72104-6

72104-6

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.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Court Must Give Effect To The Legislative Mandate For A Comprehensive And Cohesive Coalition Bargaining Structure For Labor Relations 2

1. Coalition Bargaining Under The Reform Act is Required for All Bargaining Representatives With Fewer Than 500 Members. 2

2. Coalition Bargaining of All Bargaining Units is Required for Health Care 5

3. Upon Certification as the Bargaining Representative, FWOG Was Part Of the Coalition and Covered by the Coalition Master Agreement. 6

4. The Reform Act Created a Previously Nonexistent Opportunity for State Civil Service Collective Bargaining. 7

B. Collective Bargaining For Public Employees Is Authorized Through Statute; It Is Not A Constitutional Right 8

1. The First Amendment Does Not Create a Right to Collectively Bargain Based on Assertions of Interference and Retaliation. 10

2. The Definitions and Duties Under the Reform Act Do Not Create a Right to Bargain Beyond That Specifically Granted By the Reform Act 12

3. Supplemental Bargaining of Agency Specific Issues Under the Reform Act Is Not a Right to Bargain for a Separate Bargaining Agreement. 13

4. The Duty of Fair Representation Does Not Create a Right to Bargain for a Separate CBA. 14

C. Harmonization Of The Reform Act Requires That FWOG Is Properly Part Of The Coalition 15

D. The Reform Act Is A Unique Collective Bargaining Law to Which FWOG Improperly Applies PERC's Interpretations Of Other Statutory Schemes 17

III. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Allen v. Seattle Police Officer's Guild,
100 Wn.2d 361, 670 P.2d 246 (1983) 15

Cowlitz Cnty.,
Decision 7007 (PECB 2000) 19

Delyria v. State,
165 Wn.2d 559, 199 P.3d 980 (2009) 16

Fray v. Spokane Cnty.,
134 Wn.2d 637, 952 P.2d 601 (1998) 16

Godfrey v. State,
84 Wn.2d 959, 530 P.2d 630 (1975) 14

In re Schneider,
173 Wn.2d 353, 268 P.3d. 215 (2011) 3

Lake v. Woodcreek Homeowners Ass'n,
169 Wn.2d 516, 243 P.3d 1283 (2010) 16

Muir v. Coun. 2 Wash. State Coun. of Cnty. & City Emps.,
154 Wn. App. 528, 225 P.3d 1024 (2009) 15

Smith v. Arkansas State Highway Emp., Local 1315,
441 U.S. 463, 99 S. Ct. 1826 (1979) 9

