Amalgamated Util. Workers v. Consol. Edison Co.,* 309 U.S. 261, 264-65, 267-69, 60 S. Ct. 561, 84 L.Ed. 738 (1940); *Oshkosh Truck Corp. v. N.L.R.B.*, 530 F.2d 744, 748 (7th Cir. 1976). Accordingly, "[p]rivate rights must give way when the Board reasonably determines that the purposes of the Act are best served by settlement." *George Ryan Co., Inc. v. N.L.R.B.,* 609 F.2d 1249, 1252 (7th Cir. 1979) (citation omitted).

The difference in focus between the public goal of promoting collective bargaining versus litigation about individual rights and damages, results in a completely different evidentiary hearing. In *Moore*, evidence in the record included expert evidence about "long term consequences, both medical and financial, to uninsured individuals." *Id.* at 313. The focus before the Commission is whether a change in working conditions without bargaining is "material." *Chelan Cnty. Deputy Sheriff's Ass'n v. Chelan Cnty.,* Case No. 11787-U-95-2772, 1996 WL

586493, at *3 (Wash. Pub. Emp't Relations Comm'n Sept. 1, 1996) ("for a unilateral change to be unlawful, it must be 'material, substantial, and significant'") (citation omitted). Unlike the employees in *Moore,* Kitsap Transit employees were not deprived of health insurance benefits. On the contrary, they had access to a Group Health plan. AR 439-40, 491. The evidence of materiality was based on the testimony of two employees, who addressed short-term impacts of transitioning to a new health insurance plan. AR 1903, 379-80, 396-98, 385-87, 389-90. Requiring the Commission to impose individual damage remedies risks turning the Commission into a class-action courtroom, which is far beyond the scope of activity envisioned for this part-time commission. *See* RCW § 41.58.015.

In addition, requiring a remedy that mirrors damages in an individual rights lawsuit *undermines* the bargaining process. The remedy chosen by the Commission put the parties back at the bargaining table negotiating about health insurance benefits for the ATU members, while compensating individual members for any out-of-pocket costs. The remedy endorsed by the Court of Appeals gives represented employees an incentive *not to bargain* by giving the employees, who were never without insurance, an ongoing monetary payment that they never would have received through the bargaining process. They would continue to receive

that until the union agreed to another health insurance plan (or the employer was able to find a comparable PPO plan). Since agreement on a comparable plan would mean the end of the windfall payments, the remedy gives the union an incentive to delay bargaining and resolution.

By insisting that the Commission must impose damages attainable in lawsuit asserting individual claims, the Court of Appeals failed to recognize that the Commission is empowered to decide what remedies will best serve the public interest in harmonious labor relations.

C. The Order Remanding for Additional Fact-Finding Implicates the Substantial Public Interest in the Finality of Administrative Proceedings.

The Court of Appeals ordered the matter remanded back to the Commission for additional fact-finding on the question of whether it was impossible for Kitsap Transit to find a comparable PPO plan, determining that the evidence met the standard of RCW § 34.05.562(2)(b). App. at 5-6. The evidence does not meet the requirement that the party offering it "did not know and was under no duty to discovery or could not have reasonably have been discovered until after the agency action . . . ." RCW § 34.05.562(2)(b). As a result, introduction of the offered evidence is nothing more than a post-hoc attempt to develop new grounds to challenge the Commission's remedy decision. Allowing the introduction of such evidence after an agency has acted seriously undermines the public

interest in efficiency and finality of agency proceedings, as reflected in the Administrative Procedures Act, RCW § 34.05.

VI. CONCLUSION

For the foregoing reasons, pursuant to RAP 13.4(b)(1) & (4), Kitsap Transit respectfully requests that the Washington Supreme Court grant this Petition for Review of the Court of Appeals decision.

DATED this 16th day of May, 2015.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Petition for Review to be served by email and hand delivery, addressed to the following:

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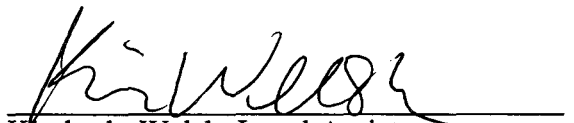
DATED this 14th day of May, 2015.



Kimberly Welsh, Legal Assistant

4839-5032-2723, v. 1

APPENDIX

2015 WL 1730693
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 2.

AMALGAMATED TRANSIT UNION, LOCAL 1384, Appellant,
v.
KITSAP TRANSIT and the Public Employment Relations Commission, Respondents.

No. 45687–7–II. | April 14, 2015.

