72104-6

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NO. 72104-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,

Appellant,

v.

FISH AND WILDLIFE OFFICERS GUILD, and PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

BRIEF OF APPELLANT

ROBERT W. FERGUSON
Attorney General

MORGAN B. DAMEROW
ASSISTANT ATTORNEY GENERAL
WSBA #27221
7141 CLEANWATER LANE SW
OLYMPIA, WA 98501
360-586-2466
OID #91032

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I. INTRODUCTION

Following negotiations for the collective bargaining agreement between the State of Washington (State) and the Washington Federation of State Employees, the Washington State Department of Fish and Wildlife (DFW) Enforcement Officers filed a petition with the Public Employment Relations Commission (Commission) to change bargaining representatives to the Fish and Wildlife Officers Guild (FWOG). The Personnel System Reform Act of 2002 (RCW 41.80) (Reform Act) requires that bargaining units with less than 500 members, like FWOG, bargain with the State as a coalition for a master agreement applicable to all coalition bargaining units. FWOG is asking this Court to overturn the Commission which correctly ruled that FWOG is a member of the Coalition agreement as required by the Reform Act and has no right to bargain independently with the State.

This Court should affirm the Commission's Decision No. 11394-B-PSRA. The Commission applied the proper legal standard and correctly interpreted the Reform Act, finding that the State had not committed an unfair labor practice (ULP), had not unfairly refused to bargain with FWOG over changes to wages and health benefits for bargaining unit members, did not insist to impasse on ground rules, and

had not unilaterally changed paid release time, thus maintaining the dynamic status quo.

II. ISSUES/ASSIGNMENT OF ERROR

A. Did the Superior Court err when it reversed the decision of the Public Employment Relations Commission finding that:

1. The Reform Act does not entitle FWOG, which represents a bargaining unit of fewer than 500 members, to negotiate a separate master collective bargaining agreement or an agreement on health benefits?

2. The Commission's decision that, for FWOG's bargaining unit, the status quo for wages, hours, and terms and conditions of employment was the terms and conditions of the Coalition collective bargaining agreement?

3. The Commission's decision that the State committed no ULP?

III. STATEMENT OF THE CASE

A. Factual Background

Collective bargaining for general government state employees is authorized by the Reform Act, codified as Title 41.80 RCW. Prior to the passage of the Reform Act Washington State general government employees had no right to engage in traditional full scope collective bargaining. The first agreements negotiated under the Reform Act became effective on July 1, 2005. The agreements track the state budget cycle and run for two years starting July 1 of every odd number year.

Administrative Record[1] (AR) 74, ¶4. The Reform Act allows bargaining representatives to engage in collective bargaining with the Governor's designee regarding wages, hours, and working conditions.

Bargaining under the Reform Act falls into two categories: 1) independent bargaining with unions representing more than 500 employees, and 2) coalition bargaining with unions, like FWOG, that represent less than 500 members. RCW 41.80.010(2)(a). With passage of the Reform Act, the Legislature established the potential for variance between represented groups, but was specific that bargaining units of less than 500 employees are subject to one bargaining agreement: the Coalition agreement.

Prior to June 24, 2011, the Enforcement Officers employed at DFW) were in a bargaining unit designated as RU-538 and were represented by the Washington Federation of State Employees, AFSCME, Council 28, AFL-CIO (WFSE). Administrative Record (AR) 194, ¶1. During 2010 and into early 2011, WFSE and the State negotiated a collective bargaining agreement (CBA) for the 2011-13 biennium.

[1] The Superior Court filed the Administrative Record from the PERC with the Court of Appeals without renumbering the administrative record provided by PERC. Accordingly, citations to the PERC administrative record are identified as AR. The parties' filings with the Superior Court were independently numbered by the King County Clerk of Court. Citations to the Superior Court filings are identified as Clerks Papers (CP). The transcript from the hearing before Honorable Judge Prochnau was also ordered and independently numbered by the court reporter. Citations to the transcript of hearing are identified as TR.

Article 42 of the 2011-13 CBA, tentatively agreed to on December 14, 2010, reduced WFSE bargaining unit members' salaries by three percent, effective July 1, 2011. AR 74, ¶5, 728. On January 5, 2011, the same compensation reductions were negotiated and tentatively agreed to in the 2011-13 CBA between the State and the coalition of bargaining units containing less than 500 members (Coalition). AR 75, ¶6, 316, 2290.

The State also negotiated an agreement with a coalition of all exclusive bargaining representatives (Health Care Coalition) on employer contributions for employee health care benefits for all represented employees. AR 75, ¶7. The agreement with the Health Care Coalition (also referred to as the "super coalition") provided that the State's share for health care premiums would be reduced from eighty-eight percent prior to January 1, 2012, to eighty-five percent after January 1, 2012. AR 840. This agreement with the Health Care Coalition was tentatively agreed to on December 2, 2010. AR 75, ¶7, 80-82, 192.

