

68376-4

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NO. 68376-4

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

WASHINGTON FEDERATION OF
STATE EMPLOYEES,
Appellant,

and

UNIVERSITY OF WASHINGTON,
Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. The Commission decision should be affirmed..... 1

A. The University misstates the case. 1

B. The Commission did not commit an error of law in its consideration of the holding in *Boise Cascade*..... 9

C. The Commission decision neither contradicts Commission precedent nor the findings in this case, and the decision is not arbitrary and capricious..... 14

D. Substantial evidence supports PERC’s finding that the University proposed and insisted that employees be transferred from the WFSE unit to a unit represented by SEIU..... 19

E. The Commission’s ruling is consistent with the allegations in the Preliminary Ruling and the WFSE unfair labor practice complaint..... 22

II. Conclusion. 24

APPENDIX A A-1

TABLE OF AUTHORITIES

Cases

<i>International Ass'n of Firefighters, Local No. 469 v. Public Employment Relations Com'n of State of Wash.</i> , 38 Wn.App. 572, 686 P.2d 1122 (1984)	13
<i>WPEA v. State</i> , 172 Wn.App. 254, 110 P.3d 1154 (2005).....	13

Federal Cases

<i>Boise Cascade Company v. NLRB</i> , 860 Fed.2d 471 (D.C. Cir. 1988).....	passim
<i>Fiberboard Paper Products v. NLRB</i> , 379 U.S. 203 (1964)	14

PERC Decisions

<i>Adams County</i> , Decision 4006 (PECB, 1992)	24
<i>Bremerton – Kitsap County Health Dept.</i> , Decision 2984 (PECB, 1988)..	5
<i>Central Washington University</i> , Decision 10215-B (PSRA, 2010).....	12
<i>City of Richmond</i> , Decision 8879-A (PECB, 2006)	18
<i>City of Seattle</i> , Decision 4163 (PECB, 1992)	2
<i>City of Spokane</i> , Decision 6232 (PECB, 1998)	2
<i>City of Tacoma</i> , Decision 6780 (PECB, 1999).....	5
<i>Int'l Union of Operating Engineers, Local 286</i> , Decision 8078 (PECB, 2003).....	2
<i>Olympia School District</i> , Decision 799 (PECB, 1980).....	6
<i>Puget Sound Educational Service Dist.</i> , Decision 5126 (PECB, 1995).....	5, 12
<i>Snohomish County</i> , Decision 9540-A (PECB, 2007)	16, 17, 18

<i>State – Department of Natural Resources, Decision 9388-A (PSRA, 2006)</i>	12
<i>University of Washington, Decision 10263 (PSRA, 2008)</i>	7, 12
<i>University of Washington, Decision 10490-C (PSRA, 2011)</i>	10, 19
<i>University of Washington, Decision 10496-A (PSRA, 2011)</i>	12
<i>University of Washington, Decision 8216 (PSRA, 2003)</i>	16
<i>University of Washington, Decision 8216-A (PSRA, 2004)</i>	15, 16
<i>University of Washington, Decision 8878 (PSRA, 2005)</i>	15
<i>University of Washington, Decision 8878-A (PSRA, 2006)</i>	passim
<i>Western Washington University, Decision 9309 (PSRA, 2006)</i>	17

Statutes

RCW 41.06	16
RCW 41.06.150(4).....	4
RCW 41.06.157	4
RCW 41.56	17
RCW 41.80.005(2).....	21
RCW 41.80.060	13
RCW 41.80.070	passim
RCW 41.80.110(1).....	22, 23
RCW 41.80.110(1)(a) and (e)	23

Regulations

WAC 391-35-020..... 12

WAC 391-45-050..... 23

WAC 391-45-110..... 22

WAC 391-45-110(2)(b) 24

WAC Ch. 391-25 11

WAC Ch. 391-35 6, 7, 12

Other Authorities

The Developing Labor Law, Fifth Edition Ch. 16.IV.C.2.m(1) 2

I. The Commission decision should be affirmed.

By statute, the Public Employment Relations Commission is granted *exclusive* authority to determine and to modify bargaining units of State employees.¹ The Commission applied this principle in determining that the University of Washington (University) committed an unfair labor practice by insisting during bargaining that the Washington Federation of State Employees (WFSE) agree to “transfer” certain employees from its bargaining unit of University employees, certified by PERC, to a bargaining unit represented by another union (SEIU), thus modifying the two units. The Commission’s application of this principle was appropriate and should be affirmed.

A. The University misstates the case.

The University’s claim that it was simply attempting to respect the bargaining units previously certified by PERC suffers from the fundamental flaw of confusing the duty to bargain in good faith regarding the removal of bargaining unit work with impermissibly bargaining the configuration (scope) of bargaining units.

The employees performing lab processing work at the Harborview Medical Center, operated by the University, as Central Processing Techni-

¹ RCW 41.80.070.

cians (CPT) and later as Specimen Processing Technicians (SPT), have been members of the WFSE Harborview bargaining unit for forty years. The unit was certified decades ago by the old civil service boards and more recently confirmed by PERC. A bedrock labor principle is that “once an employer assigns bargaining unit employees to perform a category of work, that work attaches to the unit and becomes bargaining unit work.”² An employer who has the work performed by persons other than bargaining unit members without first providing the unit representative the opportunity to bargain, either “skims” or “contracts out” the work.³ Both are universally recognized as unfair labor practices.⁴

In the first ULP related to these same employees, the University unilaterally reclassified the employees to Clinical Laboratory Technicians (CLT) and claimed that by that act they had become unrepresented, and then it “skimmed” unit work by having the employees continue to perform the work out of the unit. The Commission found the University guilty of the skimming unfair labor practice and ordered restoration of the *status*

² *Int'l Union of Operating Engineers, Local 286*, Decision 8078 (PECB, 2003) and *City of Spokane*, Decision 6232 (PECB, 1998).

³ “Skimming” involves use of employees of the employer not in the unit. “Contracting out” refers to use of third party employees to perform the work. *City of Seattle*, Decision 4163 (PECB, 1992).

⁴ *Id* and *The Developing Labor Law*, Fifth Edition Ch. 16.IV.C.2.m(1) “Subcontracting and Removal of Work from the Bargaining Unit.”

qou ante.⁵ The University eventually returned the employees and the work to the WFSE bargaining unit.

However, the University also immediately advised the WFSE that it was again studying the employees work to see if they were properly classified.⁶ Shortly after that, it advised the union that it was proposing to reclassify the employees to a new job classification (the same Clinical Laboratory Technician job class) and “transfer” them (again) to the SEIU bargaining unit.⁷

The University suggested that it couldn’t have employees in the same job classification in different bargaining units (in other words, in both the WFSE bargaining unit at Harborview and the SEIU unit at the University Medical Center) as a reason for wanting to include the Harborview lab processing technicians in the SEIU unit. But, the University has at least 59 different situations of employees in a job class being in two or more different bargaining units, including employees in the SPT job class being in both the WFSE and the SEIU unit.⁸

The University never initiated a reallocation process to actually reclassify the employees. Rather it continued to hold the employees hostage

⁵ *University of Washington*, Decision 8878-A (PSRA, 2006) (Appendix A).

