NO. 93033-3
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KITSAP COUNTY, and KITSAP COUNTY SHERIFF,

Petitioners,

v.

KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD; and PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

RESPONDENT, KITSAP COUNTY CORRECTIONAL OFFICERS' GUILD'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Kitsap County Correctional Officers' Guild ("Guild") represents all corrections officers employed by the Kitsap County ("County") Sheriff's Office. After the County unilaterally announced it would layoff two Guild members in January 2012, the Guild demanded to bargain the County's decision to engage in layoffs. The County refused to bargain, and instead filed a declaratory judgment lawsuit stating it had no such duty. The County also attempted to reframe the request to bargain as over the *budget*, not the layoffs. The Guild counterclaimed, arguing the County's refusal to bargain layoffs constituted an unfair labor practice.

Despite the impressive procedural history of the case, working through two divisions of the Court of Appeals, the issues are quite simple. Layoffs motivated by a desire to save on labor costs are a mandatory subject of bargaining, which the Court of Appeals agreed with and found the County's refusal to bargain this decision to constitute an unfair labor practice ("ULP"). The County now seeks this Court's review by misreading and obscuring the Court of Appeals decisions.

II. COUNTER-STATEMENT OF THE CASE

On October 24, 2011, the Guild's President learned that two of the Guild's members had been told they would be laid off on January 1, 2012. CP 635 ¶8. That same day, the Guild President drafted and delivered a

letter demanding to bargain any layoffs. CP 635 ¶9. The Guild's attorney also told the County's Labor Relations Manager that the Guild demanded to bargain the layoffs. CP 635-6 ¶11. The parties met in bargaining on one occasion, but the County would only discuss the effects of its layoff decision, not the decision itself. CP 636 ¶13. In December, 2011, the Guild's legal counsel exchanged emails with the County's Labor Relations Manager, who affirmed that the County would not bargain its previously decided layoff decision. CP 637 ¶16. The Guild's attorney reiterated the demand to bargain, but the County refused to bargain and filed a declaratory judgment action on December 22, 2011. CP 638 ¶18. The two Guild members were laid off on January 1, 2012. CP 638 ¶19.

The County sought a Superior Court order that it was not required to bargain over its budgetary decisions and staffing levels. The Superior Court ruled in the County's favor in Ocboter 2012, but the Guild appealed. The Court of Appeals Division II remanded the case back to Superior Court, finding the balancing test required under RCW Chapter 41.56 was not properly conducted.[1] The Public Employment Relations Commission ("PERC") intervened in the case, and on August 29, 2014, the Superior Court ruled in favor of Kitsap County. The Guild and PERC appealed. CP

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[1] *Kitsap County v. Kitsap County Correctional Officers' Guild*, No. 44183-7-II, 149 Wn.App. 987 (2014) (Petition for Review Appendix B).

5-7, 15-17. The Court of Appeals Division I reversed in the Guild's and PERC's favor, holding that the layoffs are a mandatory subject of bargaining, the Guild requested to bargain, and by refusing to bargain, the County committed an unfair labor practice.[2]

III. SUMMARY OF THE ARGUMENT

The County fundamentally misunderstands the issue in this case, and that confusion permeates its entire Petition to this Court. The Guild requested to baragin the County's decision to layoff two employees. The County's layoff decision is not the same as its budget. The fact that the layoffs were motivated by the County's desire to lower its costs does not render the budget and the layoffs one and the same, nor is this distinction mere "semantics." There is no conflict between the Court of Appeals decision and any other predecent or law, unless one deliberately misreads decades of PERC cases, two U.S. Supreme Court cases, this Court's prior holdings, and the clear analysis of two Divisions of the Court of Appeals.

This Court accepts review only in limited circumstances not present here. The Court of Appeals correctly determined that the County commited an unfair labor practice by refusing to bargain the layoffs. That Court situated its analysis within the framework from PERC, the U.S.

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[2] *Kistap County v. Kitsap County Correctional Officers' Guild*, Case No. 73637-0-I, 2016 WL 1090154. (Petition for Review Appendix A).