The WFSE, like other bargaining representatives, presents the negotiated tentative CBAs to its membership for ratification. The tentative CBA reached on December 14, 2010, was posted on the WFSE website, along with a summary of its significant economic provisions, including the three percent salary reduction agreed to in Article 42, and the change in health care contribution rates. AR 75, ¶ 8, 80-82. Contract

information meetings for WFSE general government members were scheduled at approximately forty-five locations throughout the state. AR 75, ¶9, 84-86. Ballots were mailed out to members the week of January 24, 2011. AR 75, ¶10, 88-89. On February 17, 2011, the ballot count was concluded and WFSE announced that its members, which still included the members now represented by FWOG, (FWOG filed its Petition to represent DFW Enforcement Officers on March 4, 2011. AR 125, ¶3.) had voted to ratify the 2011-13 CBA. AR 75, ¶11, 91. The Reform Act requires that tentative contracts be presented to the Legislature for approval or rejection. RCW 41.80.010(3). The Legislature approved and funded the WFSE CBA and the Coalition CBA in the 2011-13 budget on May 25, 2011. The Second Engrossed Substitute House Bill (2ESHB) 1087, § 908, AR 837-38. Section 922 of the same bill approved and funded the Health Care Coalition agreement for represented employees under the super coalition. 2ESHB 1087, § 922; AR 2393-95. Section 921 of 2ESHB 1087 appropriated funds for health insurance benefits for represented employees outside the Health Care Coalition, and Section 920 appropriated funds for health insurance benefits for non-represented employees.[2]

[2] The new health care benefit contributions negotiated in the Health Care Coalition CBA, and mandated by the Legislature for all represented and unrepresented general government employees, were implemented on January 1, 2012. AR 2395-96.

On the same day - May 25, 2011 - the Legislature passed a law declaring an emergency, temporarily reducing the base salaries of all state employees of the executive, legislative, and judicial branches by three percent, effective from July 1, 2011 through June 29, 2013.[3] AR 169-71.

On June 6, 2011, the WFSE disclaimed representation of the DFW Enforcement Officers. AR 126, ¶6. On June 24, 2011, following an election, the Commission issued an Interim Certification certifying FWOG as the exclusive bargaining representative. AR 126, ¶7, 202-05. FWOG's bargaining unit has fewer than 500 members. AR 195-96, ¶8.

On June 28, 2011, four days after the Commission issued its Interim Certification, and three days before the commencement of the 2011–13 fiscal biennium, FWOG submitted a letter to the then State Labor Relations Office (LRO)[4], seeking "to verify that the employer understands the need to maintain the status quo throughout this period and up until the State reaches a Collective Bargaining Agreement with the [FWOG]." AR 22-23. The LRO was and is the Governor's designee for collective bargaining with state employee unions and associations under the Reform Act. AR 1034; RCW 41.80.010(1).

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[3] The three percent compensation reduction was implemented effective July 1, 2011. AR 838.

[4] Because of agency reorganization, LRO is now known as the State Labor Relations Section (LRS) of the Office of Financial Management. LRS continues to be the Governor's designee for collective bargaining with state employees.

FWOG's June 28, 2011, letter also asserted that the salary reductions and reductions in health care contributions–which were negotiated, agreed to, and ratified while the DFW Enforcement Officers were represented by WFSE–no longer had any application following WFSE's disclaimer of representation on June 6, 2011. AR 22-23. The provisions of the 2011-13 Coalition CBA took effect on July 1, 2011, and the State applied them to DFW Enforcement Officers.

The LRO responded that FWOG was covered by the master CBA negotiated with the Coalition, pursuant to RCW 41.80.080(2)(a), and in accordance with Article 1.2 of the master Coalition agreement. AR 24-25. The LRO's letter also pointed out that the dynamic status quo of this bargaining unit encompassed the salary reductions. *Id.* LRO's letter to FWOG closed with the observation that "the Employer does not believe it has the duty or the ability to bargain over legislatively imposed pay reductions, nor does it have the ability to bargain a new agreement between the State and the [FWOG], which, by law, must bargain a master agreement along with the other unions forming the Coalition." *Id.*

B. Procedural History

After additional communications between the LRO and FWOG, the underlying ULP action ensued. FWOG filed a Complaint on November 11, 2011, alleging a ULP. AR 4, ¶2.1 to AR 5, ¶2.6. The

Commission's November 18, 2011, Preliminary Ruling[5] identified causes of action for refusal to bargain and a derivative interference violation by the State. The identified causes of action were identified as whether the State unilaterally changed wages and health benefits, breached its good faith bargaining obligations in negotiations over wage and health benefits, unilaterally changed paid release time for bargaining unit members of the union's negotiating team, and insisted to impasse on ground rules, which is alleged to be a non-mandatory subject of bargaining. AR 7-8.

The Commission's hearing examiner partially dismissed the ULP action on June 11, 2012. (*State–Fish and Wildlife,* Decision 11394 (PSRA 2012)) Examiner Stephen W. Irvin rejected FWOG's motion for summary judgment and granted the State's motion for summary judgment relating to the allegations that the State unilaterally reduced wages and health benefits without providing an opportunity for bargaining. AR 885-96. FWOG appealed to the Commission. AR 897-911.

Following partial summary judgment, there were two remaining allegations: that the employer unilaterally changed paid release time and that the employer insisted to impasse on ground rules. AR 2480. Those

[5] Complaints are reviewed by Commission staff. In reviewing the Complaint the staff assumes that all of the facts alleged in the complaint are true and can be proven at hearing. Based on this assumption, and before any hearing on the merits, if the facts as alleged would constitute a ULP, the Commission issues a Preliminary Ruling requiring that the opposing party file an Answer. The issues identified in the Preliminary Ruling are the issues which proceed for further adjudicative proceedings.

allegations were dismissed on December 19, 2012 (*State–Fish and Wildlife,* Decision 11394-A (PSRA, 2012)), following a hearing. AR 2479-95. FWOG timely appealed to the Commission. AR 2496-2515.