⁶ Exhibit 38, AR-11-939 (June 16, 2007 letter). (The administrative record is at CP9.)

⁷ Exhibit 35, AR-11-826 (October 4, 2007 letter).

⁸ Exhibit 10, AR 11-750-759.

to lower paying jobs (in the University's compensation plan SPT jobs were paid less than CLT jobs, even though the University admitted they were doing exactly the same work). All the while, the University insisted that the WFSE agree that both the work and the employees leave the WFSE unit and go to the SEIU unit, and that the two units be modified accordingly. The WFSE continually refused and eventually filed this second unfair labor practice charge.⁹

At the heart of his case is the complex University job classification system. By statute, RCW 41.06.150(4), the Director of the Department of Personnel is charged with establishing and maintaining a classification system of jobs for state employees.¹⁰ The University, however, has created a web of classifications mixing abolished DoP job titles, current DoP job titles and University job titles, which it uses to designate whether employees are represented or not and if represented, by what union. By doing so, it has confused the issues of work and representation into its job titles. By labeling employees with one job title or another, the University purports to control what bargaining unit (union) the employee is in by what title they

⁹ ULP Complaint AR-1-4 and Amended Complaint AR-3-128.

¹⁰ In October 1, 2011, these duties were transferred to the Human Resource Director in OFM with abolishment of the Department of Personnel. See RCW 41.06.157.

are assigned.¹¹ With several job titles that describe the same work, it isn't difficult to do.

In *City of Tacoma*, Decision 6780 (PECB, 1999), the Commission held that a similar practice by an employer, while perhaps administratively efficient for the employer, “cannot override the statutory authority of the Commission to place employees into bargaining units....” It has also said “[a]n employer does not create a non-union position by changing job titles....” *Puget Sound Educational Service Dist.*, Decision 5126 (PECB, 1995), see also *Bremerton – Kitsap County Health Dept.*, Decision 2984 (PECB, 1988).

The parties disagreed on the appropriate unit for the Harborview specimen processing employees and the work. The University took the position that the SEIU unit was the appropriate unit for the employees because the WFSE unit list of job titles did not list the CLT classification. However, at the same time, the much more recent but broadly defined SEIU unit specifically excluded “employees in other bargaining units.” This reference would obviously exclude the employees in the WFSE Harborview unit doing the lab processing work from the SEIU unit. The WFSE’s position was also that the University could not alter the employ-

¹¹ Gladys Burbank testimony at Tr. 70-83 and Exhibits 9, 10 and 11.

ees' bargaining unit affiliation and representation through the assignment of a new job title.

The parties clearly disputed which unit these employees would more appropriately belong in, assuming they were actually reclassified. PERC's clarification rules (WAC Ch. 391-35) are specifically designed to address such issues when brought to the Commission in a timely fashion.¹²

Instead of pursuing a course of initiating a reallocation of the employees classifications,¹³ and then filing a petition seeking clarification of the WFSE unit,¹⁴ the University insisted that the WFSE agree to a modification of both the WFSE and the SEIU units by transferring the employees doing the lab processing work from the WFSE unit to the SEIU unit.¹⁵

Having previously been found guilty of an unfair labor practice for unilaterally removing the Harborview lab processing work from the WFSE unit, the University knew enough not to do that again. However, it failed to reallocate the employees and file for a timely clarification of the unit by PERC.¹⁶

¹² "A clarification petition may be filed at any time a dispute exists concerning unit definition." *Olympia School District*, Decision 799 (PECB, 1980) citing Decision 279-A (PECB, 1978) affirmed by Benton County Superior Court (1979).

¹³ Article 47 of the parties' contract concerns reallocations. Exhibit 36, AR-11-828.

¹⁴ This is the course the University eventually pursued after the trial court's ruling in this case. See Opening Brief of Appellant, Appendix B.

¹⁵ Decision of Commission, Finding of Fact 12, AR-27-1160.

¹⁶ The University's statement that it did is in error. Brief of Respondent p. 8 at footnote

The issues involved in this case created an intersection of two fundamental principles. First, the work done by the employees, regardless of the assigned job classification, has long been the work of the WFSE bargaining unit at Harborview. Second, changes in circumstances which create a dispute regarding the bargaining unit makeup should be brought to PERC in a timely manner for a clarification of the unit(s) involved in accordance with RCW 41.80.070 and WAC Ch. 391-35.

The context of this case involves several previous PERC proceedings. Several years earlier, after its initial decision that the lab processing work should be in the SEIU unit, the University filed its first clarification petition, which PERC properly dismissed as untimely since it was fifty-four months late.¹⁷ In the first unfair labor practice case involving these employees, the University was found to have breached its duty to bargain a mandatory subject (removal of bargaining unit work). In the present case, the WFSE alleged that the University hadn't bargained in good faith

25. The University never initiated a reallocation process until after the trial court decision. AR-11-939 (Cited by the University as supporting this statement is a June 18, 2007 letter notifying the WFSE that the University was re-evaluating the classification).

¹⁷ *University of Washington*, Decision 10263 (PSRA, 2008). See Opening Brief of Appellant, footnote 56 at p. 33. After the trial court ruling in this case, the University reclassified the SPT employees to a Laboratory Technician job class (leaving them and the work in the WFSE unit) and filed another clarification petition claiming that the reallocation was a recent change in circumstances supporting the clarification. A hearing has been held, but PERC has yet to rule on either the timeliness or the merits of the petition. See Opening Brief of Appellant, Appendix B.

regarding another mandatory subject, higher wages for the lab processing employees. The Commission found that although the University had engaged in “hard bargaining” (the parties never agreed on any higher wages for the employees) it had met in negotiations with the union and therefore hadn’t breached its duty to bargain wages.

Related to this issue, but slightly different, the WFSE alleged and the Commission found that the University had proposed and insisted on bargaining regarding unit configurations. The Commission found this to be an unfair labor practice (a scope of bargaining violation) because that is a matter exclusively within PERC’s jurisdiction, and therefore not a proper subject of bargaining.

The University failed to see the distinction and convinced the trial court that because the Commission had found the University had not engaged in bad faith bargaining on wages, it was both an error of law and arbitrary and capricious for the Commission to conclude that the University nevertheless committed an unfair labor practice by insisting the WFSE agree to modify its bargaining unit as part of the same negotiation. The WFSE submits that it is not inconsistent to find that the University had not bargained in bad faith on wages at the same time it committed a violation for insisting on bargaining the configuration (scope) of the WFSE bargain-

ing unit. The issue that lies at the core of this case is whether the Commission committed an error of law or acted arbitrarily and capriciously in coming to the same conclusion.