Supreme Court, and this Court. The County presents the Court of Appeals decision as a novelty that undermines the County's budgetary authority, but nothing could be further from the truth. Layoffs have long been held to require bargaining. Lastly, the County's waiver argument is based on a deliberate misreading of the two Court of Appeals decisions to create conflict where none exists. Therefore, this Court should deny the Petition.

IV. ARGUMENT FOR DENYING REVIEW

A. The Court of Appeals Correctly Determined that Kitsap County Commited A ULP When It Refused to Bargain The Decision To Layoff Employees

1. A balancing test must be applied when determining whether a subject of bargaining is mandatory or permissive.

Kitsap County and the Guild are governed by RCW Chapter 41.56, the Public Employees Collective Bargaining Act ("PECBA"). PECBA makes it an "unfair labor practice" for an employer "to refuse to engage in collective bargaining."[3] RCW 41.56.030(4)'s defines "Collective bargaining" as the duty "...to confer and negotiate in good faith, and to execute a written agreement [on matters] including wages, hours and working conditions." PERC has repeatedly emphasized the duty to bargain "personnel matters, including wages, hours, and working conditions" of bargaining unit employees and are characterized as mandatory subjects of

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[3] RCW 41.56.140

bargaining."[4] An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining, commits an unfair labor practice.[5]

Bargaining subjects are classified as "mandatory," "permissive" and "illegal."[6] PERC has indicated: that "[m]atters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered remote from 'terms and conditions of employment' or which are regarded as a prerogative of employers or of Unions, have been categorized as 'nonmandatory' or 'permissive.'"[7]

PECBA case law recognizes certain "management rights," which are deemed permissive subjects of bargaining. This Court has stated that when matters touch on "wages, hours and working conditions" but also on "management rights," a "balancing test" should be used to determine if a subject is a "mandatory subject of bargaining."[8] Commenting on this test, PERC has said: "The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of the impact on the bargaining unit."[9] PERC has been consistent and clear that it looks at the

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[4] *City of Yakima*, Decision 11352 (PECB, 2012) (*quoting Federal Way School District*, Decision 232-A (EDUC, 1977), (*citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)).
[5] *Id.*; RCW 41.56.140(4) and (1)
[6] *Yakima County,* Decisions 6594-C and 6595-C (PECB, 1999).
[7] *Id.*; *see also Federal Way School District*, Decision 232-A (EDUC, 1977).
[8] *See International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 778 P.2d 32 (1989).
[9] *Spokane County Fire District 9,* Decision 3661-A (PECB, 1991).

essential nature of the change, *not the creative label that a party might attach to the change.*[10]

The duty to bargain is broad, and subjects are not automatically exempt from bargaining simply if they *somehow involve* management rights. For example, in *King County v. PERC*,[11] the Court of Appeals rejected King County's claim that its right to regulate jail security exempted it from a duty to negotiate with the nurses' Union as to whether nurses had to wear name badges. The nurses' Union argued, and PERC agreed, that this touched on employees' safety concerns, a working condition, and therefore subject to the duty to bargain. In upholding PERC, the Court of Appeals balanced the competing interests, noting that while King County asserted the policy was "a fundamental management prerogative" and bargaining could cause "chaos," the nurses' concern was for their own safety, "a much more significant concern than those raised in the cases King County relied on."[12]

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[10] As the Commission explained in *Yakima County,* Decisions 6594-C and 6595-C (PECB, 1999), "Where a subject relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates." *See also City of Richland,* Decision 6120 (PECB, 1997) ("The Commission and its Examiners thus go beyond characterizations and labels to analyze the facts demonstrated by a full evidentiary record.");*City of Wenatchee,* Decision 8802 (PECB, 2004) ("Whether a staffing proposal is a mandatory or permissive subject of bargaining depends on the nature of the proposal.").

[11] 94 Wn.App. 431, 438-39, 979 P.2d 130 (1999).