On September 5, 2013, the Commission issued Decision 11394-B (PSRA, 2013), affirming the State had not committed a ULP. The ruling noted that:

> The union was not entitled to negotiate a separate master collective bargaining agreement or agreement on health benefits. Upon certification, the status quo for employee wages, hours, and terms and conditions of employment became the coalition collective bargaining agreement. The employer did not unilaterally change the status quo on wages, health benefits, or paid release time. The employer did not insist to impasse upon ground rules.

AR 2580-88.

FWOG appealed the Commission's Decision. King County Superior Court Judge Prochnau reversed concluding that the Commission erred in its ruling that the State had no duty to bargain changes in terms and conditions of employment with FWOG; that the Commission erred by ruling that the State could impose the terms of the Coalition agreement upon FWOG; and that the Commission erred by not finding a ULP from the changes in wages and health insurance imposed by the State as of July 1, 2011. CP 102-03. The court applied general contract principles

and agency law to arrive at its conclusion that the FWOG was not covered by the Coalition agreement. This appeal followed.

IV. ARGUMENT

A. Standard of Review

This appeal is governed by the Administrative Procedures Act (APA). FWOG bears the burden of demonstrating that the Commission's decision is invalid. RCW 34.05.570(1)(a), *see also, Pub. Empl. Relations Comm'n v. City of Vancouver*, 107 Wn. App. 694, 702, 33 P.3d 74, 79 (2001). Relief shall only be granted if the Court determines FWOG has been substantially prejudiced the Commission's decision. RCW 34.05.570(1)(d). When an appellate court reviews a Commission decision, the court applies the standards of Chapter 34.05 RCW directly to the agency record without regard to the superior court decision. *E.g. Goldsmith v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 573, 584, 280 P.3d 1173 (2012), *citing*, *Burnham v. Dep't of Soc. & Health Servs.*, 115 Wn. App. 435, 438, 63 P.3d 816 (2003). The decision under review is the Commission's decision and not the hearing examiner's decision. *Publ. Empl. Relations Comm'n.*, 107 Wn. App. 694.

The Court reviews the Commission's conclusions of law de novo. *Yakima Cty. v. Yakima Cty. Law Enforcement Officers Guild*, 174 Wn. App. 171, 180, 297 P.3d 745 (2013). When reviewing questions of law,

an appellate court may substitute its determination for that of the Commission, although the Commission's interpretation of the collective bargaining statutes is entitled to great weight and substantial deference. *Pub. Empl. Relations Comm'n.*, 107 Wn. App. 694, *citing City of Bellevue v. Fire Fighters, Local 1604*, 119 Wn.2d 373, 382, 831 P.2d 738 (1992); *Pub. Sch. Employees of Quincy v. Public Employment Relations Commission*, 77 Wn. App. 741, 745, 893 P.2d 1132 (1995).

FWOG did not assign error, in their appeal to the superior court, to any factual finding by the Commission. Accordingly, the Commission's factual findings are verities. *Fuller v. Empl. Sec. Dep't of State of Wash.*, 52 Wn. App. 603, 606; 762 P.2d 367 (1988); *see also* RAP 10.3(g). Therefore, the Court's review is limited to determining whether the Commission's Decision violates the law.[6]

B. The Commission Properly Interpreted And Applied The Reform Act Finding That FWOG Is Covered By Coalition Bargaining Agreement.

[6] If the Court determines that FWOG properly assigned error to the Commission's findings of fact, review of the Commission's Decision is conducted under the "substantial evidence" standard. "Substantial evidence" as used in RCW 34.05.570(3)(e) has been defined in most court decisions as "evidence in sufficient quantum to persuade a fair minded person of the truth of the declared premises." *See, e.g., Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995) (citations omitted), *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, (1996).

In 1975, well before the creation of the Reform Act, the Legislature created the Commission with the intent on achieving more efficient and expert administration of public labor relations in Washington, in the context of then-existing collective bargaining statutes. *See* RCW 41.58.005. The Commission has since been the administrative agency authorized to resolve any ULP and to issue appropriate remedial orders in labor relations cases. It witnessed the creation of the Reform Act and has been administering and enforcing that law since its inception. RCW 41.80.120(1). If the Commission determines that any person has engaged in a ULP, it shall issue an order requiring the person to cease and desist from such ULP, and to take such affirmative actions as will effectuate the purposes and policy of this chapter. RCW 41.80.120(2). Here, the Commission acted within its powers and authority, and properly interpreted and applied RCW 41.80.010, .050, .080, and .110, finding the State did not commit a ULP.

1. The Washington Legislature controls public employees' collective bargaining rights and the manner in which collective bargaining is administered for Washington public employees.

Public sector collective bargaining is a statutory right of public employees, not a natural or inalienable right. *See section D supra, see also, Smith v. Arkansas State Highway Emp., Local 1315,* 441 U.S. 463,

465, 99 S. Ct. 1826 (1979) (the first amendment does not impose any affirmative obligation on the government to listen to an association, recognize an association and bargain with it). Thus, the Legislature controls both the grant of rights, as well as the administration of such rights.[7]

Washington's first grant of the ability for public employees to collectively bargain occurred in the 1960's with the enactment of the Public Employees' Collective Bargaining Act (PECBA), RCW 41.56. The PECBA granted collective bargaining rights for public employees of political subdivisions of the state but specifically exempted state employees. *See, e.g.*, *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 666–67, 818 P.2d 1076 (1991) (describing the Legislature's initial actions in establishing and defining the statutory system of public employee collective bargaining in Washington). Following enactment of the original PECBA and prior to passage of the Reform Act, the State selectively granted collective bargaining to specific state employee groups. For