Synopsis

Background: Transit union sought judicial review of order of Public Employment Relations Commission finding that public transit employer had committed unfair labor practices, but modifying hearing examiner's monetary remedies as punitive. Union also moved to supplement the record with additional evidence. The Superior Court, Thurston County, Christopher Wickham, J., denied motion and affirmed Commission's order. Union appealed.

Holdings: The Court of Appeals, Bjorgen, A.C.J., held that:

[1] court abused its discretion by denying union's motion to supplement the record, and

[2] Commission acted improperly by not restoring union members to status quo, requiring remand to Commission.

Reversed and remanded.

West Headnotes (6)

[1] **Appeal and Error**

Court of Appeals reviews a trial court's denial of a motion to supplement the record for an abuse of discretion.

Cases that cite this headnote

[2] **Administrative Law and Procedure**

Court of Appeals reviews a Public Employment Relations Commission order under the standards prescribed by the Administrative Procedures Act, applying those standards directly to the record before the agency. West's RCWA 34.05.

Cases that cite this headnote

[3] **Administrative Law and Procedure**

Court of Appeals reviews de novo claims that the Public Employment Relations Commission erroneously interpreted or applied the law.

Cases that cite this headnote

[4] **Labor and Employment**

Court of Appeals reviews the Public Employment Relations Commission's interpretation of a statute under the error of law standard, which allows an appellate court to substitute its own interpretation of the law for the Commission's; although Court will still give the Commission's interpretation of a statute great weight and substantial deference because of the expertise the Commission has developed administering the statute.

Cases that cite this headnote

[5] **Labor and Employment**

Trial court abused its discretion by denying transit union's motion to remand matter back to Public Employment Relations Commission for further fact finding, where union's evidence with which it sought to supplement the record, describing public employer's attempts during pendency of its appeal before full Commission, to locate a substantially equivalent health insurance plan to replace the one employer had unilaterally altered, contradicted Commission's conclusion that employer could not possibly

obtain such a health plan. West's RCWA 34.05.562(2)(b).

Cases that cite this headnote

[6] Labor and Employment

Public Employment Relations Commission acted improperly by not ordering public transit employer to make transit union's members whole, for damages inflicted by its unfair labor practice of unilaterally altering health insurance options available to members without either having successfully bargained to do so or having received an arbitrator's award, requiring remand to Commission to make proper remedial measure determination. West's RCWA 41.56.160.

Cases that cite this headnote

Appeal from Thurston Superior Court; Hon. H. Christopher Wickham, J.

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PUBLISHED OPINION

BJORGEN, A.C.J.

***1** ¶ 1 The Amalgamated Transit Union, Local 1384(ATU) appeals superior court orders (1) denying its motion to supplement the record in its appeal of a decision and order by the Public Employment Relations Commission (Commission) and (2) affirming the Commission's order. The Commission's order found that Kitsap Transit had committed two unfair labor practices related to the loss of one of the two health insurance options ATU's members had obtained through collective bargaining with Kitsap Transit, but ordered remedial measures that ATU contends were legally inadequate.

¶ 2 On appeal, ATU contends that (1) the superior court abused its discretion when it declined either to receive new evidence when considering ATU's petition for review or to remand the matter back to the Commission for further fact finding, (2) the Commission acted arbitrarily and capriciously and made factual findings unsupported by the record when determining that Kitsap Transit could not comply with an order requiring it to restore the lost health insurance option, and (3) the Commission erroneously interpreted or applied the provisions of chapter 41.56 RCW and acted arbitrarily and capriciously when it (a) declined to order Kitsap Transit to restore the lost health insurance option and (b) failed to order Kitsap Transit to pay monetary damages sufficient to make ATU's members whole for the loss of the health insurance option.

¶ 3 We hold that the superior court erred when it denied ATU's motion to remand the matter back to the Commission for further fact finding. We hold also that 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 and that the superior court therefore erred in upholding that commission action. Consequently, we reverse the superior court's decision upholding the Commission's order and remand this matter to the Commission for further proceedings consistent with this opinion.

FACTS

¶ 4 ATU and Kitsap Transit agreed to the collective bargaining agreements relevant to this appeal in 2004 and 2005. Under these agreements and past practice between the parties, Kitsap Transit provided ATU's members with two health insurance options. One was a preferred provider organization (PPO) plan offered by Premera Blue Cross. The second was a health maintenance organization (HMO) plan provided by Group Health. The HMO plan resulted in less out-of-pocket expense for ATU's members, but the PPO plan offered them a broader, national network of physicians and allowed enrolled workers to see a specialist without first obtaining a referral from a primary care physician.