[12] *Id.*

2. The Court of Appeals Decision Correctly Classified The Layoffs As A Mandatory Subject of Bargaining

PECBA requires bargaining over "working conditions." Job security is a paramount "working condition." Specifically, the Commission noted that it "has repeatedly held that the decision to lay off employees is a mandatory subject of bargaining."[13] With layoffs, PERC distinguishes between where the employer's main motivating factor is *an economic motivation and/or a desire to reduce labor costs* and where layoffs are an incidental result from a *programmatic change or an alteration to the services*. Beginning with *South Kitsap School District,*[14] PERC has held that economically motivated layoffs are mandatory bargaining subjects. Subsequent decisions by PERC have confirmed that "the decision to lay

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[13]*City of Kelso*, Decision 2633-A (PECB, 1988). *See* also *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280 (PECB, 2009) (noting "because the employer's layoff decision had a significant impact on employees' wages, hours and working conditions, the decision is a mandatory subject of bargaining"). *City of Centralia*, Decision 1534-A (PECB, 1982); *City of Mercer Island*, Decision 1026-A (PECB, 1981); *South Kitsap School District* Decision 472 (PECB, 1978)). NLRB cases are similar: *Pan American Grain Co.*, 2007 NLRB LEXIS 530, (2007) (affirming the ALJ's finding that Respondent's decision to lay off employees was mandatory bargaining subject); *Tri Tech Services,* 340 NLRB 894, 895 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain.") (*citing Taino Paper Co.* 290 NLRB 975, 977-978 (1988); *Peat Mfg. Co.,* 261 NLRB 240 (1982)); *Davis Electric Wallingford Corporation, et al*, 318 NLRB 375 (1995) (finding employer committed unfair labor practice by giving employees three working days notice of layoffs and refusing to bargain). *See also Quality Packaging Inc.*, 265 NLRB 1141, *2 (1982) (ordering employer to cease and desist from "unilaterally altering its method of recalling employees from layoff without notice to or bargaining with the Union as the exclusive bargaining representative of its employees").

[14] Decision 472 (PECB, 1978).

off employees is a mandatory subject of bargaining."[15] When an employer is motivated to reduce its labor costs or make other changes to wages, hours and working conditions on a temporary or permanent basis, including laying off personnel, it has repeatedly been found to be a decision implicating a mandatory subject of bargaining. In *City of Kelso*,[16] for example, the City unilaterally decided to contract out its firefighting work by partially annexing itself. The resulting annexation meant the City's firefighters would be laid off. Commenting on the City's motivation, PERC noted the change was "driven primarily, if not exclusively, by considerations of labor costs....We cannot know what concessions the union might have offered ... to save the jobs...since the employer did not give it the opportunity required by law."[17] PERC concluded that layoffs motivated by labor costs savings are "among the types of issues where there is a duty to give notice and bargain."[18]

In a recent and directly analogous case to our own, PERC determined furloughs (i.e. temporary layoffs) are a mandatory subject of bargaining. On appeal to the full Commission, PERC agreed with the

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[15] *Tacoma and Pierce County Employment Training Consortium*, Decision 10280 (PECB, 2009) (*citing City of Kelso*, Decision 2633-A (PECB, 1988), *aff'd.* in part and *rev'd.* in part, 57 Wn. App. 721, 790 P.2d 185 (1990), review denied, 115 Wn.2d 1010, 797 P.2d 512 (1990)); *See also Yakima County*, Decision 11621 (PECB, 2013); *Stevens County*, Decision 2602 (PECB, 1987); *City of Centralia*, Decision 1534-A (PECB, 1983).
[16] Decision 2633 (PECB, 1988).
[17] *Id.*
[18] *Id.*

Examiner's finding that the employer's "chief motivation for imposing furloughs was to reduce labor costs,"[19] making the furlough decision a mandatory subject of bargaining. Specifically, it found:

> [T]he employer's stated reason for deciding to implement furloughs was to achieve labor savings, and not to eliminate services. The Examiner noted that the employer had the right to determine and manage its own budget, and considered the impact of the looming financial crisis. [But t]hese facts did not make the decision to furlough employees a permissive one.[20]

The Commission went on to contrast the *King County*[21] case with *Wenatchee School District*,[22] and highlighted this critical distinction: "Unlike *Wenatchee School District*, where the respondent made a wholesale change to the scope of its operation, this employer's decision to close its offices *does not constitute a programmatic change to an employer service*, rather the decision to implement furloughs simply precludes certain services from being available ten days of the year."[23] King County was not making changes to the services it provided; rather, it was using the furloughs to achieve a savings in labor costs and help balance its 2009 budget. With this motivating mechanism at play, PERC held that furloughs, like layoffs, are a mandatory subject of bargaining.