B. The Commission did not commit an error of law in its consideration of the holding in *Boise Cascade*.

The University admits that it is appropriate for the Commission to consider NLRB precedent, but argues that “PERC’s *mis*interpretation of an NLRB precedent, which it chose to rely on in support of its decision that the University had committed an unfair labor practice, should not be given any deference.”¹⁸ Specifically, the University argues that the Commission erred in citing *Boise Cascade Company v. NLRB*, 860 Fed.2d 471 (D.C. Cir. 1988) in holding that the University committed an unfair labor practice by insisting that the WFSE bargain with the University regarding the configuration of the WFSE and SEIU bargaining units. The University is incorrect.

After citing the holding in *Boise Cascade* that neither the employer nor the union may modify a bargaining unit determined by the Board [NLRB], the Commission stated:

In sum, when an employer assigns new duties to an employee or a class of employees as to make those employees more similar to a classification of employees in a different

¹⁸ Brief of Respondent at p. 17.

bargaining unit, an employer that believes a bargaining unit should be clarified must file a timely unit clarification petition for this Commission to consider based upon the recent changes in circumstances.^{FN} Absent such a petition, the employer is bound [to] maintain the historical bargaining unit.

^{FN} In this case, the employer's unit clarification petition was not timely because the petition was filed in a time period substantially after the change in circumstances had occurred. [54 months late] *University of Washington*, Decision 10263 (PSRA, 2008).

In this case, it is readily apparent from the record that the employer continually insisted during bargaining that, once the employees were reallocated into the CLT classification, they would be transferred to SEIU's bargaining unit.

University of Washington, Decision 10490-C (PSRA, 2011), at p. 10.¹⁹

The University's argument that the Commission erred in relying on language from *Boise Cascade* in support of its decision rests on the fact that in *Boise Cascade*, the employer actually implemented its proposal altering the bargaining unit configuration.²⁰ The University argues the distinction that it did not actually implement a change in the WFSE bargaining unit, this time. However, as the board found, the University insisted the WFSE agree to the modification of its bargaining unit as a condition of increasing the pay of the employees in the SPT classification to equal that of the employees in the CLT classification who were doing the same

¹⁹ AR-27-1158.

²⁰ This, of course, is what the University did in the first unfair labor practice case involving these employees. *University of Washington*, Decision 8878-A (PSRA, 2006).

work.²¹ The Commission's holding that it is an unfair labor practice to insist on bargaining the configuration of a Commission certified unit is not an unreasonable extension of the holding in *Boise Cascade* that it is an unfair labor practice to unilaterally reconfigure a board (NLRB) certified unit.

Because RCW 41.80.070 vests exclusive authority in the Commission to determine appropriate bargaining units, what the University was asking the WFSE to do was in contravention of the statute's grant of exclusive authority to the Commission to modify bargaining units. Although the WFSE is the exclusive bargaining representative for the Harborview bargaining unit, it is the rights of the employees in the bargaining unit that are at stake. For example, at appropriate times, employees in the unit could petition for a change in representative for the bargaining unit, or for no representative. WAC Ch. 391-25. The University was demanding a new "community of interest" for them.

The University argues that it was not trying to alter the bargaining unit configuration (scope) but rather to preserve it. Its position is that changing the job title of the employees in the SPT job classification automatically changed the bargaining unit the employees were in and their rep-

²¹ Findings 12, *infra*.

representative. The University's argument is a contortion of the law regarding the modification of bargaining units. See *Puget Sound Educational Service Dist., supra*. As the Commission observed, in this case, changing employees' duties, which may or may not be accompanied by a change in job title, may constitute a change in circumstances warranting clarification of a bargaining unit, by the Commission. See WAC 391-35-020.

However, whether a petition is brought in a timely fashion following a change of circumstances and whether the change warrants a modification of the bargaining unit, is a decision for the Commission to make.²² As the Commission has told this employer regarding a different group of employees, "[t]he mere change of job titles is not a material change to working conditions that would fully qualify under Chapter 391-35 WAC to alter the composition of the underlying unit."²³ This is not a new rule.²⁴ There is a critical difference in bringing up the issue to determine if a change raises a

²² The University appears to have understood this when it filed its first clarification petition asking that the employees in the SPT classification be transferred to the SEIU bargaining unit, however, the University failed to bring the petition within a reasonable period of the time (54 months after the alleged change in circumstances). Decision 10263. Following the Superior Court's decision in this matter, the University reclassified the employees and filed a third clarification petition which is pending before the Commission both with regard to timeliness and its merits. See footnote 18, *supra*. The University has demonstrated that it understands what the proper procedures are, it has simply failed to follow them or follow them in a timely fashion in this case.

²³ *University of Washington*, Decision 10496-A (PSRA, 2011).

²⁴ *State – Department of Natural Resources*, Decision 9388-A (PSRA, 2006) and *Central Washington University*, Decision 10215-B (PSRA, 2010).

dispute as to the appropriateness of a particular unit, and *insisting* on reconfiguring a unit.

The Commission's decision is consistent with a proper application of the federal decision in *Boise Cascade*, and even if the Commission's decision were contrary to *Boise Cascade*, the Commission is not bound by such precedence. While there are obvious general principles of law applicable to private employment and public employment, there are also important distinctions.²⁵ In *International Ass'n of Firefighters, Local No. 469 v. Public Employment Relations Com'n of State of Wash.*, 38 Wn.App. 572, 686 P.2d 1122 (1984), the court noted that PERC had developed a body of its own decisional authority derived from an NLRB rule.

Particularly in the context of PERC's exclusive right to configure bargaining units granted by RCW 41.80.070, PERC's reliance on the holding in *Boise Cascade* that an employer may not modify a bargaining unit determined by the board, is consistent with the Commission's holding in this case, and previous Commission decisions regarding "scope bargaining," *infra*, and is not an error of law as the University argues.

²⁵ For example, in *WPEA v. State*, 172 Wn.App. 254, 110 P.3d 1154 (2005), this court held that the State's different compensation for the common job classes constituted a denial of equal protection, a constitutional provision inapplicable to private employers. RCW 41.80.060 purports to limit the right of State employees to strike. A right generally available to private employees.

C. The Commission decision neither contradicts Commission precedent nor the findings in this case, and the decision is not arbitrary and capricious.

The University argues that in *University of Washington*, Decision 8878-A (PSRA, 2006)²⁶ the Commission did not base its decision finding the University guilty of an unfair labor practice on the University's unilateral reconfiguration of the WFSE bargaining unit, and it is therefore error for the Commission to have used that as a basis in this case for finding an unfair labor practice.

Relying in part on U.S. Supreme Court decision in *Fiberboard Paper Products v. NLRB*, 379 U.S. 203 (1964) and extensive Commission precedence, in the first unfair labor practice case, the Commission held that the University had violated its duty to bargain with regard to the transfer of bargaining unit work, a skimming violation.

