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Court of Appeals Case No. 70165-7-I

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

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UNIVERSITY OF WASHINGTON,

Appellant,  
v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent,

and

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Intervenor/Respondent.

5/11/16  
10:15 AM  
J. J. [unclear]

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**REPLY BRIEF OF APPELLANT**

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## I. ARGUMENT

In their responses to this appeal, the Washington Federation of State Employees (“WFSE”) and the Public Employment Relations Commission (“PERC”) misconstrue the fundamental argument of the University. The University does not dispute that in a traditional skimming case, the employer must engage in bargaining over the decision to “skim” the work from the bargaining unit. The University also does not dispute that the effects of its decision to consolidate are a mandatory subject of bargaining. Here, the parties all agree that the University had a statutorily protected right to make the decision, without bargaining, to consolidate patient access centers within UW Medicine. This appeal thus does not present a traditional skimming issue; rather, the issue is whether the “skimming” in this case is a separate and distinct decision from the decision to consolidate. If it was not, then the PERC erred and its holding that the University refused to bargain the decision to skim bargaining unit work must be reversed. Put differently, the University contends that the proper scope of bargaining was how the “skimming” would be implemented, not “whether” it would occur.

### A. Effects Are Subject to a Duty to Bargain “How” Not “Whether.”

In *International Ass’n of Fire Fighters Local 1052 v. PERC*, 113 Wn.2d 197, 778 P.2d 32 (1989), the Washington Supreme Court

admonished the PERC for approaching scope of bargaining issues summarily. The Court explained that the PERC is responsible for balancing management prerogatives against employee interests in working conditions when determining whether a duty to bargain exists. *Id.* at 203.

The Court also addressed the proper scope of effects bargaining:

In some cases, an employer's decisions on nonmandatory subjects may have effects on mandatory subjects. If the union so requests, such effects must be submitted to negotiation. Thus, for example, while an employer need not bargain with its employees' union concerning an economically motivated decision to terminate a services contract (a nonmandatory subject), it must bargain over how the layoffs necessitated by the contract's termination will occur. *See First Nat'l Maintenance Corp. v. NLRB, supra* 452 U.S. at 681-82, 101 S.Ct. at 2582-83.

*Id.* at 201 (emphasis added).

*First Nat'l Maintenance Corp v. NLRB*, 452 U.S. 666, 101 St.Ct. 2573 (1981), cited by the Washington Supreme Court, involved layoffs occurring as the necessary result of the closure of a business. The Supreme Court ruled that the employer's decision to close the business did not have to be bargained – and that the layoffs necessarily resulting from the closure decision also did not have to be bargained. The Court rejected the union's demand that the company delay closure so they could bargain over the layoffs. The Court explained, "Congress had no expectation that the elected union representative would become an equal partner in the

running of the business enterprise in which the union's members are employed." *First Nat'l Maintenance Corp.*, 452 U.S. at 676. The Court further explained, "Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." *Id.* at 683. In regards to the effects of the decision to close the business, the Court cited severance pay as an example of an effect that would be appropriately bargained in such circumstances. *Id.* at 677, n. 15.

*International Ass'n of Fire Fighters Local 1052 and First Nat'l Maintenance Corp.* embody the well-established rule that bargaining over effects means bargaining "how" a change will be implemented, not "whether" the change will occur. Here, the alleged unlawful "skimming" was clearly an effect of the consolidation. If the University had authority without bargaining to make the decision to consolidate call center work – as both WFSE and the PERC concede – the University necessarily had the right to move the work from Harborview to the consolidated center. The actual movement of the work from the Harborview unit was not a separate decision – and the scope of bargaining that the PERC should have imposed was "how" bargaining work would move out of WFSE, not whether it would occur.