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Decision 3240 (PECB, 1990).
[23] *King County, supra.*

Turning to the instant case, the Court of Appeals correctly summarized the case as follows: "The subject of the demand to bargain was the layoff decision, not the budget."[24] Throughout its Petition, the County makes the same mistake that the Court of Appeals has already corrected. Indeed, the Court of Appeals directly stated that the County was conflating the issue: "By mischaracterizing the Guild's position as a demand to bargain the budget, the county thoroughly undermines its argument. The layoff decision alone was the subject of the Guild's demand to bargain."[25] The issue is the layoff decision, *not* the budget. The Court of Appeals' decision therefore conforms with decades of applicable law under PECBA that holds economically motivated layoffs are a mandatory subject of bargaining.

The Court of Appeals noted that while the trial court's "finding of fact correctly stated that the Guild 'demanded to bargain the layoffs,' the Court did not balance the competing interests involved in the layoff decision. Rather, the trial court balanced the competing interests in 'the decision to reduce the budget, reduce staffing levels, and layoff employees.'"[26] The Court of Appeals thoroughly reviewed relevant

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[24] *Kistap County v. Kitsap County Correctional Officers' Guild*, Case No. 73637-0-I, 2016 WL 1090154. (Petition for Review Appendix A at 1).
[25] *Id.* at 12.
[26] *Id.* at 10.

caselaw and PERC decisions.[27] The Court correctly held that PERC has consistently held that "a layoff decision motivated by budget cuts is a mandatory subject of bargaining because of the impact it has on wages, hours, and working conditions, while a decision to change an agency's programmatic prioirites or scope of operations is a permissive subject because it implicates management perogatives."[28]

B. The Court Of Appeals Decision Does Not Conflict With Any Decision Of This Court, Or, For That Matter, Any Court

1. U.S. Supreme Court Decisions Are Not Controlling Because This Is A State Statutory Claim, Notwithstanding The Fact That PERC and Court of Appeals Decisions Are Consistent With Earlier U.S. Supreme Court Decisions.

The County largely rests its analysis on two U.S. Supreme Court decisions arising under the NLRA, the first of which actually predates the adoption of PECBA by several years.[29] The primary problem with the County's argument is that both decisions expressly interpret the NLRA. While PECBA models the NLRA in many ways and PERC has cited to these decisions in some of its own cases,[30] this does not mean the analysis from those opinions would override the balancing test adopted by the

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[27] *Id.* at 11-21.
[28] *Id.* at 14.
[29] County's Petition for Review at 11.
[30] *See, e.g., King County v. PERC*, 94 Wn.App. 431, 440, 979 P.2d 130 (1999) (invoking NLRB's standard that "scope of bargaining" test involves whether the issue touches Union's "legitimate concern"); *Nucleonics Alliance, Local 1-369 v. WPPSS*, 101 Wn.2d 24, 677 P.2d 108 (1984).

Washington State Courts and PERC in applying PECBA. The issue in this case was not whether there was a violation of the NLRA; rather, the issue is whether the layoff decision constitutes a mandatory subject of bargaining under PECBA. Since the courts and PERC have adopted, and repeatedly applied, a clear balancing test and analysis for questions of this nature, there is no reason to seek out, or apply, a test first developed by the U.S. Supreme Court in 1964 under the NLRA.

Additionally, in *First Nat'l Maintenance*, as framed by the Court, the issue was whether an employer must "negotiate with the certified representative of its employees over its decision to close a part of its business[.]"[31] The incidental effect of the employer's decision in *First National* was to terminate several employees, but the legal issue centered on the employer's obligation to bargain over its decision to cease operations. The instant case has nothing to do with ceasing a particular operation or the closing of a business. Kitsap County merely sought to save on labor costs by laying off some Guild members. Even if the test developed in *First National* had some applicability under PECBA, the two cases are completely inapposite because of the different legal questions.