[T]he exclusive bargaining representative claims jurisdiction over the work performed by the bargaining unit. If the nature of that work changes, the employer must bargain in good faith over those changes. If the employer first bargained with the union over the changes in work duties for the bargaining unit, it would not have unilaterally changed the scope of the bargaining unit's work jurisdiction.^{FN} The employer failed to provide the union an opportunity to bargain the change.

²⁶ See Appendix A (Commission Decision) and Exhibit 1 at AR-11-653 (Examiner Decision).

^{FN} Had the change in work performed by the stock room attendants and central procession technicians [the other job classifications at issue in that case] resulted in reclassifications that permitted the incumbent union to retain jurisdiction over work, the result may have been different.

University of Washington, Decision 8878-A. (Appendix A hereto.)

The issue was not the University's insistence on a new bargaining unit, but that the University had unilaterally removed the work of the employees from the WFSE bargaining unit. As the hearing examiner's decision in that case stated, the allegation alleged by the Federation was a "skimming" violation.²⁷ It was the University's failure to bargain before removing the work that was at issue. In the present case, it was the University's insistence on bargaining the scope of the unit, a subject exclusively for PERC's clarification process, that constituted the violation.

The University argues that the Commission's decision in this case was arbitrary and capricious because it is inconsistent with previous Commission decisions including *University of Washington*, Decision 8216-A (PSRA, 2004). In the preliminary ruling in that case, the Commission's Executive Director dismissed several of the unfair labor practice allegations stating "the Commission has exclusive jurisdiction to police bargaining relationships and determine appropriate bargaining units under

²⁷ *University of Washington*, Decision 8878 (PSRA, 2005). Exhibit 1 AR-11-653.

RCW 41.06.340....”²⁸ In the subsequent decision (8216-A), the remaining unfair labor practice charges against both the University and the WFSE were dismissed. In discussing its recent assumption of State employee bargaining unit determinations, the Commission noted that

Kemper [the employee who filed the charges] offered no evidence that the bargaining unit was inappropriate, or that the employer or the union had unlawfully conspired to keep her in it.

The decision also noted that some years previously, the Washington Personnel Resources Board had refused to remove the employee’s position from the bargaining unit. The decisions in *University of Washington*, Decision 8216 (PSRA, 2003) and 8216-A (2004) are entirely consistent with the Commission’s ruling in this case regarding its exclusive jurisdiction to make bargaining unit configuration determinations.

The University also argues that the Commission’s decision in this case is contrary to its ruling in *Snohomish County*, Decision 9540-A (PECB, 2007). The County was alleged to have skimmed bargaining unit work. Preliminary to its discussion regarding the difference between a skimming case and a “scope [of the bargaining unit]” case, PERC stated:

²⁸ Decision 8216 (Prior to the effective date of RCW 41.80.070, the Washington State Personnel Resources Board’s authority over State employee bargaining units in RCW 41.06 was transferred to PERC.)

The starting point for any discussion about the scope of the bargaining unit begins with certification and the bargaining unit description. This agency is charged with determining appropriate bargaining units. RCW 41.56.060.

Snohomish County, Decision 9540-A.²⁹

The Commission noted that “distinguishing between skimming and scope cases is not an easy task.” *Id.* The County had reclassified certain employees and removed them and their work from the bargaining unit (similar facts to the earlier ULP in Decision 8878-A against the University concerning these employees). The Commission found that the case was a skimming case and not a scope case because

...at no time did the employer attempt to remove the classifications held by the lead employees from the bargaining unit, rather it only attempted to remove the work and individuals who performed that work.

Id.

That same distinction applies between the first unfair labor practice concerning these employees and this unfair labor practice.

The Commission’s decision in this case is not contrary to its application of *Boise Cascade* in the *Snohomish County* case, as the University argues. In *Snohomish County*, the Commission stated:

²⁹ This case was decided under the provision of RCW 41.56 the collective bargaining provisions for certain public employees other than State employees but the Commission applies the same Commission precedent regarding refusal to bargain violations to both laws. *Western Washington University*, Decision 9309 (PSRA, 2006).

In *Boise Cascade Corp. v. NLRB*,... [t]he NLRB found that the employer unlawfully bargained to impasse over the scope of the bargaining unit and the Court of Appeals affirmed. *Boise Cascade Corp. v. NLRB*, 830 Fed.2d 471. Neither of these cases present a factual situation similar to the one the union is asserting.

Id.

Snohomish County was appropriately characterized by the Commission as a skimming case, as the 2003 unfair labor practice involving these employees had been, not a scope case like the present unfair labor practice case.

Finally, the University argues that the Commission's decision conflicts with its ruling in *City of Richmond*, Decision 8879-A (PECB, 2006). The University cites to the Commission approval of conditional offers as encouraging parties to engage in the free and open exchanges of ideas as part of the collective bargaining process. The University characterizes its conduct in this case as "merely suggesting" that the employees be transferred from one bargaining unit to another, which it characterizes as a "conditional offer."

The problem with the University's argument is that the University not only suggested that the union agree to the transfer of the employees from one bargaining unit to another, it *insisted* as the Commission found in its additional Finding 12, *infra*, that the WFSE agree to the transfer of

the employees from one bargaining unit to another. The University's reliance on language concerning conditional offers is inapplicable to facts of this case.

D. Substantial evidence supports PERC's finding that the University proposed and insisted that employees be transferred from the WFSE unit to a unit represented by SEIU.

The University did not "merely suggest" that the employees in the SPT job class be transferred to the SEIU bargaining unit, it insisted that the transfer occur. In its decision, the Commission specifically found that

12. During the course of negotiations described in Findings of Fact 7 and 8, the employer proposed and *insisted* that once the employees in the Specimen Processing Technician classification were reallocated to the Clinical Laboratory Technician position, those employees would be transferred to the bargaining unit of employees represented by the SEIU. [Emphasis edded.]

University of Washington, Decision 10490-C (PSRA, 2011).³⁰

The University does not actually argue that this finding is not supported by the record, nor could it. As detailed in the Opening Brief of Appellant, from 2003 through 2007 the University was insistent that the specimen processing employees in the Harborview laboratory and their work be transferred from the WFSE bargaining unit to the SEIU bargaining

³⁰ Decision of Commission AR-27-1160.

unit.³¹ This insistence persisted even after the finding that the University had committed an unfair labor practice in skimming the employees' work. There was ample evidence in the record that the University insisted that if the employees were to receive a raise, the WFSE would have to agree that they go to the SEIU bargaining unit. Although the University's argument is characterized as attacking the Commission's finding, it is really the Commission's conclusion that the University is challenging, i.e. that the insistence the parties bargain the unit configurations constituted a refusal to bargain violation.

Despite the evidence of the University's insistence for many years that the employees be moved from one bargaining unit to another, the University argues

PERC's ruling that the University's *mere communication* of a proposal to reconfigure bargaining units is an unfair labor practice contradicts its contemporaneous finding that the University bargained in good faith and is therefore arbitrary and capricious. [Emphasis added.]