State v. Costich,
152 Wn.2d 463, 98 P.3d 795 (2004) 16

State v. Engle,
166 Wn.2d 572, 210 P.3d 1007 (2009) 16

State v. J.P.,
149 Wn.2d 444, 69 P.3d 318 (2003) 13

Statutes

Laws of 2010, ch. 283, § 13 5

RCW 41.06 8

RCW 41.06.150 8

RCW 41.06.150(11)(b) 7

RCW 41.49 18

RCW 41.56 ..... 6, 17

RCW 41.56.029 18

RCW 41.56.029(2)(ii) 18

RCW 41.56.473 18

RCW 41.80 ..... 10, 18

RCW 41.80.005 12

RCW 41.80.010 ..... 3, 4, 9

RCW 41.80.010(2)(a) ..... passim

RCW 41.80.010(3)(a) 9

RCW 41.80.020 4

RCW 41.80.020(1) 9, 10

RCW 41.80.020(2) 10

RCW 41.80.020(2)(a) 6

RCW 41.80.020(3) 2, 5, 10, 16

RCW 41.80.080 ..... 4, 5, 12

RCW 41.80.080(2)(a) 4, 18

RCW 41.80.080(3) 15

RCW 41.80.080(4)(b) 9

RCW 41.80.101 12

RCW 47.64 18

RCW 47.64.120 18

RCW 47.64.270 18

Substitute House Bill 2168 8

WAC 356 8

I. INTRODUCTION

The ability to bargain with the State as a public employer is a legislatively created right and, as such, the parameters of the right are legislatively defined. Under the Reform Act, small bargaining unit representatives (those with fewer than 500 members) must bargain as part of a coalition for wages, hours, and other terms and conditions of employment (wages).[1] Health care contribution bargaining is required to be done as a super coalition of all eligible state bargaining representatives. Fish and Wildlife Officers Guild (FWOG) argues that the Constitution and the common law allow it to bargain independently outside of this comprehensive legislative scheme. By escaping the coalition bargaining scheme, FWOG aims to avoid the recent three percent salary reductions that impacted state employees, and to avoid increases in employee health care contributions which the super coalition negotiated for all bargaining units. FWOG's argument is not supported by the Constitution and is contrary to the Reform Act.

The Reform Act is a comprehensive, cohesive, and exhaustive plan by the Legislature authorizing bargaining with representatives of state civil service employees. There is no preeminent right, as asserted by FWOG, for civil service employees to engage in collective bargaining

[1] The Reform Act is also commonly referred to as the PSRA.

with the State outside of the Reform Act. FWOG's arguments should be rejected because they defy the Legislature's clear plan that requires all bargaining representatives with fewer than 500 employees to bargain collectively for a master agreement and for a super coalition to bargain health care contributions.

II. ARGUMENT

A. The Court Must Give Effect To The Legislative Mandate For A Comprehensive And Cohesive Coalition Bargaining Structure For Labor Relations

The Reform Act establishes two unique requirements for coalition bargaining. First, coalition bargaining is required regarding wages, hours, and working conditions for all bargaining unit representatives with fewer than 500 members. RCW 41.80.010(2)(a). Second, health care coalition bargaining is required for all bargaining units. RCW 41.80.020(3). This statutory scheme leaves no room for the separate bargaining agreements for wages and health care that FWOG demands.

1. Coalition Bargaining Under The Reform Act is Required for All Bargaining Representatives With Fewer Than 500 Members.

There is no minimum size for a bargaining unit. While bargaining units formed under bargaining statutes other than the Reform Act bargain independently with the employer irrespective of size, the Legislature chose a different path when it granted bargaining to civil service employees

under the Reform Act. *See* § D *infra.* The primary purpose of statutory construction is the carry out the legislative intent giving effect to the plain meaning of the statutory language. *In re Schneider*, 173 Wn.2d 353, 363 268 P.3d. 215 (2011). The Legislature expressly articulated a structure unlike that of other collective bargaining statutes establishing a coalition bargaining requirement. The Reform Act's threshold to negotiate a separate contract is 500 members either in one unit or collectively. RCW 41.80.010(2)(a). RCW 41.80.010 requires that there be one Master Agreement for all bargaining units representing fewer than 500 members. FWOG represents approximately 100 members; therefore it is part of the Coalition.

Contrary to FWOG's arguments, the Reform Act prescribes exactly what is to happen when a new bargaining unit is certified. New bargaining unit representatives with fewer than 500 employees are to be included within the Master Coalition Agreement upon certification.

> If an employee organization has been certified as the exclusive bargaining representative of the employees of a bargaining unit, the employee organization may act for and negotiate master collective bargaining agreements that will include within the coverage of the agreement all employees in the bargaining unit as provided in RCW 41.80.010(2)(a). However, if a master collective bargaining agreement is in effect for the exclusive bargaining representative, *it shall apply to* the bargaining unit for which the certification has been issued. Nothing in

> this section requires the parties to engage in new negotiations during the term of that agreement.

RCW 41.80.080(2)(a) (emphasis added).