[7] The most widely known and applicable collective bargaining statute, the National Labor Relations Act, specifically exempts state and local government employees from coverage because the term "employer" does not include any "State or political subdivision thereof . . . ." 29 U.S.C. § 152(2). Thus, it is apparent that the United States Congress intentionally left the control of such rights to the individual states, which may (or may not) enact statutes *creating and regulating* collective bargaining rights for their public employees.

example, the State granted officers of the Washington State Patrol (WSP) collective bargaining rights under the PECBA. RCW 41.56.473. Similarly, the State granted Washington State Ferry System employees collective bargaining rights through the Marine Employees Public Employment Relations. RCW 47.64. In the Reform Act, the State granted full scope collective bargaining to general government state employees. But instead of including state general government employees within the PECBA under Title 41.56 RCW, as occurred for WSP officers, the State enacted a new unique collective bargaining law specifically applicable to state general government employees: the Reform Act codified at Title 41.80 RCW.

The Commission has recognized that the Legislature controls how public employees' collective bargaining rights are administered. *E.g.*, *Green River Cmty. Coll.*, Decision 4491 (CCOL, 1993) ("Where they exist, the collective bargaining rights of state and local government employees are the product of lobbyists and legislators in the various states."). In 2002, the Legislature exercised its power enacting the Reform Act, which, as the Commission has stated, "substantially restructured both the collective bargaining rights of state civil service employees and the administration of the collective bargaining process." *W. Wash. Univ.*, Decision 10068-A (PSRA, 2008).

The Reform Act created distinctly different statutory schemes that govern public sector collective bargaining for state employees: the statutory scheme at issue in this case is the Reform Act. While judicial and Commission precedent interpreting the PECBA provides general assistance in interpreting the Reform Act concerning general labor principles. AR 2585. However, the provisions of the Reform Act, namely the specific wording of RCW 41.80.010(2)(a), .050, and .080(2)(a), are unique to the Reform Act and found nowhere in the PECBA. These unique features of the Reform Act confirm that interpretations of the PECBA are of no value in interpreting the specific requirements of the Reform Act. The Commission acknowledged that were this case governed by the PECBA there would be a different outcome, and the one sought by FWOG, would result but that its interpretations of the PECBA are not controlling.

> In essence the union requests that the status quo principles applicable under Chapter 41.56 RCW apply to Chapter 41.80 RCW. The status quo under Chapter 41.56 RCW would have been the collective bargaining agreement negotiated between the employer and the WFSE and that status quo would have continued until the employer and the union negotiated a new agreement. *However, the unique features of Chapter 41.80 require a different result.*

AR 2585 (emphasis added).

Because the Reform Act, not the PECBA, covers FWOG and the employees it represents, the Commission carefully analyzed the relevant provisions of the Reform Act and applied them to the facts of this case. And because the Reform Act, which sets all parameters for the collective bargaining relationship between FWOG, its bargaining unit of employees, and the State, mandates the Decision the Commission reached. The Court should uphold the Legislature's intent and affirm the Commission's Decision, notwithstanding FWOG's arguments about contract law, agency law, and any other constitutional, common law and policy assertions.

2. The State and FWOG are not authorized to bargain over the State's contribution for Health Care Premiums, outside of the Health Care Coalition.

The Reform Act limits the scope and manner of bargaining over health care benefits to "the dollar amount expended on behalf of each employee for health care benefits." RCW 41.80.020(3). The Reform Act also specifically requires health care benefits to be bargained by the health care coalition:.

> [N]egotiations regarding . . . *the dollar amount expended on behalf of each employee for health care benefits shall be conducted between the employer and one coalition of all the exclusive bargaining representatives subject to this chapter*. . . . Any such provision agreed to by the employer and the coalition shall be included in all master collective bargaining agreements negotiated by the parties. . . . For agreements covering the 2011-2013 fiscal biennium,

> any agreement between the employer and the coalition regarding the dollar amount expended on behalf of each employee for health care benefits is a separate agreement and shall not be included in the master collective bargaining agreements negotiated by the parties.

RCW 41.80.020(3) (2011) (emphasis added). Bargaining for health care benefits is never negotiated with individual representative units, it must be bargained through the Health Care Coalition.

As noted above, when FWOG filed its petition for representation, health care negotiations had been concluded, and by the time FWOG received its Interim Certification, the separate health care agreement had been funded by the Legislature. The Reform Act does not contain any statutory mechanism that would allow FWOG to re-open bargaining over health care benefits. As a matter of law, the Commission properly concluded that no ULP occurred with regard to health care. CP 11.

3. The State is not allowed to bargain individually with FWOG on matters already negotiated in the Coalition master agreement.

One substantial parameter the Legislature established in the Reform Act is RCW 41.80.010, which prescribes how bargaining agreements shall be negotiated. This statute contains specific directions for bargaining with exclusive bargaining representatives who represent greater than 500 employees (like when FWOG members were part of WFSE), or fewer than 500 employees (FWOG). When a representative

represents less than 500 employees, the only authority for bargaining is through the "Coalition agreement" and process.