Brief of Respondent, p. 27.

The Commission did decide that the University's bargaining with regard to wages was only hard bargaining, not bad faith bargaining as the Federation had alleged. The WFSE did not appeal the portion of the

³¹ *Id.* at pages 24-26.

Commission's decision that the University's hard bargaining regarding wages was still good faith bargaining. In essence, the Commission held that but for the University's insistence on modifying the bargaining units, its conduct in dealing with the issue of the SPT employees' pay was hard bargaining, but not a refusal to bargain.

RCW 41.80.005(2) defines collective bargaining as:

“Collective bargaining” means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020. The obligation to bargain does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter.

The parties traded numerous communications and met in a formal negotiation session at least once, although no agreement was ever reached. It is not inconsistent for the Commission to describe that conduct as “good faith” hard bargaining, but still find that the University's injection of its insistence that the union agree to a modification of the bargaining units was an unfair labor practice. Because, as previously argued, this injection constituted impermissible “scope” bargaining.

The University's suggestion that its insistence was simply an attempt to deal with the untenable situation of having employees in the same job classification doing the same work in two different unions is not credi-

ble. First, the SEIU CLT employees were employed at the University Medical Center laboratory, and the SPT employees in the WFSE bargaining unit were employed at Harborview, in entirely separate hospitals, miles apart. Further, the Union presented evidence of at least 59 situations where the University had employees in the same job classification represented by more than one union.³²

Regardless of its stated reason, it is clear that the University was attempting to avoid the clarification process in PERC's rules whereby PERC, and not the parties, determine the configurations of bargaining units. The record amply supports the Commission's determination that the University did not merely communicate a suggestion, but that it proposed and insisted on transferring the employees in the WFSE bargaining unit to the SEIU bargaining unit.

E. The Commission's ruling is consistent with the allegations in the Preliminary Ruling and the WFSE unfair labor practice complaint.

PERC's rules provide for a preliminary determination whether allegations, if true, would constitute an unfair labor practice cause of action i.e. one of the grounds specified in RCW 41.80.110(1).³³

(1) It is an unfair labor practice for an employer:

³² Exhibit 10 at AR-11-750 through 756.

³³ WAC 391-45-110.

(a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter;...

(e) To refuse to bargain collectively with the representatives of its employees.

RCW 41.80.110(1).

In addition, WAC 391-45-050 requires the filing of a detailed complaint upon which the preliminary ruling is based. The causes of action specifically alleged in this complaint were interference and refusal to bargain allegations under RCW 41.80.110(1)(a) and (e).³⁴ The WFSE amended complaint was a twenty-five paragraph, five page detailed complaint of the University's conduct. It alleged that the University was contemplating reclassifying the SPT employees in the WFSE bargaining unit to CLT positions in SEIU's bargaining unit;³⁵ that it was the University's clear position that the employees would be reclassified back to CLT positions in SEIU's bargaining unit;³⁶ that the WFSE believed that the University never had any intention of bargaining *anything but* the placement of the SPT employees into the SEIU bargaining unit;³⁷ and finally the WFSE alleged that this bargaining constituted a refusal to bargain and an interference violation.³⁸

³⁴ June 10, 2008 preliminary ruling. AR 4-136.

³⁵ Exhibit 3 at ¶3.10 (AR-3-130).

³⁶ *Id.* at ¶3.14 (AR-3-131).

³⁷ *Id.* at ¶3.24 (AR-3-133).

³⁸ *Id.* at ¶3.25 (AR-3-133).

Despite these detailed pleadings, the University argues that because the PERC's staff failed to insert into the preliminary ruling a detailed allegation that the University could be found guilty of an unfair labor practice for insisting on bargaining the unit configuration it is deprived of fair notice in violation of the provisions of WAC 391-45-110(2)(b).

In support of this argument, the University cites *Adams County*, Decision 4006 (PECB, 1992). In that case, the Executive Director found in the preliminary ruling grounds for a "refusal to bargain violation" cause of action based on allegations, as specified in a few paragraphs in the complaint, that the employer had proposed a condition of meeting only after working hours. In this case, the WFSE's complaint detailed the employer's conduct and specifically repeated several times, the University's insistence that the employees be transferred from the WFSE to the SEIU bargaining unit. The University had clear and specific notice of the allegations against it from the detailed complaint and the preliminary ruling.

II. Conclusion.

Although the University argues that the WFSE asks the court to simply defer to PERC in this case, no where does the WFSE make that argument. The WFSE does argue that the court should give appropriate deference to the Commission's decision that the University's conduct con-

stituted a refusal to bargain violation, because by its insistence, the University was invading the Commission's exclusive jurisdiction regarding the configuration of bargaining units and had engaged in "scope bargaining."

The Commission's decision is supported by the record and is consistent with the statutory authority PERC is given to determine bargaining units of State employees, as well as previous Commission decisions dealing with a party's attempt to bargain the scope of bargaining units. The Commission's decision should be affirmed.

DATED this 17th day of August, 2012.

Respectfully submitted,

YOUNGLOVE & COKER, P.L.L.C.


Edward Earl Younglove III, WSBA #5873
Attorney for Appellant

APPENDIX A

University of Washington, Decision 8878-A (PSRA, 2006)

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES,)	
)	CASE 17946-U-03-4627
)	
Complainant,)	DECISION 8878-A - PSRA
)	
vs.)	
)	
UNIVERSITY OF WASHINGTON,)	DECISION OF COMMISSION
)	
Respondent.)	
)	

Parr & Younglove, by Edward E. Younglove III, Attorney at Law, for the union.

Rob McKenna, Attorney General, by Jeffrey W. Davis, Assistant Attorney General, for the employer.

This case comes before the Commission on a timely appeal filed by the University of Washington (employer) seeking to overturn the Findings of Fact, Conclusions of Law, and Order issued by Examiner Christy L. Yoshitomi.⁽¹⁾ The Washington Federation of State Employees (union) supports the Examiner's decision.

¹ University of Washington, Decision 8878 (PSRA, 2005).

Certain legal issues in this case are similar to issues being decided concurrently in an appeal from University of Washington, Decision 8818 (PSRA, 2005). Both cases concern "skimming" of bargaining unit work, with the union alleging that the employer failed or refused to fulfill its collective bargaining obligations before it transferred bargaining unit work outside of the bargaining units represented by the union. In both cases, the employer contends that this Commission lacks jurisdiction to hear these claims, and otherwise denies that it was required to collectively bargain changes of employee classifications. In order to provide for more uniform case precedent, we examine the legal arguments of the parties in both cases as a whole, and apply a similar legal standard to the factual differences of each decision on appeal.

ISSUES PRESENTED

1. Does this Commission have jurisdiction over unfair labor practice complaints filed under Personnel System Reform Act (PSRA) provisions that took effect in 2002, prior to the July 1, 2005, effective date of RCW 41.80.110?
2. If this Commission has jurisdiction over the union's complaint,

did the employer commit unfair labor practices when it transferred certain stockroom attendants and central processing technicians out of the bargaining unit represented by the union without first bargaining in good faith?