¶ 5 In 2007 and 2008, the collective bargaining agreements between ATU and Kitsap Transit expired. ATU and Kitsap Transit tried and failed to negotiate successor agreements, eventually bargaining to an impasse. Because ATU's

members were eligible for interest arbitration under state law, RCW 41.56.492, that impasse triggered mandatory arbitration proceedings. RCW 41.56.450.

***2** ¶ 6 State law also froze the terms of employment of ATU members during the pendency of the arbitration, preventing both ATU and Kitsap Transit from unilaterally changing the "existing wages, hours, and other conditions of employment."RCW 41.56.470. Because the Commission's precedent "has long recognized that health insurance benefits are a form of wages,"*Yakima County Law Enforcement Guild v, Yakima County,* No. 19234–U–05–4887, 2006 WL 1547092, at *1 (Wash. Pub. Emp't Relations Comm'n June 2, 2006), RCW 41.56.470 prevented Kitsap Transit from unilaterally altering the health insurance options available to ATU's members without either successfully bargaining to do so or receiving an arbitrator's award. [1]

¶ 7 By 2010 Kitsap Transit was experiencing budget shortfalls and facing service cuts. Its director of human resources, Jeff Cartwright, began looking for potential cost savings to alleviate these financial pressures. Cartwright determined that, although roughly equal numbers of ATU's members chose the PPO and HMO options, the PPO option cost Kitsap Transit over a million dollars more a year. Cartwright asked Kitsap Transit's insurance broker to look for a cheaper PPO option.

¶ 8 Cartwright then took the step that ultimately caused Premera to refuse to continue covering ATU's members with the PPO plan. Cartwright offered incentives to PPO members to abandon the plan, even though the insurance broker warned that decreasing the number of Kitsap Transit workers covered by Premera could make the pool of insured workers so small as to make coverage uneconomical for Premera. Eventually, as the broker had warned, so few of Kitsap Transit's employees chose PPO coverage that Premera withdrew its bid to continue PPO coverage for ATU's members in 2011.

¶ 9 The search by Kitsap Transit's insurance broker for other, comparable PPO coverage proved futile. Consequently, ATU members lost the ability to choose PPO coverage for 2011, and all ATU members received HMO coverage.

¶ 10 ATU responded by filing a complaint with the Commission alleging, among other things, that Kitsap Transit had violated RCW 41.56.140(4) by refusing to engage in collective bargaining with it by unilaterally taking the steps resulting in the elimination of the PPO coverage.

¶ 11 The parties contested ATU's allegations before one of the Commission's hearing examiners. Ultimately, the examiner determined that Kitsap Transit had refused to bargain with ATU when it caused the loss of PPO coverage for ATU's members.

¶ 12 The examiner, in her remedial order, required Kitsap Transit to cease and desist its unlawful labor practices and to take affirmative action "to effectuate the purposes and policies of Chapter 41.56 RCW." Administrative Record (AR) at 1905. Among these affirmative acts, the examiner ordered Kitsap Transit to:

> [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.
>
> ***3** [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).

¶ 13 Kitsap Transit appealed to the Commission, arguing that the examiner had erred by finding it had committed the unfair labor practice, by rejecting its excusal defense, and by ordering monetary remedies that amounted to an impermissible windfall for ATU's members. The Commission rejected Kitsap Transit's first two claims and affirmed the examiner's conclusion that Kitsap Transit had committed unfair labor practices. However, the Commission determined that compliance with the examiner's order to reinstate the PPO coverage could prove impossible and agreed with Kitsap Transit that the examiner's monetary remedies were punitive. Accordingly, the Commission

adopted the examiner's findings of fact, conclusions of law, and order, but modified the remedies section set out above so that

I. Paragraph 2 a. is stricken.

II. Paragraph 2 b. is modified as follows:

b. Make bargaining unit employees who were formerly covered under the Premera PPO plan whole for their losses incurred as a result of the employer's unilateral elimination of the Premera PPO plan. The employer shall reimburse the employees 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. We order the employer to make these reimbursements from the date the employer unilaterally stopped offering the PPO plan until the parties negotiate, and implement, a good faith agreement or obtain, and implement, an award from an interest arbitrator on health insurance coverage.

AR at 1986.

¶ 14 ATU petitioned the superior court for review of the Commission's order, contending that the Commission erroneously interpreted or applied the law, acted arbitrarily and capriciously, and made factual findings unsupported by substantial evidence. To remedy these errors, ATU sought reinstatement of the examiner's remedial order.