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[31] *First Nat'l Maintenance v. National Labor Relations Board*, 452 U.S. 666, 667, 101 S. Ct. 2573; 69 L. Ed. 2d 318 (1981).

Likewise, in *Fibreboard Paper Products Corp.*,[32] the primary issue was "whether the 'contracting out of work being performed by employees in the bargaining unit is a statutory subject of collective bargaining'" under the NLRA.[33] The Court held that the employer was required to bargain, as it had been motivated by a desire to reduce labor costs, although the case itself was in the context of contrating out work.[34]

Furthermore, PERC and the Court of Appeals' decisisons are consistent with these earlier U.S. Supreme Court decisions. The Court of Appeals began its analysis by noting *Fibreboard* and *First Nat'l* "provide the framework for analyzing whether a layoff decision will be classified as permissive or mandatory."[35] In *First Nat'l*, the Court held the employer was not required to bargain layoffs arising from shutting down part of its operation.[36] In applying this framework, the Court of Appeals noted:

> PERC has maintained the distinction that flows from *Fibreboard* and *First National*: generally, a layoff decision motivated by budget cuts is a mandatory subject of bargaining because of the impact it has on wages, hours, and working conditions, while a decision to change an agency's programmatic prioirties or scope of operations is a permissive subject because it implicates management

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[32] *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 85 S. Ct. 398; 13 L. Ed. 2d 233 (1964).
[33] *Id.* at 204.
[34] *Id.* at 213-214.
[35] *Kistap County v. Kitsap County Correctional Officers' Guild*, Case No. 73637-0-I, 2016 WL 1090154. (Petition for Review Appendix A at 8).
[36] 452 U.S. at 686.

perogatives.[37]

The Court of Appeals then directly invoked those cases when it ruled the County's layoff decision "was a decision to meet budget cuts by reducing labor costs....The fact that the County had a legitimate need to achieve budgetary savings and had a statutory duty to manage its own budget, did not make the layoff decision a permissive subject of bargaining."[38] There is no conflict between the Court of Appeals' decision and U.S. Supreme Court precedent.

2. The Court of Appeals Decision Is Not Goverened By This Court's Decision In *Barnes*, But To the Extent It Were, There Is No Conflict

The County also incorrectly asserts the decision conflicts with this Court's 1974 decision in *Spokane Educ. Ass'n v. Barnes.*[39] But that case arose under RCW Chapter 28A.72, the Personnel Act that the Legislature repealed in 1975. That statute, which was created to develop "orderly methods of communication between certificated employees and the school districts by which they are employed,"[40] is both now repealed[41] and has no clear parallels with the more modern and expansive PECBA in RCW

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[37] Petition for Review Appendix A at 14.
[38] *Id.* at 18.
[39] 83 Wn.2d 366, 519 P.2d 1362 (1974).
[40] *Id.* at 368.
[41] 1969 ex.s. c 223 § 28A.72.010. Prior: 1965 c 143 § 1. Formerly RCW 28.72.010, Repealed by 1975 1st ex.s. c 288 § 28, effective January 1, 1976.

Chapter 41.56.[42] Whatever proposition the County feels this case stands for has no bearing on the matter at hand.

To the extent that this Court's holding in *Barnes* applies to the instant case, the Court of Appeals correctly identified crucial factual differences. In *Barnes*, the School Board found itself in a four-day window between voters' rejection of a special levy and the statutory deadline for layoffs.[43] As the Court of Appeals noted, in the instant case the Guild requested to bargain more than two months before the layoffs were to occur.[44]

C. The Court Of Appeals Decision Does Not Create An Issue Of Public Interest Because It Comports With Longstanding Legal Interpretations Of PECBA Concerning The Duty To Bargain Layoffs And Does Not Impair The County's Budgetary Authority.