> If an exclusive bargaining representative represents more than one bargaining unit, the exclusive bargaining representative shall negotiate with each employer representative as designated in subsection (1) of this section one master collective bargaining agreement on behalf of all the employees in bargaining units that the exclusive bargaining representative represents. *For those exclusive bargaining representatives who represent fewer than a total of five hundred employees each, negotiation shall be by a coalition of all those exclusive bargaining representatives. The coalition shall bargain for a master collective bargaining agreement covering all of the employees represented by the coalition.* The governor's designee and the exclusive bargaining representative or representatives are authorized to enter into supplemental bargaining of agency-specific issues for inclusion in or as an addendum to the master collective bargaining agreement, subject to the parties' agreement regarding the issues and procedures for supplemental bargaining.

RCW 41.80.010(2)(a) (emphasis added).

Thus, the statute requires that there be a single CBA—"a master collective bargaining agreement"—between the State and a coalition of all of the labor organizations that individually represent fewer than 500 employees. It does not authorize bargaining between the governor's designee and such a representative *outside of* the Coalition. As part of the coalition bargaining, the State and bargaining representatives may bargain agency-specific issues "subject to the parties' agreement regarding the issues and procedures for supplemental bargaining." *Id.* However,

negotiation of any agency specific issue is not an absolute right which a bargaining representative may assert. Bargaining of agency specific issues requires agreement from both sides regarding the issues and the procedure for supplemental bargaining.

Therefore, when FWOG—which represents fewer than 500 employees, AR 195-96—submitted a demand to bargain to the LRO on June 28, 2011, the scope of potential bargaining was limited to supplemental agency-specific issues, not issues already addressed in the existing master Coalition agreement such as the agreed three percent wage reduction as part of Article 41.1. AR 316. Therefore, the Commission properly concluded that the State did not alter the status quo and thereby commit a ULP with respect to wages because upon certification as the bargaining representative on June 24, 2011, FWOG was included within the Coalition agreement and was not entitled to negotiate a separate master CBA. CP 11.

C. The FWOG's Superior Court Arguments Should Be Rejected as They Are Inconsistent With the Reform Act Which Governs General Government FWOG Employees

The Commission found that FWOG was covered by the Coalition agreement. FWOG argued to the superior court that this decision was contrary to contract law and agency theory. These assertions were predicated on an assertion that the right to bargain is a preeminent right.

The superior court erred when it accepted FWOG's invitation to apply contract and agency law to collective bargaining under the Reform Act. The ability to engage in collective bargaining for wages, hours and working conditions is a statutory grant not a constitutional right.

1. Public employment is established and regulated by legislative action and not by common law contract.

In the superior court, FWOG attacked the Commission ruling by offering a common law theory of agency for the formation of a binding contract, a theory that is inapplicable to public employment. The terms and conditions of employment for public employment are those granted or authorized though legislative action. Prior to full scope bargaining under the Reform Act, the state Civil Service laws established the terms and conditions of employment. With passage of the Reform Act, the Legislature established the potential for variance between represented groups, but in reference to bargaining units of less than 500 employees, determined that there would be one bargaining agreement applicable to all of these units: the Coalition agreement. FWOG asserted below that the contract theory of agency extracts this unit from the structure established by the Legislature. CP at 38-40. However, there is no contract right of employment, rather it is a statutory right to engage in bargaining on the terms and conditions set forth by the Legislature.

Washington courts have clearly stated that the terms and conditions of public employment are controlled by statute and not by contract. *E.g. Washington Fed'n of State Employees v. State*, 101 Wn.2d 536, 541–42, 682 P.2d 869 (1984); *Weber v. Dep't of Corr.*, 78 Wn. App. 607, 610, 898 P.2d 345 (1995). Courts have consistently held that the terms and conditions of public employment are not contractual rights. *City of Tacoma v. Price*, 137 Wn. App. 187, 191, 152 P.3d 357 (2007), *Wash. Fed'n of State Employees*, 101 Wn.2d 536. *Weber*, 78 Wn. App. 607. *Greig v. Metzler*, 33 Wn. App. 223, 230, 653 P.2d 1346 (1982). Civil service employment is controlled by the civil service statutes, RCW 41.80 in this instance, subject to article I, section 23 of the Washington Constitution. *Wash. Fed. Of State Emps.*, 101 Wn.2d at 542; *Riccobono v. Pierce Cnty.*, 92 Wn. App. 254, 263, 966 P.2d 327 (1998). In other words, "civil service employment is grounded on a contract of employment formed between the public employer and the employee, but that the contract incorporates, as implied and controlling terms, the civil service statutes as now exist or hereafter amended". *Riccobono*, 92 Wn. App. at 263–64 n.25. The superior court erred in its application of contract and agency law in reaching its finding that the Commission committed an error of law and the employer had committed a ULP.

2. The Legislature intentionally limited employee rights under the provisions of the Reform Act.

Statutory enactments such as the Reform Act effectively abrogate common law principles rendering them inapplicable. In this case the Legislature explicitly limited the collective bargaining rights afforded to employee organizations to those stated in the Reform Act. The Commission correctly focused its analysis to the provisions of the Reform Act itself. The superior court erred in applying agency principles over the provision of the Reform Act. In this case, the Commission correctly disregarded precedent pertaining to other state collective bargaining law under the PECBA, focusing solely on harmonizing its interpretation within the Reform Act.

In enacting the Reform Act the Legislature clearly articulated that the Reform Act was not an absolute grant but one which contained reservations. RCW 41.80.050. The clause that delineates the authority to bargain is preceded by this articulation of the reservation of rights which states:

> *Except as may be specifically limited by this chapter,* employees shall have the right to self-organization, to form, join or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all activities except to the extent that they may be required to pay a fee to an

> exclusive bargaining representative under a union security provision authorized by this chapter.
>
> RCW 41.80.050. (emphasis added).