The first sentence of RCW 41.80.080 references RCW 41.80.010, which defines two classes of exclusive bargaining representatives: representatives with more than 500 employees, and representatives with fewer than 500 employees. A new bargaining representative must fall into one class or the other. Large or small, an exclusive bargaining representative is bound by any master collective bargaining agreement (CBA) that is already "in effect" at the time that the representative is certified. The second sentence of RCW 41.80.080 adds specificity that new bargaining representatives are to be included within the contracts already in place as emphasized by the final sentence's statement that new negotiations are not required.

If FWOG represented more than 500 employees, RCW 41.80.020 would entitle it to negotiate a separate contract as there would be no contract "in effect" for the exclusive bargaining representative. This is not the case. As described above, FWOG represents approximately 100 employees. Therefore, negotiation for FWOG "shall be by a coalition." RCW 41.80.010. There is no dispute that coalition bargaining occurred and resulted in the 2011-13 Coalition Master Agreement. Administrative

Record (AR) 2182-2357. At the time FWOG was certified as the exclusive bargaining representative, there was a master CBA "in effect." Therefore, that agreement "shall apply to" FWOG. By the express language of the statute, no new negotiations are required while that agreement remains in effect. Nothing in RCW 41.80.080 gives FWOG an independent right to bargain a separate agreement addressing wages, hours, and working conditions.

2. Coalition Bargaining of All Bargaining Units is Required for Health Care.

The Reform Act requires coalition bargaining for health care contributions. RCW 41.80.020(3). All bargaining representatives, irrespective of the number of members they represent, must bargain for a single statewide agreement regarding the dollar amount expended on behalf of each employee for health care. RCW 41.80.020(3). In 2010, the Legislature included the marine employees of the Washington State Ferry System within this health care coalition. Laws of 2010, ch. 283, § 13. Since that time, no state employee bargaining representatives have separately bargained health care contributions. The plain language of the statute unambiguously establishes a single unified method for health care bargaining in order to assure a uniform result. Accordingly, FWOG does

not have an independent right to bargain a separate agreement addressing health care contributions.

3. Upon Certification as the Bargaining Representative, FWOG Was Part Of the Coalition and Covered by the Coalition Master Agreement.

A key issue in this case is whether there was a master CBA in effect for FWOG when it was certified. In reaching its conclusion that FWOG was covered by the Coalition Master Agreement, the Public Employment Relations Commission (PERC) harmonized the status quo requirement while a question concerning representation is pending with the coalition bargaining requirement of RCW 41.80.020(2)(a) that there be one master agreement for all small bargaining representatives. PERC contrasted the Public Employees Collective Bargaining Act (PECBA), Chapter 41.56 RCW, with the Reform Act, properly concluding that the outcome required by the Reform Act was that upon certification FWOG became part of the Coalition. This inclusion in the Coalition ended any status quo requirement making the terms and conditions of employment those contained in the 2009-11 Coalition Master Agreement in effect when FWOG was certified which was replaced by the 2011-13 Coalition Master Agreement effective July 1, 2011.

FWOG asserts that inclusion within the Coalition is predicated on being a representative "who had previously been a party to the master

Coalition agreement." Brief of Respondent (Br. of Resp't) at 22. There is no such requirement in the statute, and FWOG's interpretation is at odds with the coalition structure of the Reform Act. As described above, the Reform Act states that negotiation for a small bargaining representative, like FWOG, "shall be by a coalition." RCW 41.80.010(2)(a). Nothing in the Reform Act provides for a small bargaining representative to bargain its own separate agreement with the State. Instead, what is possible, as attempted by the State in this case, is bargaining agency specific issues by agreement of the issues and process. This failed because FWOG improperly insisted on bargaining a separate agreement. AR 1001, Transcript of Hearing (TR) at 59 ll. 14-15.