The Court of Appeals correctly held that the underlying issue in this case is the layoffs, not the County's budget. But it is well established that "the decision to lay off employees is a mandatory subject of bargaining."[45] As has been addressed, where layoffs are "a change driven

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[42] For example, RCW 28A.72.030 created a duty to "meet, confer, and negotiate" over matters relating to "curriculum, textbook selection, in-service training, student teaching programs, personnel, hiring and assignment practices, leaves of absence, salaries and salary schedules and noninstructional duties." There is no mention of the phrase "wages, hours and working conditions," which is the operative PECBA phrase defining the scope of collective bargaining for public employees.

[43] 83 Wn.2d at 370.

[44] *Kistap County v. Kitsap County Correctional Officers' Guild*, Case No. 73637-0-I, 2016 WL 1090154. (Petition for Review Appendix A at 19).

[45] *Tacoma and Pierce County Employment Training Consortium*, Decision 10280 (PECB, 2009) (*citing City of Kelso*, Decision 2633-A (PECB, 1988), *aff'd.* in part and *rev'd.* in part, 57 Wn. App. 721, 790 P.2d 185 (1990), review denied, 115 Wn.2d 1010, 797 P.2d

primarily, if not exclusively, by considerations of labor costs then the employer has a "duty to...bargain"[46]

The County now asserts that it cannot bargain layoffs because this is "an unlawful delegation of legislative powers."[47] Not only does the Court of Appeals decision comport with PERC's interpretation of PECBA, but the County's argument that this impairs its budget authority flies in the face of the bargaining process. Public employers have the ability to amend budgets and adopt supplemental requests at any time, and they routinely do so for things like recently ratified collective bargaining agreements.[48]

Additionally, under PECBA, many public employers can actually be forced to make adjustments to previously adopted budgets to account for increased wage amounts or other benefits stemming from an interest arbitration decision. Under PECBA, the bargaining unit here is eligible for interest arbitration, meaning that if the parties cannot reach a mutually satisfactory agreement, the contract may be submitted to a neutral arbitrator.[49] The arbitrator is authorized to "make written findings of fact and a written determination of the issues in dispute, based on the evidence

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512 (1990)); *See also Yakima County*, Decision 11621 (PECB, 2013); *Stevens County*, Decision 2602 (PECB, 1987); *City of Centralia*, Decision 1534-A (PECB, 1983).

[46] *City of Kelso*, Decision 2633 (PECB, 1988).

[47] Petition for Review at 16.

[48] *See* RCW Chapter 36.40.

[49] See RCW 41.56.030.

presented" which determination "shall be final and binding on the parties..."[50] Thus, the statutorily mandated interest arbitration process already subjects the County to a system whereby a CBA's final terms could require budget modification, retroactive by several years.

PERC has repeatedly held collective bargaining cannot be "an exercise in futility"[51] where one side is "merely going through the motions."[52] An employer must "meet with a willingness to hear and consider a union's view and a willingness to change its mind."[53] It would be bad faith bargaining for a public employer to take the position that once its budget is finalized, a union could not negotiate any changes that would affect that original budget. There is no duty to agree, but alternatives must be considered even if it means adjusting an established budget amount.

D. There Is No Conflict In The Two Court Of Appeals Decisions

1. The County misstates the findings of the two divisions on the issue of whether there was a contractual waiver in an effort to create a conflict where none exists.

The County alleges that the Division I and Division II decisions are in "direct conflict." The County's argument comes from a fundamental

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[50] RCW 41.56.450.
[51] *Kitsap County*, Decision 11675, (PECB, 2013); citing *Mansfield School District*, Decision 4552-B (EDUC, 1995).
[52] *Id.*; citing *Western Washington University*, Decision 9309 (PSRA, 2006)
[53] *Id.*; *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988), *aff'd*, Decision 2350-D (PECB, 1989).

misunderstanding of Division II's holding. In the County's words: "Division II held that the provision in the CBA and civil service rules regarding layoffs constituted a waiver."[54] This argument stems entirely from misreading the Court's holding.