In its Opening Brief, the University rhetorically asked: “Under the PERC’s analysis, what action could the University take to exercise its right to consolidate patient access centers?” *Opening Brief at 22*. In 75 pages of responsive briefing, neither the WFSE nor PERC answers that question. According to the argument made by WFSE and the decision of the PERC, the University could not take any action until it completed bargaining with the WFSE over the decision to remove work from the Harborview unit and move it to the Consolidated Center. This response completely emasculates the Legislature’s insertion of a statutory management right into RCW 41.80. “The employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040.” RCW 41.80.020(5).<sup>1</sup> The fundamental flaw in the PERC’s decision is that it completely ignored this statutory requirement.

**B. A Lawful Unilateral Change Does Not Have to Be Delayed Until Bargaining Over the Effects of the Change Has Concluded.**

It is well-established that a union cannot hold an employer’s decision on a non-mandatory subject “hostage” by refusing to come to

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<sup>1</sup> In addition, neither responsive brief explains how the University can be found guilty of failing to bargain over removing (*i.e.*, “skimming”) the work from the bargaining unit if the WFSE still represents the employees after they have moved to the new Consolidated Contact Center. Both the WFSE and the PERC assert that until the PERC ruled on the petitions at the new Consolidated Center, the Union continued to represent the employees. Under that approach, since no work has been removed from union representation, it is axiomatic that the University was not obligated to bargain removing the work.

agreement with the employer over the effects of that decision. *Central Washington University*, No. 10413-A, 2011 WL 2725841 (PERC, 2011) at 5. “The Commission [has] determined that an employer ‘may implement decisions within its sole prerogative ... even though required bargaining has not been concluded on the effects of that decision.’”, quoting *Washington State – Social and Health Services*, No. 9690-A, 2008 WL 5369618 (PERC, 2008), quoting *City of Bellevue*, No. 3343-A, 1990 WL 693219 (PERC, 1990).

While the WFSE references the *City of Bellevue*, No. 10830-A, 2012 WL 1385444 (PERC, 2012) case dealing with the integrally related decisions, it completely misconstrues the relevance of that decision. Intervenor’s Brief at 32-33. *Bellevue* stands for the rule that when a change to a mandatory subject of bargaining occurs as a direct result of a change to a non-mandatory subject, the former does not have to be bargained as a separate decision. In *Bellevue*, the employer did not have to bargain its decision to remove bargaining unit work (a regional consolidation of services) – but that is not the holding that supports the University in this case. The holding of *Bellevue* that is relevant here is that the employer also did not have to bargain resulting layoffs as a separate decision.

In this case, the University did not have to bargain the decision to consolidate. Because the movement of bargaining unit work to the Contact Center was inseparable from the consolidation, it should be treated like layoffs in *Bellevue*, and as envisioned by the Washington Supreme Court in *International Ass'n of Fire Fighters Local 1052*, 113 Wn.2d 197 – an effect that is integrally related to the lawful change and subject only to bargaining over how it will occur, not whether it will occur.

**C. Skimming Cases Decided Under RCW 41.56 Are Inapposite to This Appeal.**

WFSE and PERC cite numerous PERC decisions regarding the duty to bargain the removal of bargaining unit work, *i.e.*, skimming. However, much of the case law was decided under Chapter 41.56 RCW, not Chapter 41.80 RCW. Chapter 41.56 RCW does not contain statutory management rights such as RCW 41.80.020(5) and RCW 41.80.040. For example, *Kennewick Public Hospital*, No. 4815-A, 1996 WL 470889 (PERC, 1996), cited by WFSE, is inapposite. *Kennewick* involved an employer who transferred its operations to a wholly-owned subsidiary and claimed the employees were no longer represented. *Kennewick* did not involve exercise of a statutory management right.