¶ 15 In conjunction with its appeal of the Commission's order, ATU moved in the superior court to supplement the record with additional evidence, either through its admission in superior court or through a remand to the Commission for further fact finding. ATU's evidence showed that, subsequent to the examiner's decision but before the Commission's, Cartwright informed it that he had located a health plan he considered comparable to the lost PPO coverage. After the Commission's decision, Kitsap Transit made the coverage available to ATU's members, with ATU's assent. Eventually ATU's bargaining units ratified new collective bargaining agreements that allowed ATU's members to choose the new PPO-like coverage or the HMO coverage. ATU contended in superior court that this evidence showed the Commission had erred in finding that it might be impossible for Kitsap Transit to restore the lost PPO coverage or its substantial equivalent.

*4 ¶ 16 The trial court denied ATU's motion to supplement the record and affirmed the Commission's order. ATU appealed.

ANALYSIS

¶ 17 On appeal, ATU claims that the superior court erred in (1) denying ATU's motion to supplement the record, (2) determining that compliance with an order to restore PPO coverage was impossible, and (3) striking the examiner's order requiring Kitsap Transit to restore substantially equivalent PPO coverage and pay affected ATU members damages based on its premium savings.

¶ 18 We agree that the superior court's decision not to remand this matter to the Commission with orders to perform further fact finding was erroneous and that the Commission's remedies were an erroneous application of RCW 41.56.160(2). Accordingly, we vacate the Commission's order and remand this matter back to the Commission for further proceedings consistent with this opinion. [2]

I. STANDARD OF REVIEW

[1] ¶ 19 We review a trial court's denial of a motion to supplement the record for an abuse of discretion. *Samson v. City of Bainbridge Island,* 149 Wash.App. 33, 65, 202 P.3d 334 (2009)."A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons."*McCoy v. Kent Nursery, Inc.,* 163 Wash.App. 744, 758, 260 P.3d 967 (2011).

[2] ¶ 20 We review a commission order "under the standards prescribed by the [Administrative Procedures Act, chapter 34.05 RCW (APA)],"*City of Vancouver v. Pub. Emp't Relations Comm'n,* 180 Wash.App. 333,347, 325 P.3d 213 (2014), applying those standards directly to the record before the agency.*City of Federal Way v. Pub. Emp't Relations Comm'n,* 93 Wash.App. 509, 511, 970, 970 P.2d 752. P.2d 752 (1998). Under the APA we may grant relief from an agency order for any one of the nine reasons set out in RCW 34.05.570(3). Of these, the one relevant to our disposition of ATU's appeal is its claim that the Commission erroneously interpreted or applied the law. As the party challenging the Commission's order, ATU bears the "burden of demonstrating [its] invalidity." RCW 34.05.570(1)(a).

[3] [4] ¶ 21 We review de novo claims that the Commission erroneously interpreted or applied the law. *City of Vancouver,*

180 Wash.App. at 347, 325 P.3d 213. We review the Commission's interpretation of the provisions of chapter 41.56 RCW under the error of law standard. *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wash.App. 409, 97 P.3d 17 (2004). Under this standard, we "may substitute our interpretation of the law for the Commission's, although we give the Commission's interpretation of chapter 41.56 RCW great weight and substantial deference" because of the expertise the Commission has developed administering the chapter. *City of Vancouver,* 180 Wash.App. at 347, 325 P.3d 213.

II. MOTION TO SUPPLEMENT THE RECORD

¶ 22 The APA permits supplementation of an administrative record in two ways: through a trial court's acceptance of new evidence or a trial court's order remanding a matter back to the agency for further fact finding. RCW 34.05.562(1), (2). ATU contends that the trial court abused its discretion by denying its motion to supplement the record through either of these means. We agree as to the second means; the trial court abused its discretion by denying the motion to remand for further fact finding.

*5 ¶ 23 As relevant, a court may receive new evidence on appeal of an administrative decision

> only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding ... [m]aterial facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1)(c). ATU's evidence did not satisfy these criteria. The Commission's order resulted from a full adjudicatory proceeding, which required a decision based on the record, RCW 34.05 .476(3), *see* WAC 391 –45–001, not from the type of proceeding that permits a court to receive new evidence during review of the agency's order. *See*RCW 34.05.010(16) (definition of a rule), .482–.491 (defining a brief adjudication). Because the superior court could not, under the APA, receive and consider the evidence, it did not abuse its discretion by declining to do so. We affirm this portion of the superior court's order denying ATU's motion to supplement the record.

[5] ¶ 24 Alternatively, a superior court is authorized to remand a matter back to the agency for further fact finding and consideration before final disposition of a petition for review if it finds that

> new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and ... the interests of justice would be served by remand to the agency.

RCW 34.05.562(2)(b). ATU argues that its evidence met this criteria. Kitsap Transit contends that it did not, because it did not relate to the validity of the Commission's decision at the time it was taken and because ATU could reasonably have discovered it before the Commission's decision. ATU is correct.