We find that this Commission has had jurisdiction over unfair labor practice disputes between higher education employers and unions representing their classified employees since June 13, 2002. We affirm the Examiner's findings and conclusions that the employer failed to satisfy its bargaining obligations when it transferred bargaining unit work under the guise of reclassifying employees.

ISSUE 1 - THE COMMISSION'S JURISDICTION

In University of Washington, Decision 9410 (PSRA, 2006), this Commission outlined the many civil service and collective bargaining laws that formerly applied to state higher education institutions. We incorporate that history by reference, and we will only discuss the pertinent changes to the state collective bargaining laws not previously discussed in that case.

1993 Amendments

Our discussion begins with two pieces of legislation enacted in 1993 that have substantial bearing on these disputes.

1. The first, Laws of 1993, ch. 281, merged the higher education civil service systems under Chapter 28B.16 RCW with state civil service under Chapter 41.06 RCW. The Department of Personnel and the newly created Washington Personnel Resources Board (WPRB) administered these laws.
2. The second, Laws of 1993, ch. 379, allowed state institutions of higher education and unions representing higher education classified employees to move the employees in those bargaining units out of the coverage of the civil service system and have their bargaining relationship regulated by this Commission under the provisions of Chapter 41.56 RCW.

While the Legislature provided a mechanism for higher education employers and unions to "opt-out" of civil service, the amendment still required WPRB certification of bargaining units under Chapter 41.06 RCW before the option could be exercised. This distinction is important when Commission precedents interpreting Chapter 41.56 are applied to bargaining units certified under Chapter 41.06 RCW. Although both this Commission and the WPRB examined the duties, skills, and working conditions of public employees when configuring appropriate bargaining units, each agency treated those determinations differently once the unit configuration was established.

Generally, when the WPRB and the Higher Education Personnel Board (HEPB) exercised jurisdiction to certify bargaining units, they did so by listing all of the employee civil service classifications to be encompassed by the bargaining unit. Employees in positions not allocated to classifications listed on the certification were not part of the bargaining unit. Once the WPRB certified and described a bargaining unit, the unit description remained in perpetuity unless specifically changed, even if the incumbent union's representation ceased.

When this Commission certifies bargaining units, it avoids the use of job titles in the bargaining unit description, and uses generic terms designed in an attempt to ensure that the nature of the work performed by bargaining unit employees is clear. University of Washington, Decision 8392 (PSRA, 2004) (citing City of Milton, Decision 5202-B (PECB, 1995)). The use of generic terms avoids the need to revisit and revise bargaining unit descriptions just because the job titles are changed or new classification titles are added within the same occupational type. University of Washington, Decision 8392. If a union certified by this Commission ceased to be the exclusive bargaining representative, the unit description ceased to function, and different bargaining unit configurations could later be found appropriate.

The Personnel System Reform Act Amendments

In 2002, the Legislature enacted Substitute House Bill 1268, the PSRA, which substantially restructured both the collective bargaining rights of state civil service employees and the administration of the collective bargaining process. In order to transition state agencies, employees, and exclusive bargaining representatives into the "full-scope" collective bargaining process, the Legislature phased-in the PSRA over a three-year period. Section 411 (codified as RCW 41.80.910) specified the effective dates of various sections, as follows:

- (1) Sections 203, 204, 213 through 223, 227, 229 through 231, 241, 243, 246, 248, 301 through 307, 309 through 316, 318, 319, and 402 of this act take effect July 1, 2004.
- (2) Section 224 of this act takes effect March 15, 2005.
- (3) Sections 208, 234 through 238, and 403 of this act take effect July 1, 2005.
- (4) Sections 225, 226, 233, and 404 of this act take effect July 1, 2006.

Under Article II, section 41, of the State Constitution, bills passed by the Legislature and signed into law normally take effect 90 days after final adjournment of the legislative session in which they are enacted, unless the Legislature directs otherwise. The 2002 Legislative Session adjourned on March 14, 2002. Thus, the PSRA provisions became effective June 13, 2002, unless section 411 specifically listed the section as having a later effective date. Two sections of the act are important to this analysis. The first, section 232, amended RCW 41.06.340 by transferring jurisdiction of state civil service unit determinations, representation cases, and unfair labor practice complaints from the WPRB to this Commission. Set forth in bill draft style, (2) that amendment states:

-
- 2 Added material is underlined; deleted material is indicated by ((strikeout within double parenthesis)).

(1) With respect to collective bargaining as authorized by sections 301 through 314 of this act [later codified as RCW 41.80.001 through 41.80.130], the public employment relations commission created by chapter 41.58 RCW shall have authority to adopt rules, on and after the effective date of this section, relating to determination of appropriate bargaining units within any agency. In making such determination the commission shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by the

employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees. The public employment relations commission created in chapter 41.58 RCW shall adopt rules and make determinations relating to the certification and decertification of exclusive bargaining representatives.

(2) Each and every provision of RCW 41.56.140 through ((41.56.190)) 41.56.160 shall be applicable to this chapter as it relates to state civil service employees ((and the Washington personnel resources board, or its designee, whose final decision shall be appealable to the Washington personnel resources board, which is granted all powers and authority granted to the department of labor and industries by RCW 41.56.140 through 41.56.190)).

(3) A collective bargaining agreement entered into under RCW 41.06.150 before July 1, 2004, covering employees subject to RCW 41.80.001 and 41.80.010 through 41.80.130 that expires after July 1, 2004, shall remain in full force during its duration, or until superseded by a collective bargaining agreement entered into by the parties under sections 301 through 314 of this act. However, an agreement entered into before July 1, 2004, may not be renewed or extended beyond July 1, 2005, or until superseded by a collective bargaining agreement entered into under sections 301 through 314 of this act, whichever is later.

The section 232 amendments granted this Commission the authority to act on the majority of collective bargaining disputes. It also removed the WPRB's authority to hear certain claims brought forth under the Chapter 41.06 RCW collective bargaining agreements.⁽³⁾ Section 232 became effective June 13, 2002.

3 The WPRB retained jurisdiction to hear other matters not governed by collective bargaining laws, such as the adjustment of grievances for non-represented employees.

The second provision in question is Section 315 (codified as RCW 41.80.900). That section states:

All powers, duties, and functions of the department of personnel pertaining to collective bargaining are transferred to the public employment relations commission except mediation of grievances and contracts, arbitration of grievances and contracts, and unfair labor practices, filed under a collective bargaining agreement existing before July 1, 2004. Any mediation, arbitration, or unfair labor practice issue filed between July 1, 2004, and July 1, 2005, under a collective bargaining agreement existing before July 1, 2004, shall be resolved by the Washington personnel resources board in accordance with the authorities, rules, and procedures that were established under RCW 41.06.150(11) as it existed before July 1, 2004.