4. The Reform Act Created a Previously Nonexistent Opportunity for State Civil Service Collective Bargaining.

Before the Reform Act, collective bargaining occurred at an agency level over personnel matters within the discretion of the agency head. Former RCW 41.06.150(11)(b) (2002) (repealed). Under the former process there were over 100 different CBAs that covered state employees. AR 1036, TR at 94 ll. 6-8. Essentially the bargaining agreements addressed agency policy. These agreements were far from the robust agreements based on the level of negotiations which occurred under the Reform Act. Issues currently bargained were governed by

administrative rule, codified at WAC 356, and were adopted by the Director of the Department of Personnel. RCW 41.06.150 (repealed).

Repeal of the prior bargaining authority and grant of the opportunity to engage in true negotiations for wages, hours, and working conditions occurred as part of the same bill. Substitute House Bill (SHB) 2168. SHB 2168 did far more than modify Chapter 41.06 RCW. It nullified collective bargaining under RCW 41.06 and created an entirely new structure with new requirements. Notably for the present case, it created mandatory coalition bargaining for small bargaining representatives and mandatory health care coalition bargaining. The coalition requirements provide a mechanism that balances a meaningful opportunity to bargain with the recognition that bargaining over 100 CBAs of the scope authorized by the Reform Act would be insurmountable. The Reform Act gave state civil service employees a new opportunity that they did not previously enjoy. It was not simply a continuation of a prior limited ability to bargain. The new right was a comprehensive right to bargain wages, hours of work, and conditions of employment.

B. Collective Bargaining For Public Employees Is Authorized Through Statute; It Is Not A Constitutional Right

It is undisputed that the ability to engage in collective bargaining for public sector employees is a creature of statute and not a guarantee of

the Constitution. Thirty-five years ago, the U.S. Supreme Court made this clear stating that though a group may choose to associate to advance its own interests, the First Amendment does not impose any affirmative obligation on the government to listen to an association, recognize an association and bargain with it. *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465, 99 S. Ct. 1826 (1979). In other words, public employees bargain with the State at the pleasure of the State. FWOG concedes that the opportunity to engage in collective bargaining is a statutorily created right. Br. of Resp't at 38.

In addition to the collation bargaining requirements, the Reform Act requires that bargaining must be completed by October 1, of the year preceding the CBA's consideration by the Legislature.[2] RCW 41.80.010(3)(a). Bargaining units are allowed to petition to change representatives 90 to 120 days prior to the expiration of a bargaining agreement, which is after the deadline for coalition bargaining to be completed. RCW 41.80.080(4)(b).

Substantively, the Reform Act delineates matters subject to bargaining: wages, hours, and other terms and conditions of employment. RCW 41.80.020(1). The employer is not required to bargain retirement or

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[2] FWOG asserts that the title of RCW 41.80.010 requires some type of ratification of an agreement by the bargaining unit. Reading the section in its entirety makes it clear that the "ratification" described in the title is the legislative review and funding process for bargaining agreements.

health care except the dollar amount expended for health care as part of the super coalition. RCW 41.80.020 (2) and (3) .

However, the rights granted are not limitless. RCW 41.80.020(1) states that bargaining is allowed "[e]xcept as otherwise provided in this chapter." The procedural and substantive parameters of the Reform Act make it clear that the ability to bargain is not an absolute grant but one in which the Legislature intentionally set limits and requirements.

1. The First Amendment Does Not Create a Right to Collectively Bargain Based on Assertions of Interference and Retaliation.

FWOG concedes that the right of association does not create a right to bargain. Br. of Resp't at 38. Since it does not, the right of association cannot be the basis to expand bargaining under Title 41.80 RCW. Furthermore, claims of interference and retaliation against individuals for engaging in protected activity of union affiliation cannot expand the authorized collective bargaining parameters. Additionally, in this case, the State has not sought to limit or in any way restrict any individual's ability to engage in protected First Amendment activities. Similarly the State has not retaliated against individual members. FWOG does not identify any adverse action taken against any individual or FWOG as a result of the members deciding to change bargaining

representatives. In fact, the opposite is true, as the State offered to bargain agency specific issues with FWOG.