The specific limitation phrase embodies the Legislature's intent that the collective bargaining rights created by the Reform Act are not preeminent in any context, but instead are constrained by other statutory provisions of the act.

Notwithstanding the clear existence of this enumerated limitation, FWOG argues that the Commission (1) had, at the very least the freedom, and more likely an obligation, to consider common law principles grounded in contract, agency, and constitutional law when interpreting the relevant provisions of the Reform Act, and (2) erred in not applying such principles. The Reform Act's structure and grant of collective bargaining rights is very different from the grant in the PECBA and other collective bargaining laws. Appellee's dissatisfaction, however, does not amount to Commission error. The Commission properly exercised restraint in not expanding the Reform Act beyond the limitations created by the Legislature.

As expressed in RCW 41.80.050, the Reform Act does, in fact, contain specific limitations on the rights of employees to self-organize and bargain collectively. Such limitations may be inconsistent with general common law principles of contract and agency law. However, a party

does not have a vested right in a rule of common law which prevents its alteration by the Legislature. *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975). Assuming arguendo that the common law principle of agency applied, a statute whose terms are inconsistent with a rule of the common law such that both may not simultaneously be given effect is deemed to abrogate the common law. *Public Utility Dist. No. 1 v. Madden*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973), appeal dismissed, certiorari denied, 95 S. Ct. 20, 419 U.S. 808 (1974). In enacting a statute, the Legislature is deemed to be aware of applicable common law rules. *Public Utility Dist. No. 1,* 83 Wn.2d at 219. Therefore the Legislature intended that under the statutory grant of collective bargaining FWOG's inclusion with the Coalition supersedes the common law principle of agency.

Only where a case is not governed by statutory law, is it appropriate for the court to apply common law to determine the outcome of the case. *Senear v. Daily-Journal American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982). And, even then, common law principles may be adopted only so long as it is consistent with Washington statutory law. RCW 4.04.010 (common law shall be the rule of decision of a court, "so far as it is not inconsistent with the Constitution and laws of the United States *or of the state of Washington*, nor incompatible with the institutions

and conditions of society in this state . . . .") (emphasis added); *see In re Parentage of L.B.*, 155 Wn.2d 679, 688–89, 122 P.3d 161 (2005) (noting that common law is subject to statutory law).

The Reform Act establishes the right of public sector employees "to self-organization, to form, join or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining . . . ." RCW 41.80.050. This is not a "preeminent" right of employees; a right "superior to or *notable* above all others." *See* Webster's II, *New Riverside University Dictionary* 927 (1988).

3. There is no violation of the First Amendment's right of association by the Reform Act's mandate that FWOG, because it represents less than 500 state employees, is part of the coalition bargaining agreement.

Prior to the passage of the Reform Act there was no right for Washington State general government employees to engage in traditional full scope collective bargaining. By granting this right the Legislature chose to require unions representing less than 500 members to bargain as a coalition. RCW 41.80.010(2)(a). Despite this explicit requirement of the Reform Act, FWOG argues that it has a preeminent right that prevents the Legislature from establishing the framework for collectively bargaining with union's representing less than 500 employees. FWOG is attempting

to transform the legislatively created opportunity to engage in collective bargaining, into a preeminent right linked to a right of association. This argument has no legal support.

Courts have affirmed that the right of union association may be impacted by legislative action, that impact alone does not create a constitutional impingement of the right of association. In *Lyng v. Int'l Union,* the U.S. Supreme Court found that restrictions on striking employees' eligibility for food stamp benefits did not directly and substantially interfere with First Amendment association right. *Lyng v. Int'l Union*, 485 U.S. 360, 366, 108 S. Ct. 1184 (1988). The food stamp restriction did not require employees to "strike, or associate for any other purpose, and it does not 'prevent' them from associating together or burden their ability to do so in any significant manner." *Id.*

The right of association does not mean that the impacts of legislation cannot have an impact of the efficacy of a union. There has been no restriction on the members selecting FWOG as their representative. Requiring unions with less than 500 members to be subject to a Coalition contract does not impede each group's ability to advocate its issues when bargaining a successor agreement. FWOG would have the right of association mandate a corollary obligation on the part of the employer to listen. FWOG is unable to demonstrate that they are unable

to associate, speak freely or advocate for ideas. FWOG is asking that this Court improperly extend a right to association mandating that the employer listen by compelling that the State bargain separately with FWOG.

The First Amendment is not a substitute for the labor relations laws. *Smith v. Arkansas State Highway Emp., Local 1315,* 441 U.S. 463, 464, 99 S. Ct. 1826 (1979). The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. *Smith,* 441 U.S at 464. It protects the right of associations to engage in advocacy on behalf of their members. *Id. Smith* makes it clear that the government cannot prevent the individuals from association with the goal of making their voice or opinions heard. *Id.* The *Smith* court clearly states that the government does not have to listen. *Id. See also Minnesota St. Bd. v. Knight*, 465 U.S. 271, 287, 104 S. Ct. 1058 (1984) (when the government makes a general policy, it is under no greater constitutional obligation to listen to any specially affected class than it is to listen to the public at large).