(emphasis added). The section 315 amendments retained the WPRB's jurisdiction to hear mediation, arbitration and unfair labor practice "issues" filed under the Chapter 41.06 RCW contracts between July 1, 2004, and July 1, 2005.

The employer now argues that section 315 deprives this Commission of state civil service unfair labor practice jurisdiction until July 1, 2005. We disagree with the employer's interpretation.

The Rule of Eiusdem Generis

In ascertaining the meaning of a particular word or words within a statute, this Commission must consider both the statute's subject matter and the context in which the word is used. *Chamberlain v. Department of Transportation*, 79 Wn. App. 212, 217 (1995). Statutes must be interpreted and construed so that all language used is given effect, and no portion is rendered meaningless or superfluous. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546 (1996). Where a statute is unambiguous, we assume the Legislature means what the statute says, and we will not engage in statutory construction past the plain meaning of the words. In *re Estate of Jones*, 152 Wn.2d 1, 11 (2004) (citing *Davis v. Department of Licensing*, 137 Wn.2d 957, 963-964 (1999)). When faced with general terms in a sequence with specific terms, the rule of *eiusdem generis* states that the general term is restricted to items similar to the specific terms. In *re Estate of Jones*, 152 Wn.2d at 11 (citing *Dean v. McFarland*, 81 Wn.2d 215, 221 (1972)). "The spirit or purpose of an enactment should prevail over . . . express but inept wording." *State v. Day*, 96 Wn.2d 646, 648 (1981).

Application of the Rule

Applying the rule of *eiusdem generis*, we find the Legislature intended this Commission to exercise jurisdiction over unfair labor practices starting June 13, 2002. The specific language of Section 232(2) eliminates from RCW 41.06.340 language permitting the WPRB to enforce RCW 41.56.140 through 41.56.190, while still making those unfair labor practice provisions applicable to state civil service employees. At the same time the WPRB lost its jurisdiction to enforce those provisions, this Commission gained authority to adjust unfair labor practice complaints involving state civil service employees based on the default language of RCW 41.56.160, which empowers this Commission to prevent unfair labor practice complaints. The general language of Section 315 of the PSRA contains no reference to any unfair labor practice statute, and only directs the WPRB to resolve any unfair labor practice "issue" filed under a collective bargaining agreement existing prior to July 1, 2004. (4)

4 Furthermore, the employer's reading of the PSRA creates an absurd result. A literal reading of section 315 suggests, at best, that this Commission does not have jurisdiction to hear any "mediation, arbitration, or unfair labor practice issue" filed between July 1, 2004, and July 1, 2005. When read in conjunction with section 232, this literal reading of the PSRA would have this Commission exercise jurisdiction over unfair labor practice complaints between June 13, 2002, and June 30, 2004, then the WPRB would exercise jurisdiction over complaints filed between July 1, 2004, and July 1, 2005, with this Commission finally reasserting exclusive jurisdiction over complaints on July 1, 2005.

ISSUE 2 - SKIMMING OF BARGAINING UNIT WORK

Applicable Legal Standards

The Public Employees' Collective Bargaining Act (PECB), Chapter 41.56 RCW, requires employers to bargain collectively with the

unions representing their employees.(5) Peninsula School District v. Public School Employees, 130 Wn.2d 401, 407 (1996). The scope of bargaining within RCW 41.56.030(4) encompasses "grievance procedures and . . . personnel matters, including wages, hours and working conditions." Commission and judicial precedents interpreting that definition identify three broad subjects of bargaining: mandatory, permissive, and illegal. NLRB v. Wooster Division Borg-Warner, 356 U.S. 342 (1958) (cited in Pasco Police Association v. City of Pasco, 132 Wn.2d 450 (1997) (City of Pasco); Federal Way School District, Decision 232-A (EDUC, 1977)).

5 RCW 41.56.140 through 41.56.160 protect rights conferred by Chapter 41.56 RCW. Thus, the employer is bound to collectively bargain in good faith when asked to.

- * Employee "wages, hours, and working conditions" are generally mandatory subjects over which the parties must bargain in good faith. It is an unfair labor practice for either an employer or an exclusive bargaining representative to refuse to bargain to a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).
- * Management and union prerogatives, along with procedures for bargaining mandatory subjects are permissive subjects over which the parties may negotiate, but are not obliged to do so. City of Pasco, 132 Wn.2d at 460 (as to permissive subjects, each party is free to bargain or not to bargain, and to agree or not to agree).
- * Matters that parties may not agree upon because of statutory or constitutional prohibitions are illegal subjects of bargaining. Neither party has an obligation to bargain such matters. City of Seattle, Decision 4687-B (PECB, 1997), aff'd, 93 Wn. App. 235 (1998), review denied, 137 Wn.2d 1035 (1999).

In deciding whether an issue of bargaining is either mandatory or permissive, this Commission considers two factors: (1) the extent to which managerial action impacts upon the wages, hours, and working conditions of employees, and (2) the extent to which a managerial action is deemed to be an essential management prerogative. International Association of Fire Fighters, Local 1052 v. PERC, 113 Wn.2d 197, 200 (1989) (City of Richland). The Supreme Court in City of Richland held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives,' are classified as non-mandatory subjects." City of Richland, 113 Wn.2d at 200.

The "scope" of bargaining therefore becomes a question of law and fact for the Commission to determine on a case-by-case basis. City of Richland, 113 Wn.2d at 203; WAC 391-45-550. The National Labor Relations Board (NLRB) and the various state labor relations boards generally accept as a management prerogative the level of services to be offered by an employer and, as such, a permissive subject of bargaining. See Federal Way School District, Decision 232-A. This Commission recognizes that public employers have the right to "entrepreneurial" control over nonmandatory subjects of bargaining. Snohomish County Fire District 1, Decision 6008-A (1998); Wenatchee School District, Decision 3240-A (PECB, 1990).

In *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), the United States Supreme Court held that the decision to contract out work previously performed by members of an established bargaining unit that results in the termination of bargaining unit employees is a mandatory subject of bargaining. In *South Kitsap School District*, Decision 482 (PECB, 1978), this Commission held that any decision transfer or "skim" bargaining unit work was also a mandatory subject of bargaining. Exclusive bargaining representatives have a legitimate interest in preserving work that their bargaining units historically perform, at least where an employer has not cut back services and personnel. *South Kitsap School District*, Decision 482. This obligation applies to all bargaining unit work, (6) whether the work be entry level, (7) at the highest level, (8) or new bargaining unit work. (9) Employers are prohibited from altering the scope of the Chapter 41.56 RCW bargaining obligation.

6 *City of Vancouver*, Decision 808 (PECB, 1980).

7 *City of Kennewick*, Decision 482-B (PECB, 1980).

8 *City of Mercer Island*, Decision 1026-B (PECB, 1982).

9 *Community Transit*, Decision 3069 (PECB, 1988).