In contrast, in *State Attorney General*, No. 10733, 2010 WL 1644961 (PERC, 2010), *aff'd*, 2011 WL 6148983, the state improved its

delivery-service model by consolidating services and closing offices. 2010 WL 1644961 at \*6. The PERC held that the elimination of positions and other changes to wages, hours, and working conditions were a “direct outgrowth” of the decision to consolidate and therefore fell “squarely” within the management rights in RCW 41.80.040. *Id.* The Commission explained that employers covered by RCW 41.80 are “privileged to make changes to those subjects covered by RCW 41.80.040 at any time ... even if there is a bargaining obligation with an exclusive bargaining representative.” 2011 WL 6148983 at \*3.<sup>2</sup>

**D. *Gitano Group* Principles Apply.**

The PERC claims that cases decided under the National Labor Relations Act (“NLRA”) have no persuasive authority in this case because federal law “conflicts” with Washington law in the area of the formation of bargaining units. Brief of Public Employment Relations Commission at 19. Yet, PERC does not cite to any difference in the statutes. As with the PERC, the determination of appropriate bargaining units in the private sector is reserved to the National Labor Relations Board. 29 USC 159 (b). Washington courts have long recognized that decisions by the federal

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<sup>2</sup> WFSE cites certain cases under RCW 41.80 involving skimming claims against the University. Once again, the WFSE misconstrues the argument of the University. The University does not contend that the statutory management right in RCW 41.80 is applicable to decisions predicated only on moving work from a bargaining unit to non-bargaining unit employees. Unlike those cases, this matter involves a fundamental reorganization of work and service delivery at the University, and thus is covered by the statutory management right.

National Labor Relations Board (“NLRB”) construing the National Labor Relations Act (“NLRA”) are persuasive authority when interpreting similar provisions in Washington’s public sector labor law. *Pasco Police Officers’ Ass’n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

Indeed, *Gitano Group* principles have already been adopted by the PERC in previous PERC case law. Under *Gitano Group*, 208 NLRB 1172 (1992), when an employer consolidates employees performing similar work into a new location, there is a presumption the employees at the new location are a separate bargaining unit. PERC has applied the same principles to mergers of bargaining units. *City of Mount Vernon*, No. 4199, 1992 WL 753337 (PERC 1992) (“When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation.”). At the time of the consolidation decision, the University expected that WFSE members would be combined with SEIU members, as well as employees from UW Physicians Network. That is what the Flexource study called for. That is why the University notified SEIU. AR 834. SEIU shared that belief – it intervened in WFSE’s

petition to represent the new jobs. Tr. 443. Furthermore, although UWPN is a separate entity, it is part of UW Medicine.<sup>3</sup> Tr. 475; AR 702. The University intended to consolidate employees performing similar work into a new location and the same principles present in *Gitano Group* and *City of Mount Vernon* apply here.<sup>4</sup>

The University fully recognized that the ultimate determination of union representation at the new Consolidated Center would need to be resolved by the PERC. Indeed, that determination is now in the process of being made. Recently, the PERC found that the consolidation of employees into the new Consolidated Center resulted in a new, separate bargaining unit. *University of Washington*, Nos. 11833-11836 (PERC, 2013), at 11.<sup>5</sup> “Because the employees at the Contact Center can stand alone as their own bargaining unit and the WFSE does not represent a substantial majority of those employees, accretion is not appropriate in this case.” The PERC ordered that an election be held among employees to determine whether they will be represented by WFSE, the SEIU, or no union. *Id.*

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<sup>3</sup> Flexource’s charts show UWPN reporting to the University’s VP, Johnese Spisso. AR 702.

<sup>4</sup> Under PERC’s own rules, the University is prohibited from expressing a preference between two unions seeking to represent a group of employees. WAC 391-25-140(3).

<sup>5</sup> While the WFSE objected to the University citing this case (WFSE brief at 23, fn 13), it is entirely appropriate for the University to cite subsequently decided legal decisions. Indeed, the WFSE has repeatedly referenced other cases involving the University and WFSE that were decided by the PERC subsequent to the decision at issue in this appeal.