Although it concedes that the right of association does not create a right to bargain, FWOG argues that interference or retaliation with the right of association leads to the conclusion that the State should be required to engage in collective bargaining outside of that authorized by statute. The essence of FWOG's assertion is that the State must grant full scope bargaining on FWOG's terms. FWOG errs in equating the right of association with the grant of an opportunity to bargain.

Notably, there is no evidence that at any time from the filing of the Petition for Representation until certification as the bargaining representative that the employer in any way interfered with FWOG's members' ability to change bargaining representative or to associate for any other purpose. FWOG's assertions of an Unfair Labor Practice (ULP) have nothing to do with the election process and certification but arose instead after FWOG's demands to be treated outside of the limits of the Reform Act. The State has not sought to limit or in any way restrict an individual's ability to engage in protected First Amendment activities. Similarly, the State has not retaliated against individual members or the union as a whole for engaging in either First Amendment protected activity or for union affiliation. FWOG cannot identify any adverse action

taken against the individuals or the union during or as a result of the members deciding to change bargaining representatives. The opposite is true. The State offered to bargain agency specific issues with FWOG. FWOG rejected this offer. The fact that FWOG did not receive the terms it desired is not a result of any ULP by the State, but rather FWOG's own refusal to participate in the comprehensive legislative scheme for collective bargaining with state civil service employees. AR 1000; TR at 58 ll. 14-15; RCW 41.80.101.

2. The Definitions and Duties Under the Reform Act Do Not Create a Right to Bargain Beyond That Specifically Granted By the Reform Act.

As discussed above and as acknowledged by FWOG, State civil service employees' right to collectively bargain is a legislatively created right. But FWOG's exclusive duty under these statutes to represent the interests of all bargaining unit members does not change the clear structure and requirement for coalition bargaining. In particular, FWOG errs because it argues that the election process for becoming a bargaining representative, and the duty to represent the interests of all bargaining unit members, becomes an expanded right to bargain, based on the definitions of "collectively bargain" and "exclusive bargaining representative" in RCW 41.80.080, .005.

FWOG's argument would have this Court impose a requirement that the State engage in separate bargaining with FWOG for a unique bargaining agreement. That is, FWOG invites this Court to engraft language onto a statute or insert language that is not present, something that the principles of statutory construction do not permit. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). There is no specific language in the Reform Act that grants new small bargaining representatives the right to bargain outside of a coalition. Under FWOG's reading of the statute, the provision for coalition bargaining would become meaningless as each union's exclusivity would negate any coalition bargaining requirement.

3. Supplemental Bargaining of Agency Specific Issues Under the Reform Act Is Not a Right to Bargain for a Separate Bargaining Agreement.

FWOG concedes that RCW 41.80.010(2)(a) requires exclusive bargaining representatives who represent fewer than 500 employees to bargain collectively for one master agreement. Br. of Resp't at 20-21. RCW 41.80.010(2)(a) allows supplemental bargaining of agency specific issues by agreement of the parties to both the issues and procedures for such bargaining. FWOG tries to transform supplemental bargaining into a standalone right that renders the limiting language of the statute meaningless. Supplemental bargaining is not an unfettered, unrestricted right. First, the statute makes any supplemental bargaining "subject to the

parties' agreement regarding the issues and procedures" for such bargaining. RCW 41.80.010(2)(a). Second, the statute only allows for bargaining of *agency* specific issues, not union-specific issues. The matters on which FWOG sought additional bargaining are not agency specific.

FWOG sought to negotiate compensation and health care contributions. AR 1001; TR at 59 ll. 14-15. The 2011-13 Coalition agreement addresses compensation in Article 41 agreeing to a three percent reduction. AR 2290. Health care contributions were also agreed upon at the health care coalition negotiations, and incorporated into the agreement for 2011-13. AR 78. FWOG is not entitled to an agency specific bargaining agreement on these subjects, separate from the Coalition bargaining master agreement.