FWOG's members are not being prevented from joining a union or forming an association of their choice. The evidence leads to the opposite conclusion. In March of 2011, FWOG petitioned PERC to be the

bargaining representative. AR 125, ¶3. On June 24, 2011, PERC certified FWOG as the bargaining representative for the DFW Enforcement Officers. AR 126, ¶7, 202-05. FWOG's assertion of a violation of the constitutional right of association errs in that it presumes a non-existent duty of the employer to listen. Thus, the economic activities of a group of public employees who associate together to achieve a common purpose are not protected by the First Amendment and may be either not allowed (such as prior to the Reform Act when general government employment was governed under the Civil Service Rules, WAC 356, *repealed*) or authorized with limitations as under the Reform Act.

4. The Commission correctly determined that the Coalition agreement became the effective status quo upon FWOG certification.

The superior court committed legal error when it determined that the status quo was the terms and conditions in effect on March 3, 2011, when FWOG filed its petition for representation. When a union files a representation petition, the employer must maintain the status quo and must not take unilateral action regarding wages, hours, and working conditions. *Snohomish Cnty. Fire Dist. 3,* Decision 4336-A (PECB, 1994); WAC 391-25-140(2). Status quo is determined as of the date the union filed the representation petition. *City of Seattle,* Decision 9938-A (PECB, 2009). Status quo must be maintained while the petition is

pending in order to maintain laboratory conditions in order to avoid perceptions that changes are as a result of filing the petition. *Central Wash. Univ.*, Decision 10967 (PECB, 2011).

During the pendency of the FWOG petition status quo was the terms and conditions established under the WFSE Agreement. However, on June 24, 2011, when the Commission certified FWOG as the bargaining representative for the DFW Enforcement Officers, the petition was no longer pending and the status quo became the Coalition Agreement.

The superior court improperly applied *Mabton Sch. Dist.*, Decision 2419 (PECB, 1986) in reaching its conclusion that the applicable contract under status quo[8] was the terms and conditions form the WFSE contract on March 4, 2011. TR. at 58. In *Mabton* the issue was whether a contract extension precluded consideration of a petition for a change in representation filed by a challenging union. The issue was not status quo to identify the applicable agreement for the wages, hour, and working conditions. The timing of the certification of the new bargaining unit representation is not at issue in this matter. Notably, there is no allegation

[8] The superior court referenced both status quo and dynamic status quo as part of its ruling. It appears that the court was referring to true status quo as it was explaining why it found that the terms and conditions from March 3, 2011, were applicable in its view. Dynamic status quo would have led the court to a different conclusion as addressed in section D.1.

of a change in wages, hour, and working conditions during the pendency of FWOG representation petition. The lower court erred in looking to the holding in *Mabton.*

D. While The Commission Properly Interpreted and Applied the Reform Act, the State's Actions Were Legally Required.

While DFW believes that it acted appropriately in its interactions and application of the law with FWOG as determined by the Commission, DFW believes that it prevails and was not required to bargain changes with FWOG because the events which FWOG complains are consistent with application of dynamic status quo, legal necessity and were mandated by Legislature.

1. The salary reduction and health care benefit reduction were agreed to prior to FWOG's petition for representation, and are part of the dynamic status quo.

While in general the employer is required to maintain status quo, that requirement is not absolute. *See section C.4. above.* In addition to the general status quo obligation, employers are required to maintain the "dynamic status quo." A dynamic status quo exists where actions are taken to follow through with changes already set in motion prior to the filing of a representation petition. If expected by the employees, changes that are part of a dynamic status quo do not disrupt a bargaining relationship or undermine support for a union. *King Cnty.,* Decision 6063-A (PECB, 1998). As the Commission in *King Cnty.* explained:

> Thus, where wage or benefit increases are previously scheduled, it would be unlawful to withhold them just because a representation petition is filed. [Citation omitted] Conversely, if changes the employees may view as negative merely carry out a "dynamic status quo" (i.e., actions consistent with previously-existing policies and practices), no violation will be found.

King Cnty., Decision 6063-A (PECB, 1998).

As discussed above, when FWOG filed its petition for representation, DFW Enforcement Officers were represented by WFSE, and WFSE had already completed negotiations on the 2011–13 CBA and voted for its ratification. That ratified CBA contained an agreement temporarily reducing members' salaries by three percent for the biennium, and the members' ratification also included ratification of the separate Health Care Coalition Agreement. The same salary reduction and changes to health care which FWOG alleges are a change in conditions were negotiated as part of the Coalition Agreement. AR 75.

Dynamic status quo can result in positive or negative impacts to employees and no violation will be found. *Central Wash. Univ.*, Decision 10967-A (2012). Since the changes that became effective on or after July 1, 2011, were already set in motion prior to the filing of the petition, it cannot be reasonably argued that the salary reductions and insurance contribution changes were "unexpected" by FWOG's members, nor can it

be persuasively asserted that the reductions operated to undermine support for FWOG or disrupted the bargaining relationship between FWOG and the State. The three percent salary reduction and the changes to health care benefit contributions were part of the dynamic status quo for FWOG members, and therefore did not need to be bargained prior to implementation.

2. The passage of Engrossed Substitute Senate Bill 5860 (ESSB) created a legal necessity for the State to implement the three percent salary reduction.

On May 25, 2011, the Legislature passed ESSB 5860, which mandated a three percent reduction in salary for all state employees of the executive, legislative, and judicial branches, effective July 1, 2011. The statute exempted certain groups of employees, and also recognized that provisions of a CBA could alter the implementation of the salary reduction. *See* ESSB 5860 § 1(4). Nowhere does the statute allow an exemption for represented employees not covered by a CBA, and nowhere does it allow represented employees to bargain directly over the reduction. In short, the Legislature clearly intended that the three percent salary reduction apply to all state employees not specifically exempted.