**E. It Is Disingenuous for WFSE to Claim That the Parties Did Not Bargain Over Effects When Its Own Representatives Testified to That Fact.**

WFSE continues to claim that the University did not bargain over the effects of consolidation. Yet WFSE used the word “bargaining” repeatedly in its communications with the University, including in correspondence from its own attorney. *See* AR 815, letter from Mr. Younglove (“The parties are still in bargaining....”); AR 812, letter from Mr. Younglove (the parties “are still negotiating issues surrounding” the consolidation). WFSE Labor Advocate Banks Evans testified:

Q: And you do agree that there was bargaining and there was negotiation on impacts or effects, correct? In fact, there is ongoing negotiations on impacts and effects, correct?

A: That’s correct.

Tr. 161. WFSE cannot now reasonably dispute that the parties bargained over effects.

In its Intervenor’s Brief, the WFSE improperly includes additional – new – accusations that the University refused to bargain effects after October 1, 2010. Intervenor’s Brief at 16, 17. This new allegation was not included in WFSE’s original unfair labor practice complaint (nor could it have been, as the complaint was filed in September 2010). AR 1. This new allegation about a refusal to bargain after October 1 is directly contradicted by the record and irrelevant to the original ULP charge.

The record clearly reflects that the University and WFSE were still looking for dates to bargain at the time of the hearing in November and December, 2010. Tr. 96. The PERC recognized this heretofore undisputed fact in its final decision. AR 1011 (“At the time of the hearing, the parties had not reached an agreement and continued to attempt to establish dates for negotiations.”). Exhibit 57 in the hearing was an email exchange between the University and WFSE. On September 30, 2010, the University wrote to WFSE:

As we discussed on Tuesday, the employer is very willing to continue discussions on effects bargaining for the PAC staff as they transition to the consolidated contact center. It seems as if there are some remaining issues pertaining to parking, trial service periods, rehire rights, and possible other items. Please get back to me soon as to whether a meeting or exchange of proposals would be more desirable at this stage.

AR 855. WFSE wrote back on October 1 stating that it desired to meet and suggesting that the parties work on setting a date. AR 854.

Approximately one week later, the University – not WFSE – writes again seeking a meeting. The University wrote:

Despite best efforts made by Leanna and Carly, I was told you are unavailable until the last week of October. Please take another look at your calendar to see if an earlier meeting is possible.

AR 854.

The WFSE's assertion that the University refused to meet and continue bargaining effects after October 1 in light of Exhibit 57 (AR 854-855) is not supported by the facts.<sup>6</sup>

**F. The PERC Has a Limited Role in Appeals of Its Adjudicatory Decisions.**

Quasi-judicial administrative agencies are analogized to lower courts, with no right to present argument as litigants in matters on appeal. *Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Industries*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993). There are two exceptions to this rule, allowing agencies to present argument when their internal procedures or jurisdiction are challenged. *Id.* at 782. In this case, neither exception applies. In making its determination, the Court should rely solely upon the arguments contained in the briefs of the parties in interest, the WFSE and the University.

## II. CONCLUSION

The PERC erred in holding that while the University had the statutory management right to consolidate call center work, it was required to engage in decision bargaining over the movement of that work from Harborview to the consolidated center. As discussed in its opening brief,

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<sup>6</sup> WFSE also accuses the University of refusing to bargain over effects such as trial service periods and other issues (Intervenor's Brief at 20). Again, this assertion is contrary to established facts (*e.g.*, see Exhibit 57). WFSE is confusing "refusal to bargain" with refusing to agree to WFSE's demands. RCW 41.80 does not impose a duty to reach agreement on any party – employer or union. RCW 41.80.005(2). It only requires that each make a good faith attempt to agree.

the University also contends that it the PERC erred in finding that the University did not comply with its obligation to bargain in good faith over effects, and when it concluded that the University interfered with employee rights. The decision of the PERC should be overturned.

DATED this 18th day of October, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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