¶ 25 ATU's evidence related to the validity of the Commission's decision at the time it was taken. The evidence with which ATU sought to supplement the record described Kitsap Transit's attempts, during the pendency of its appeal to the full Commission, to locate a substantially equivalent PPO plan to comply with the examiner's order. As ATU argues, the fact that Kitsap Transit found a health insurance plan meeting the examiner's specifications, and did so before the Commission decided Kitsap Transit's appeal, contradicts the Commission's conclusion that Kitsap Transit could not possibly obtain PPO-like coverage.

¶ 26 ATU's evidence was also of the type that it was under no duty to discover or present to the Commission. The examiner had ordered Kitsap Transit to restore the coverage, and we find nothing in the record that would have alerted ATU that the Commission would consider striking that portion of the order on appeal. In fact, Kitsap Transit's appeal brief raised only three issues: whether Kitsap Transit committed unfair labor practices, whether business necessities excused the unfair labor practices, and whether the examiner's make-whole remedy was punitive. We cannot say that ATU had a duty to discover and present what would have been irrelevant evidence to the Commission on appeal.

*6 ¶ 27 For these reasons, we hold that the trial court abused its discretion by denying ATU's motion to remand this matter back to the Commission for further fact finding. We

therefore reverse the trial court's denial of ATU's motion to supplement the record, and we remand to the Commission to reconsider whether Kitsap Transit should be ordered to restore substantially equivalent PPO coverage, taking into consideration the new evidence offered by ATU, described above. [3]

¶ 28 We note also that the APA requires agencies to "include a statement of findings and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record, *including the remedy.*" RCW 34.05.461(3) (emphasis added). The examiner made no explicit finding or conclusion that ordering the reinstatement of PPO coverage would be impossible, nor did the Commission. The only mention of impossibility comes, without explanation, in the body of the Commission's decision. On remand, if the Commission affirms its finding that Kitsap Transit could not have restored PPO coverage after engaging in further fact finding, the Commission must make the findings required by RCW 34.05.461(3) so that we might understand the basis for its decision in the event of an appeal.

III. THE COMMISSION'S REMEDIAL ORDER

¶ 29 The Commission affirmed the examiner's conclusion that Kitsap Transit had committed unfair labor practices through measures it took that caused ATU's members to lose their PPO coverage. In this appeal ATU challenges the remedial measures imposed by the Commission for those unfair labor practices. We hold that the Commission's remedial order was an erroneous application of governing statutes.

¶ 30 Where the Commission finds that a party has committed an unfair labor practice, it must "issue [an] appropriate remedial order[ ]." RCW 41.56.160(1). An appropriate remedial order must require the offending party "to cease and desist from [the] unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of" chapter 41.56 RCW. RCW 41.56 .160(2).

¶ 31 Our review of the remedial measures the Commission selects to effectuate the purposes and policy of chapter 41.56 RCW is deferential. The Commission has substantial expertise in administering labor law, and the " 'relation of remedy to policy is peculiarly a matter of administrative competence.' " *Municipality of Metro. Seattle v. Pub. Emp't Relations.Comm'n,* 118 Wash.2d 621, 634, 826 P.2d 158 (1992) (quoting *State ex rel. Wash. Fed'n of State Emps. v. Bd. of Trs.,* 93 Wash.2d 60, 69, 605 P.2d 1252 (1960)). Consequently, we may not set aside the remedies ordered by the Commission because we believe others more appropriately accomplish the purposes of RCW 41.56.160; we may instead do so only where the Commission abuses the discretion granted to it by the legislature with the remedies it orders. *In re Case E–368,* 65 Wash.2d 22, 29–30, 395 P.2d 503 (1964) (quoting 2 AM.JUR.2D*Administrative Law* § 672 (1962)).

*7 ¶ 32 Our deference is not, however, unlimited. The courts, not the Commission, possess the ultimate power to "determine the purpose and meaning of statutes,"*Overton v. Economic Assistance Authority,* 96 Wash.2d 552, 555, 637 P.2d 652 (1981), and thus the power to determine the bounds of the discretion granted to the Commission with the enactment of RCW 41.56.160. *See Sure–Tan, Inc. v. Nat'l Labor Relations Bd.,* 467 U.S. 883, 900, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). [4] Accordingly, while we owe deference to the *means* the Commission employs to accomplish its statutory duties, we owe no deference in determining whether the Commission's remedial choices accomplish the *ends* the legislature required the Commission's remedial powers to serve.