4. The Duty of Fair Representation Does Not Create a Right to Bargain for a Separate CBA.

FWOG's reliance on the Duty of Fair Representation as a basis for requiring a separately bargained-for agreement is misplaced. The Duty of Fair Representation (duty to represent) is a common-law imposed rule. The Legislature has the power to supersede the common law. *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975). Where a common-law duty conflicts with the plain language of a statute, then, the

common law must give way. The duty to represent requires that a union not be discriminatory, arbitrary, or act in bad faith. *Muir v. Coun. 2 Wash. State Coun. of Cnty. & City Emps.*, 154 Wn. App. 528, 531, 225 P.3d 1024 (2009). The duty to represent applies in the negotiation, administration, enforcement, and day to day protection of rights secured by contract. *Allen v. Seattle Police Officer's Guild*, 100 Wn.2d 361, 372-73, 670 P.2d 246 (1983). The Reform Act contains a parallel iteration of this duty. *See* RCW 41.80.080(3).

The Reform Act's requirement for a coalition of small bargaining unit representatives and coalition health care bargaining does not run afoul of the duty to represent. The duty to represent does not create a right to bargain a separate contract. It simply recognizes that a union owes a duty to all the unit members. The duty to represent exists and is met within the authorization to bargain which the Reform Act mandates occur for small bargaining representatives as one monolithic coalition, and that *all* bargaining units bargain a single agreement for health care.

C. Harmonization Of The Reform Act Requires That FWOG Is Properly Part Of The Coalition

The plain meaning of the Reform Act, combined with a reading of the act in the context of the various collective bargaining statutes reveals

the legislative intent to require small bargaining units, like FWOG, to bargain as a coalition.

The Legislature is presumed to say what it means and statutes are construed using the plain meaning of the statutory language. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). "Plain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283, 1288 (2010) (quoting *State v. Engle*, 166 Wn.2d 572, 578, 210 P.3d 1007, 1010 (2009)). Provisions of a statute should be harmonized wherever possible, and an interpretation that gives effect to all provisions is preferred. *Fray v. Spokane Cnty.*, 134 Wn.2d 637, 648, 952 P.2d 601 (1998). Where related statutes contain different terms, the courts presume that the Legislature meant different things by the different terms. *Delyria v. State*, 165 Wn.2d 559, 566, 199 P.3d 980 (2009).

The Reform Act expressly requires one master agreement for all small bargaining unit representatives. RCW 41.80.010(2)(a). It unambiguously states that there is only one agreement for all bargaining unit representatives addressing health care contributions. RCW 41.80.020(3). Together the coalition bargaining requirements

demonstrate a clear intent to create a unified and comprehensive bargaining structure. There is no provision for newly certified small bargaining representatives outside of these coalitions.

FWOG is asking the Court to significantly expand the opportunity to bargain from what the Reform Act authorizes. This is not supported by the statutory language. In attempting to separate itself from the clear coalition requirements, FWOG truncates and changes the statute. FWOG disregards all of the coalition requirements. Instead of "in effect for the bargaining representative," FWOG is asking this Court to alter the words of this statute to "which the bargaining representative bargained." This is not the plain wording of the statute. FWOG incorrectly argues it has a right to bargain independent of the Reform Act's requirements. FWOG's assertion that the Reform Act anticipated a different outcome is incorrect. FWOG is not exempt from the coalition bargaining requirement.