Division II did not hold that there was a waiver. It held that *if there was a waiver*, it had expired with the CBA.[55] Specifically, Division II stated "any waivers expired" with the CBA.[56] Further elaborating, Division II stated, "the alleged waivers had expired" and "there is no evidence at the time of the layoffs that the parties had agreed to renew the alleged waivers. Therefore, the alleged waivers expired in 2010."[57] Division I emphasized this very point, noting its sister court "did not reach the question of whether the quoted language amounted to a waiver of the right to bargain layoffs."[58]

Division I noted that the County should not have raised a waiver on appeal given that the "single issue on remand was for the court to conduct the balancing test....[But] the county renews the waiver argument

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[54] Petition for Review at 17.
[55] At the time of the initiation of proceedings at issue, the most recent collective bargaining agreement between the Guild and the County was for the period commencing January 1, 2007 through December 31, 2009. CP 634 ¶6. The new collective bargaining agreement stemmed from an interest arbitration award for the period of January 1, 2010 through December 31, 2012. CP 635 ¶7.
[56]. 44183-7-II (Petition for Review Appendix B at 6).
[57] *Id.* at 7.
[58] No. 73637-0-I (Petition for Review Appendix A at 22).

in the present appeal....To a great extent, the County's argument is barred by the law of the case doctrine."[59] Division I then held that Division II's holding, "that a waiver expires when the agreement expires – is not clearly erroneous," and therefore declined to set it aside.[60] Lastly, Division I briefly considered the County's newest waiver allegation that because the CBA mentioned the civil service rules, there was somehow a waiver and promptly rejected this argument.[61]

There is no conflict here. Division II did *not* hold that a waiver existed, only that if one *did* exist, it would have expired. Division I agreed and then chastised the County for raising an issue on appeal that was barred by case doctrine, rejecting the County's newest waiver argument.

2. The Courts correctly stated the law on contractual waivers.

The Court of Appeals Division II held contractual "waivers are permissive subjects that expire with the collective bargaining agreement unless they are renewed by mutual consent."[62] Division I agreed with this assessment.[63] PERC has consistently held contractual waivers to be permissive subjecst of bargaining.[64] Prior case precedent clearly shows

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[59] *Id.*
[60] *Id.* at 23.
[61] *Id.*
[62] No. 44183-7-II (Petition for Review Appendix B at 7).
[63] No. 73637-0-I (Petition for Review Appendix A at 23).
[64] *City of Yakima*, Decision 3564-A (PECB, 1991) ("Waivers of statutory bargaining rights are not, themselves, a mandatory subject of bargaining").

waivers in a contract "expire with the collective bargaining agreement."[65] Since the contract had expired at the time of layoffs and there was no indication of any renewal, the Court of Appeals correctly decided that the waiver doctrine does not apply.

V. CONCLUSION

Because Kitsap County's Petition for Review does not meet any criteria for review, the Guild respectfully requests the Petition be denied.

RESPECTFULLY SUBMITTED this 20th day of May, 2016, at Seattle, WA.

CLINE & CASILLAS

By: _____

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[65] *City of Pasco*, Decisions 4694, 4695 (PECB, 1994) ("One of the inherent forces which motivate employers to sign contracts (or contract extensions) with unions is the preservation of contractual waivers of union bargaining rights.").

CERTIFICATE OF SERVICE

I certify that on May 20, 2016, I caused to be served via electronic mail and U.S. Mail a true and accurate copy of the foregoing *RESPONDENT'S ANSWER TO PETITION FOR REVIEW* and this *CERTIFICATE OF SERVICE* in the above-captioned matter with:

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

DATED this 20th day of May 2016, at Seattle, Washington.

CLINE & CASILLAS

Cathy Riccobuono
Cathy Riccobuono
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From: Cathy Riccobuono [mailto:CRiccobuono@clinelawfirm.com]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Jacquelyn M. Aufderheide <JAufderh@co.kitsap.wa.us>; Deborah A. Boe <DBoe@co.kitsap.wa.us>; Lyon, Mark (ATG) <MarkL1@ATG.WA.GOV>; Chris Casillas <ccasillas@clinelawfirm.com>
Subject: Case No. 93033-3

To Whom it May Concern:

Attached for filing with the Court, is Respondent, Kitsap County Correctional Officers' Guild's Answer to Petition for Review.

Regards,

Cathy Riccobuono
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