¶ 33 We have already identified those ends. Orders issued under RCW 41.56.160 are intended to "restore the situation, as nearly as possible, to that which would have occurred but for the [unfair labor practice]" and must "restrain ... and remove or avoid the consequences of [an unfair labor practice]."*Municipality of Metro. Seattle v. Pub. Emp. Relations Comm'n,* 60 Wash.App. 232, 240, 803 P.2d 41 (1991), *reversed on other grounds,*118 Wash.2d 621, 826 P.2d 158 (1992). Persuasive precedent accords with this interpretation. In *Sure–Tan Inc.* the court held that the NLRA requires the NLRB to attempt "restore the situation 'as nearly as possible, to that which would have obtained but for the' " unfair labor practice and that any remedy must "be tailored to the unfair labor practice it is intended to redress." 467 U.S. at 900 (quoting *Phelps Dodge Corp. v. Nat'l Labor Relations Bd.,* 313 U.S. 177, 194, 61 S.Ct. 845, 85 L.Ed. 1271 (1941)). Similarly, the Commission has held that under RCW 41.56.160 the "standard remedy" for an unfair labor practice "includes ordering the offending party to cease and desist and, if necessary, to restore the status quo; [and to] make employees whole" for injuries caused by the unfair labor practice. *Wash. Fed'n of State Emps. v. Univ. of Wash.,*

No. 24344–U–11–6238, 2013 WL 3322566, at *6 (Wash. Pub. Emp't Relations Comm'n June 24, 2013).

[6] ¶ 34 The examiner, in keeping with this precedent, ordered Kitsap Transit to make ATU's affected employees whole by paying them the premium savings Kitsap Transit realized by switching employees from the lost PPO coverage to the remaining HMO coverage, with adjustments. The Commission struck this aspect of the order after accepting Kitsap Transit's argument that the examiner's formula created a windfall for ATU's affected workers, making the award punitive and beyond the Commission's power to order. *Deming Hosp. Corp. v. Nat'l Labor Relations Bd. (N.L.R.B.).*, 665 F.3d 196, 201 (D.C.Cir.2011) (windfall awards are punitive); *Burlington Police Emps. Guild v. City of Burlington,* No. 12587–U–96–2995, 1997 WL 394806 at *5 (Wash. Pub. Emp't Relations Comm'n 1997) (RCW 41.56.160 does not authorize punitive damage awards). In its place, the Commission ordered the County to reimburse the employees the difference between what would have been paid under the Premera PPO plan and any payments made under the HMO plan for all actual medical expenses. While agreeing that the remedial nature of RCW 41.56.160 does not authorize punitive damages, we conclude that the examiner's remedy did not award ATU's members a windfall, and therefore was not punitive, for two reasons.

*8 ¶ 35 First, under the collective bargaining agreements, ATU's members provided labor for Kitsap Transit in return for compensation. Some of this compensation came in the form of health insurance premium payments. For this reason, both judicial and commission precedent treat those premium payments as wages. *Moore v. Health Care Auth.*, 181 Wash.2d 299, 311–12, 332 P.3d 461 (2014) (citing *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 16 P.3d 583 (2001)); *Yakima County Law Enforcement Guild,* 2006 WL 1547092 at *1. Kitsap Transit wrongfully withheld those wages with its unfair labor practice. The record here documents both the number and identities of the ATU members affected by the loss of PPO coverage and the substitution of HMO coverage and the difference in premium payments between the PPO and HMO plans. As the examiner recognized, given this data it is possible to calculate with mathematical precision the wage losses inflicted on ATU's members by Kitsap Transit's unfair labor practice. The examiner's order properly compensated ATU's affected members for their actual losses and did not award a windfall; it was not punitive. *See Moore,* 181 Wash.2d at 314, 332 P.3d 461 (where monetary damages provide appropriate compensation they are, by definition, remedial and not punitive).

¶ 36 Second, apart from wage considerations, the record contains evidence that Kitsap Transit's unfair labor practice caused damage to ATU's affected members or their families. Kitsap Transit did not cross-appeal the examiner's finding of fact 32, which the Commission adopted, making it a verity on appeal. *City of Vancouver,* 180 Wash.App. at 347, 325 P.3d 213. In it, the Commission found that Kitsap Transit's unfair labor practice forced ATU's members to "chang[e] doctors and service providers" to the more limited set of health care providers covered by the HMO plan. AR at 1903. This "disrupted some patients[']care and caused delays in office visits, surgeries, and procedures," as well as "caused at least one employee's college age child to lose access to care."AR at 1903. By its nature alone, the forced change of doctors and other providers may easily disrupt or diminish an individual's care. These types of injuries are compensable using damages calculated based on the wrongfully withheld premium payments. Indeed, our Supreme Court has recently stated that doing so is the method most likely to avoid a windfall to either party. *Moore,* 181 Wash.2d at 309–14, 332 P.3d 461.