D. The Reform Act Is A Unique Collective Bargaining Law to Which FWOG Improperly Applies PERC's Interpretations Of Other Statutory Schemes

There are numerous collective bargaining statutes for public employees in Washington. All create an opportunity for public employees and other groups within each statutory framework to engage in limited or full scope collective bargaining. For State employees there are three statutory schemes: (1) the PECBA, Chapter 41.56 RCW, (2) the Reform

Act, Chapter 41.80 RCW, and (3) the Marine Employees collective bargaining, Chapter 47.64 RCW. While there are similarities between each of these statutory schemes, there are procedural and substantive differences. Non-traditional groups such as Family Child Care Providers bargain under the PECBA for "health and welfare benefits". RCW 41.56.029, .029(2)(ii). Washington State Patrol officers bargain for wage and wage-related matters but are prohibited from bargaining health care and retirement. RCW 41.56.473. Marine employees at the Washington State Ferries may negotiate wages, hours, working conditions, and insurance, but are required to bargain health care benefits as part of the health care coalition for all authorized State employees. RCW 47.64.120, .270.

The Reform Act's coalition bargaining requirements are unique. It codifies a precise outcome for a small bargaining unit that elects to change representation. Bargaining representatives with fewer than 500 members are covered by the master CBA for the bargaining representative: the Master Coalition Agreement. RCW 41.80.080(2)(a). FWOG cites cases decided under the PECBA or the Education Employment Relations Act (EERA) which authorizes collective bargaining for K-12 certificated employees. *See* Chapter 41.49 RCW. There is no similar coalition

provision in the PECBA or the EERA for a master agreement or super coalition bargaining of health care contributions.

When a bargaining unit covered by PECBA chooses a new bargaining representative, the prior contract terminates and the new bargaining representative begins with a blank slate. *Cowlitz Cnty.*, Decision 7007 (PECB 2000). The Reform Act removes this uncertainty, establishing a predictable outcome in the interest of continuity in labor relations. Small units like FWOG's members are never without a bargaining agreement. Instead, a small unit that terminates a larger bargaining representative joins the Coalition and is covered by the same Coalition agreement that applies to all small bargaining units. The decertification window occurring after the October 1 deadline allows units considering a change to be fully informed of the master agreement conditions that will apply should they elect to change. Exercising its expertise in labor relations, PERC correctly concluded that upon certification, FWOG was covered by the Coalition Master Agreement.

FWOG cites numerous cases decided by PERC under the PECBA and EERA to support its assertion that upon certification as the exclusive bargaining representative they were released from any contract and therefore the State could not impose the agreed-upon three percent salary reductions or increases to employee health care contributions. However,

the cases FWOG relies on are inapplicable under the Reform Act, when considering transition from one bargaining representative to another, as the Reform Act contains unique coalition bargaining requirements that the PECBA and EERA do not contain.

RCW 41.80.010(2)(a) creates one coalition agreement for all small representatives. It does not differentiate between new bargaining representatives and preexisting representatives. PERC's ruling that the "changes about which the union complains are all a direct consequence of the employees decision to leave the [Washington Federation of State Employees (WFSE)] and its master agreement and become an individual bargaining unit of fewer than 500 and subject to the coalition agreement" is accurate and mandated by the Reform Act. AR 2548. FWOG's members had a choice to remain with WFSE or to change representatives to FWOG. This case in not under the PECBA. The Reform Act expressly requires that FWOG is part of the Coalition Master Agreement and super health care coalition.

III. CONCLUSION

FWOG is not exempt from the structure and requirements of the Reform Act and is properly part of the Coalition CBA. FWOG is not entitled to bargain a separate agreement for wages, hours, and working conditions. Nor is it 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 20 day of February 2015.

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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 20th day of February, 2015, I caused a true and correct copy of this Appellant's Reply Brief and Certificate of Service to be served on the following in the manner indicated below:

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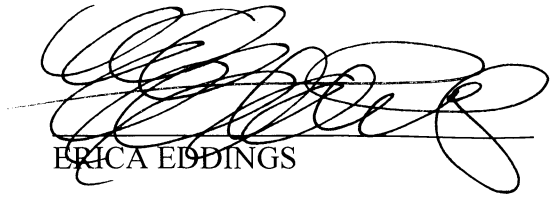
I certify under the penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 20th day of February, 2015.



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