Commission precedent recognizes that legal necessity can justify unilateral action by the employer on a mandatory subject of bargaining. *Cowlitz Cnty.*, Decision 7007-A (PECB, 2000) ("the business necessity

defense is apt where a party . . . is faced with a compelling legal or practical need to make a change affecting a mandatory subject of bargaining. It may then be relieved of its bargaining obligation, to the extent necessary to deal with the emergency."); *King Cnty.,* Decision 10576-A (PECB, 2010) ("An employer may raise a 'business necessity' defense when compelling practical or legal circumstances necessitate a unilateral change of employee wages, hours, or working conditions, but an employer is still obligated to bargain the effects of the unilateral change."). For example, legislative action can give rise to the business necessity/legal necessity defense:

> [I]n *Skagit County,* Decision 8886-A (PECB, 2006), the Washington State Legislature changed the statute governing when employers were required to deduct industrial insurance premiums from employees' paychecks. Thus, the Skagit County employer was excused from bargaining the decisions, but not the effects, because a third party instituted a change that was beyond the employer's control.

Id. The passage of ESSB 5860 created just such a legal necessity, requiring the employer to implement the three percent salary reduction and eliminating the requirement to bargain the decision. As a result, the State had no authority to bargain with FWOG over the three percent reduction, providing another reason why FWOG's claim that the State improperly refused to bargain over the reduction must be dismissed.

3. The three percent salary reduction was mandated by emergency legislation and was therefore beyond the scope of bargaining for the parties under RCW 41.80.040(4).

Even if it is assumed that FWOG is not covered by the master Coalition CBA, the State did not breach its duty to bargain with FWOG because the State, as employer, has no authority to bargain over the three percent salary reduction. Chapter 41.80 RCW uniquely modifies the scope of bargaining for the parties it covers. RCW 41.80.020(5) provides that "[t]he employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040."

RCW 41.80.040 provides:

> Management rights—Not subject to bargaining.
> *The employer shall not bargain over rights of management which*, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:
>
> (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
>
> (2) The employer's budget and the size of the agency workforce, including determining the financial basis for layoffs;
>
> (3) The right to direct and supervise employees;

> (4) *The right to take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies*; and
>
> (5) Retirement plans and retirement benefits.

(emphasis added).

As the Commission observed in *State—Attorney Gen'l,* Decision 10733-A (Reform Act, 2011):

> The Legislature granted state employers certain management rights when it enacted RCW 41.80.040. The employer is privileged to make changes to those subjects covered by RCW 41.80.040 at any time, including during the pendency of a representation petition, even if there is a bargaining obligation with an exclusive bargaining representative.

The Legislature did so when it passed ESSB 5860. Section 1 of this statute amended Chapter 41.04 RCW and reduced base salaries by three percent for all state employees of the executive, legislative, and judicial branches, from July 1, 2011 through June 29, 2013. ESSB 5860 contains a number of exceptions and exemptions, none of which apply to DFW's Enforcement Officers or other positions within FWOG. Significantly, Section 15 of ESSB 5860 contains a declaration of emergency: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2011." This language, derived from Article II, section 1 of the Washington State Constitution, is

typical for an emergency clause in a statute. *See, e.g., CLEAN v. State*, 130 Wn.2d 782, 791 n.5, 928 P.2d 1054 (1996).

The Legislature, faced with looming revenue shortfalls, included the declaration of emergency in ESSB 5860 to ensure there would be no delay in the implementation of the required employee salary reductions or in realizing the anticipated savings resulting therefrom. This is the kind of financial emergency that the Legislature contemplated when RCW 41.80.040(4) was included within the Reform Act.

In accordance with RCW 41.80.040(4) and the passage of ESSB 5860, and contrary to FWOG's contentions, the three percent salary reduction was not a mandatory subject to bargain and the State committed no ULP when it did not bargain with FWOG on this matter.

V. CONCLUSION

FWOG is not exempt from the structure and requirements of the Reform Act and is properly part of the Coalition Agreement. FWOG is not entitled to bargain a separate CBA for wages, hours and working conditions. Nor is FWOG entitled to bargain a separate agreement for health care benefits. The State respectfully requests that the Court affirm the Commission's Decision 11394-B - PSRA.

RESPECTFULLY SUBMITTED this 31 day of October, 2014.

ROBERT W. FERGUSON
Attorney General

MORGAN B. DAMEROW
ASSISTANT ATTORNEY GENERAL
WSBA #27221
7141 CLEANWATER LANE SW
OLYMPIA, WA 98501
360-586-2466
OID #91032

NO. 72104-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE, Appellant, v. FISH AND WILDLIFE OFFICERS GUILD AND PUBLIC EMPLOYMENT RELATIONS COMMISSION, Respondents.	CERTIFICATE OF SERVICE

I certify that on the 31 day of October, 2014, I caused a true and correct copy of this Brief of Appellant and Certificate of Service to be served on the following in the manner indicated below.

TO:

James Cline
2003 Western Avenue, Suite 550
Seattle, WA 98121
via e-mail at Servicjcline@clinelawfirm.com & U.S. Postal Service

Mark Lyon
7141 Cleanwater Drive SW
MS: 40113
Olympia, WA 98504
via e-mail at Mark1@atg.wa.gov & Campus Mail

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

Dated this 31 day of October, 2014, at Olympia, WA.

Jane Rockwell

JANE ROCKWELL