¶ 37 Nevertheless, Kitsap Transit contends that we should affirm the Commission's order for four reasons. We find each unpersuasive.

1. The Order Did Not Discharge the Commission's Statutory Duty

¶ 38 Kitsap Transit contends that our deferential review of the Commission's remedial choices requires that we affirm its order. As we have noted, we owe deference to the Commission's choice of remedies, but it is for us to determine what is necessary for the Commission to discharge its statutory obligation to issue an appropriate remedial order. The Commission's choice of remedy here fails to discharge that statutory duty in two ways.

*9 ¶ 39 First, the Commission's order does little to put ATU's affected members in the position they occupied before Premera's PPO coverage ended. At best, the Commission's order compensates ATU's members for their out-of-pocket expenses arising from the unfair labor practice. ATU's members, however, lost access to doctors they had formed relationships with, faced the disruptions and attendant delays associated with finding new doctors and, in some cases, lost access to health care. They also, as noted above, essentially

lost wages. The Commission's order is not at all "tailored" to these aspects of the unfair labor practice and leaves ATU's members in a worse position than they would have been in had Kitsap Transit not committed the unfair labor practice.*Sure-Tan,* 467 U.S. at 900.

¶ 40 Second, the Commission's order rewards Kitsap Transit for its unfair labor practices. Kitsap Transit has reaped several hundred thousand dollars in gains because of its unfair labor practice. *See* AR at 439 (Premera's cost savings per employee who lost PPO coverage), 1241–1337 (2011 health care coverage selection survey for ATU members). As ATU notes, requiring Kitsap Transit to pay restitution to those from whom it reaped these gains is necessary to restore the situation, as nearly as possible, to that which would have existed without the unfair labor practice. Failing to do so only creates an incentive to violations by allowing the wrongdoer to benefit from its wrong, a result condemned by *Moore,* 181 Wash.2d at 314, 332 P.3d 461.

2. ATU's Members Were Harmed By the Loss of the PPO Plan

¶ 41 Next, Kitsap Transit argues that, because it paid insurance premiums to insurance providers rather than ATU's members, the members never received those payments and therefore suffered no loss based on the improperly withheld premiums, making anything other than the Commission's order inappropriate. We disagree. As noted above, Kitsap Transit essentially withheld wages from ATU's members. The fact that Kitsap Transit did not make the premium payments directly to ATU's members is immaterial. Kitsap Transit made the payments for the benefit of ATU's members, and they enjoyed the fruits of these premium payments as compensation for their labor. The " 'most elementary conceptions of justice and public policy' " require that Kitsap Transit make ATU's members whole for the loss as best as possible; here, that requires damages payments based on the premium differentials. *Moore,* 181 Wash.2d at 314, 332 P.3d 461 (quoting *Wenzler & Ward Plumbing & Heating Co. v. Sellen,* 53 Wash.2d 96, 99, 330 P.3d 1068 (1958)).

3. Commission Precedent Does Not Foreclose a Remedy Based On Kitsap Transit's Premium Savings

¶ 42 Kitsap Transit argues that commission precedent forecloses the damages ATU seeks, payment based on the cost savings of its unfair labor practice, citing *Public School Employees of North Franklin / PSE v. North Franklin School District,* No. 8854–U–90–1941, 1992 WL 753248 (Wash. Pub. Emp't Relations Comm'n 1992). In that case the Commission's examiner, although noting that commission precedent forbade an employer from profiting from an unfair labor practice, refused to order the school district to pay restitution to employees based on the savings realized by the unlawful labor practice. *N. Franklin Sch. Dist.,*1992 WL 753248 at *9. The examiner based this decision on two factors. First, the school principal testified that it had saved no money due to the unfair labor practice. *N. Franklin Sch. Dist.,*1992 WL 753248 at *9. Second, the union failed to show that any of its members lost work, and therefore wages, because of the unfair labor practice. *N. Franklin Sch. Dist.,*1992 WL 753248 at *9.