This Commission considers five factors when determining whether a duty to bargain exists concerning the transfer of bargaining unit work. *Port of Seattle*, Decision 7271-B (PECB, 2003); *City of Anacortes*, Decision 6863-B (PECB, 2001); *Spokane County Fire District 9*, Decision 3482-A (PECB, 1991). They include:

1. The previously established operating practice as to the work in question (i.e., had non-bargaining unit personnel performed such work before?);
2. Whether the transfer of work involved a significant detriment to bargaining unit members (e.g., by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);
3. Whether the employer's motivation was solely economic;
4. Whether there has been an opportunity to bargain generally about the changes in existing practices; and
5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

If an employer presents its decision to transfer or skim bargaining unit work as a final decision, or fait accompli, then the union is excused from its bargaining obligation.

The Certification of the Bargaining Unit

When the HEPB certified the bargaining unit in question, it did so by listing all of the job classifications to be included in the unit. Thus, it can be argued that if an employee does not hold a classification specifically listed in the bargaining unit

description, that employee would not be within the bargaining unit.

At Harborview Medical Center, the union represented stockroom attendants I and II (stockroom attendants) and a group of central processing technicians I and II (central processing technicians). Once the HEPB certified the union as the exclusive bargaining representative of the employees who performed the work, that certification extended to the duties and work actually performed by those individuals. This Commission inherited the bargaining unit in question under section 308 of the PSRA, (10) and although the bargaining unit is described by job class, this Commission will strictly enforce the union's ability to be the exclusive bargaining representative of work jurisdiction that it was certified to represent.

10 Codified as RCW 41.80.070. Section 308 established criteria to be applied to units certified under the PSRA, operates in conjunction with section 232 of the PSRA, became effective June 13, 2002, and reinforces our conclusion that the Legislature intended this Commission to exercise jurisdiction over state civil service unfair labor practice cases starting June 13, 2002.

When the employer decided to add more job duties to bargaining unit employees, those duties became part of the union work jurisdiction. In Bremerton School District, Decision 1620 (PECB, 1983), an employee job emphasis changed and the pay rate increased as a result of the employer's unilateral actions, but the employee continued to work for the same supervisor and her duties, skills, and working conditions in the new position were generally within the scope of bargaining unit positions. The Executive Director ordered that because the disputed employees continued to perform a substantial amount of traditional bargaining unit work, the employees' new work assignments accreted to the existing bargaining unit, and became part of the union's work jurisdiction. See also Puget Sound Educational Service District, Decision 5126 (PECB, 1995).

Here, once the employer unilaterally assigned new duties to the bargaining unit employees, and the union accepted those new assignments without challenge, the new duties, as well as the underlying duties of those employees, became part of the union's work jurisdiction. In effect, the parties created a new "floor" for the bargaining unit, and any decision to transfer work performed by the bargaining unit, including newly assigned work, first required the employer to provide the union notice and the opportunity to bargain in good faith.

Application of Skimming Standards

The Examiner found that the employer failed to bargain in good faith the decision and the effects of the decision to reorganize the stockroom attendants and central processing technicians at Harborview Medical Center. (11) We agree. Factors 1, 2, 4, and 5 of the test outlined in Port of Seattle are applicable to this case, and this record demonstrates that the employer transferred bargaining unit work without first bargaining in good faith to impasse with the union.

11 The union declined to appeal the dismissal of allegations regarding the transfer of the patient service representative and

financial service counselor classifications.

The previously established practices of the employer demonstrate that the duties of the employees at question are as follows:

- * Bargaining unit employees in the stockroom assistant classification performed specific duties including distributing, stocking, and inventorying medical supplies at Harborview Medical Center; and
- * Bargaining unit employees in the central processing technician classification receive and record specimen samples and perform some medical duties.

A significant detriment to bargaining unit members occurred when the employer reclassified employees in the stockroom attendant and central processing technician classification which effectively transferred bargaining unit work to non-bargaining unit employees. When the employer reclassified the bargaining unit positions in question to reflect the bargaining unit work performed, the employer transferred the work as well as the employees performing the work to a different bargaining unit (represented by a different union) that represented the different classification. The employer did not re-staff the vacated positions after the reclassification.

The employer failed to provide an opportunity to bargain the change to bargaining unit work. The Examiner found, and we agree, that the employer presented the reclassifications to the union as a fait accompli. The record demonstrates that the employer initiated the reclassification process on its own initiative, without first bargaining in good faith to impasse with the union not only about the reclassifications, but also as to the effects that those reclassifications would have on bargaining unit employees.

The employer argues that not only were the reclassifications required to ensure that employees were being paid for work actually performed, but the reclassification also conformed with the parties' collective bargaining agreement. We agree with the employer that Article 22.3 of the collective bargaining agreement permits the employer to reallocate bargaining unit positions in accordance with Chapter 251-06 WAC. We disagree, however, that the reclassification provisions of the parties' collective bargaining agreement permit the employer to freely transfer or skim bargaining unit work without first bargaining with the union to impasse.

As we previously noted in this case, the exclusive bargaining representative claims jurisdiction over the work performed by the bargaining unit. If the nature of that work changes, the employer must bargain in good faith over those changes. If the employer first bargained with the union over the change in work duties for the bargaining unit, it would not have unilaterally changed the scope of the bargaining unit's work jurisdiction.⁽¹²⁾ The employer failed to provide the union an opportunity to bargain the change.

¹² Had the change in work performed by the stockroom attendants and central processing technicians resulted in reclassifications that permitted the incumbent union to retain jurisdiction over work, the result may have been different.

Examining the record presented before the Commission, substantial evidence supports the Examiner's findings of fact and conclusions of law.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Christy L. Yoshitomi are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the of the Commission.

Issued at Olympia, Washington, the 5th day of September, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

NO. 68376-4

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

WASHINGTON FEDERATION
OF STATE EMPLOYEES,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

DECLARATION
OF SERVICE

2012 AUG 21 AM 10:23
COURT OF APPEALS
STATE OF WASHINGTON

The undersigned, declares under penalty of perjury under the laws of the State of Washington as follows:

The undersigned is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

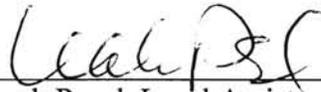
I certify that on August 20, 2012, I caused to be hand delivered via ABC Legal Services the originals and true and correct copies of the Reply Brief of Appellant and this Declaration of Service upon the following:

Washington State Court of Appeals
Division One
One Union Square
600 University Street
Seattle, WA 98101-4170

I further certify that on August 20, 2012, true and correct copies of the aforementioned Reply Brief of Appellant and this Declaration of Service were sent by electronic mail and by U.S. Mail, postage prepaid to:

Mark K. Yamashita
Office of the Attorney General
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Seattle, WA 98195-9475
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DATED this 20th day of August, 2012, at Olympia, Washington.



Leah Pagel, Legal Assistant
Younglove & Coker, P.L.L.C.