***10** ¶ 43 For a number of reasons, *North Franklin School District* speaks with a faint voice in this appeal. First, the decision does not stand for the proposition that the Commission may never order damages based on cost savings and, given judicial interpretations of RCW 41.56.160, it could not. If unwinding the effects of an unfair labor practice requires the payment of damages based on cost savings, the Commission must order those payments unless compliance would prove impossible. Second, neither of the two factors that caused the examiner to decline to order payment of damages in *North Franklin School District* is present here. A reasonable inference from the testimony at the hearing is that Kitsap Transit saved considerable money from the demise of PPO coverage for ATU's members. At the very least, Kitsap Transit offered no testimony that it had not saved money. Further, the record definitively establishes the ATU members who lost insurance and the value of that loss, adjusted for mitigation. Under *Moore,* the difference between premium payments does reflect a careful and technical analysis of what ATU's members lost in terms of compensation due to the unfair labor practice. *Moore,* 181 Wash.2d at 312, 314, 332 P.3d 461.

4. NLRB Precedent Does Not Foreclose a Remedy Based on Kitsap Transit's Premium Savings

¶ 44 Finally, Kitsap Transit contends that persuasive NLRB precedent precludes payment of damages based on premium savings, citing *Keystone Steel & Wire v. National Labor Relations Board* (NLRB), 606 F.2d 171 (7th Cir.1979). In that case, the Seventh Circuit found that the NLRB's original remedy for lost health insurance coverage was too onerous and remanded for the NLRB to adopt an "appropriate and more limited remedy." *Keystone Steel & Wire,* 606 F.2d at 180. Kitsap Transit notes that the NLRB did not, either in its original opinion or on remand, require the payment of

damages based on premium savings. *See Keystone Steel & Wire,* 606 F.2d at 180; *Nat'l Labor Relations Bd. (NLRB) v. Keystone Steel & Wire,* 653 F.2d 304, 308–09 (1981).

¶ 45 We find *Keystone Steel & Wire* inapposite for two reasons. First, there is no evidence that the union in *Keystone Steel & Wire* sought damages based on premium savings or that either the NLRB or the Seventh Circuit considered the issue. The case therefore is not precedential as concerns the Commission's ability to order damages based on premium savings. *Cont'l Mut. Sav. Bank v. Elliot,* 166 Wash. 283, 300, 6 P.2d 638 (1932); Second, RCW 41.56.160(2) is broader than 29 U.S.C. section 160 in that it specifically authorizes the payment of monetary damages. Given the broader authority to remedy unfair labor practices granted by our legislature, we do not find *Keystone Steel & Wire* persuasive in Kitsap Transit's attempts to limit the Commission's remedial powers.

¶ 46 This analysis, although involved, ineluctably leads to one conclusion: the Commission's remedial order fails the requirement of RCW 41.56.160, established through the case law, to restore the situation, as nearly as possible, to that which would have occurred but for the unfair labor practice. With that, we must determine the proper remedy for that error. ATU asks us simply to reinstate the remedies ordered by the examiner. At oral argument, Kitsap Transit contended that a remand for further proceedings would be more appropriate. We agree with Kitsap Transit.

***11** ¶ 47 As we have noted, the Commission has substantial expertise in labor law developed through administering chapter 41.56 RCW. With that expertise, in our system of separated powers, the Commission has the primary responsibility for crafting remedies. We may, as we have done here, invalidate those remedies, but it is for the Commission to propose them in the first place. Given the logic of our holding here today, the examiner's remedy is certainly a permissible one. But the Commission may determine that there are others consistent with this opinion that vindicate the purposes and policies of chapter 41.56 RCW. We remand to the Commission so that it may make that determination.

CONCLUSION

¶ 48 We hold that the superior court abused its discretion when it denied ATU's motion to remand the matter back to the Commission for further fact finding. We hold also that 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 and that the superior court therefore erred in upholding that commission action. Consequently, we reverse the superior court's decision upholding the Commission's order and remand this matter to the Commission for further proceedings consistent with this opinion.

We concur: WORSWICK, and MELNICK, JJ.

Parallel Citations

2015 L.R.R.M. (BNA) 181,059

Footnotes

1 ATU did have some flexibility in choosing a provider other than Premera, so long as the level of benefits remained unchanged.

2 Our disposition of ATU's appeal on these grounds makes it unnecessary to reach the remainder of ATU's claims.

3 On any potential mootness question on remand, see *Green River Community College v. Higher Education Personnel Board,* 107 Wash.2d 427, 730 P.2d 653 (1986).

4 *Sure–Tan* involved judicial interpretation of the appropriate remedies for a violation of the National Labor Relations Act (NLRA). Federal precedent interpreting the NLRA is persuasive precedent for our court's interpretation of similar provisions of chapter 41.56 RCW. *State ex rel. Wash. Fed'n. of State Emps., AFL–CIO v. Bd. of Trs. of Cent. Wash. Univ.,* 93 Wash.2d 60, 67–68, 605 P.2d 1252 (1980). The remedial provisions of chapter 41.56 RCW and the NLRA are largely 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).

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