

NO. 701657

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

UNIVERSITY OF WASHINGTON,

Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS
COMMISSION,

Respondents,

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Intervenor/Respondents.

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RCW 41.80 does not support the University's arguments that statutory rights to manage its agency trump the statutory right of employees to bargain over direct effects of management changes to their wages, hours and working conditions.

The University now appeals PERC's decision and challenges the remedy imposed, which restored the *status quo ante* until the University completes good faith negotiations and bargaining unit clarification proceedings are resolved.

The University urges the court to apply federal labor law regarding the representational status of a bargaining unit *after* consolidation or the movement of work to another unit. However, federal law is irrelevant to the result in this case. Regardless of who represented the unit after the University implemented the consolidation, the University is not relieved from its duty to bargain, in good faith and to impasse, *prior* to implementing the consolidation. Further, the rules regarding the creation and modification of bargaining units under state and federal law differ substantially. Here, PERC is the sole authority to create and modify bargaining units at the University. PERC correctly complied with its published rules that a unit clarification proceeding or representation proceeding may be deferred pending resolution of a pending unfair labor practice charge.

Finally the order re-establishing the *status quo ante* until the University complied with its bargaining duty and resolution of a unit clarification proceeding is well within PERC's broad remedial authority.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Should the Court uphold PERC's decision finding that the University committed an unfair labor practice by failing to bargain the effects of a business decision prior to implementation of the decision?
- B. Should the Court uphold PERC's decision to apply its own rules, rather than federal labor rules, where there is a specific PERC rule that is different from with the federal rule.
- C. Should the Court uphold PERC's remedy given PERC's broad authority and its expertise in fashioning remedies?

III. COUNTERSTATEMENT OF THE CASE

For this brief, PERC relies on the facts contained in its written decision and has summarized those facts below. Clerk's Papers (CP) 10 (Administrative Record (AR) 1009-1013). To the extent the University asks the Court to rely upon facts not before PERC, such as the subsequent ruling on the Clarification Petition filed by the parties, such facts are not relevant, or properly before this Court. The relevant facts are as follows:

The employer operated the Patient Access Center (Harborview Center) at Harborview Medical Center (Harborview). The Patient Service Specialists (Harborview employees) in the Harborview Center registered patients, scheduled patient appointments, coordinated referrals, assigned

payer plans, and verified insurance coverage and eligibility, among other duties, for Harborview, its facilities, and its satellite clinics. The Harborview employees are covered by a collective bargaining agreement and are represented by the Washington Federation of State Employees (Federation). CP 10 (AR 1009).

The Virtual Front Desk was the call center for the University of Washington Physicians Network. These employees performed similar work to that of the Harborview employees, but did not pre-register patients or verify insurance coverage . . . were not represented by a union, and, according to the University, were not public employees within the meaning of RCW 41.80.005(6). CP 10 (AR 1010).

The University also operated a call center at the University of Washington Medical Center (Medical Center). Its employees were represented by Service Employees International Union, Local 925 (SEIU). CP 10 (AR 1010).

The University decided to consolidate its three call center operations. The Harborview Center manager informed its employees that the University was going to consolidate the call centers into one call center in July 2010. The University subsequently informed the Federation of the plan to consolidate. During this time, the Federation became aware that the University was meeting with employees about the consolidation. In

March 2010, the Federation demanded to bargain the consolidation. The University did not respond to the demand until May 2010, when the employer copied a Federation labor advocate on a response to an SEIU information request. CP 10 (AR 1010-1011).

In June 2010, the University issued the “Call Center Consolidation News” to employees, including job summaries for call center positions. The University and the Federation met on June 14 and 24, 2010, to discuss the University’s plan for consolidation. On June 14, 2010 the University informed the Federation that they were not going to bargain representation issues because representation was not a mandatory subject of bargaining. The Federation asserted that the work remained part of the bargaining unit after the consolidation. The parties did not reach an agreement on how the employee transition would occur. At the time of PERC’s hearing, the parties had not reached an agreement and continued to attempt to establish dates for negotiations. CP 10 (AR 1011-1012).

The Federation indicated to the University that it believed the University was committing an unfair labor practice by failing to negotiate the impacts and advised its members to apply for the call center positions.

All of the Harborview call center employees applied for the new positions. The University sent letters to those employees confirming the salary, pay range and step placement, work schedule, and that the position

was a classified non-union position. By October, the changes were complete. CP 10 (AR 1009-1013).

The Federation filed an unfair labor practice complaint on September 21. CP 10 (AR 1-8)² On May 25, 2011, a PERC hearing examiner found that the University was not required to bargain its decision to consolidate its call centers. However, the Examiner found that the University was required to bargain, prior to implementation, over the effects of the decision to consolidate the call centers and the removal of work from the existing Federation bargaining unit. Further, the Examiner found that the University unlawfully removed work from the bargaining unit, breached its good faith bargaining obligation during effects bargaining, and interfered with employee bargaining rights. In addition to the usual order requiring the employer to post the order and cease and desist, the University was ordered to restore the work to the previous call center and the employees' employment conditions to *status quo ante*, submit to interest arbitration, and pay union dues not withheld under the Federation contract. CP 10 (AR 908-930).

The University appealed to PERC (the full Commission), which upheld the Examiner's decision that the University: (1) could not bargain

² On September 3, the Federation filed a petition for a unit clarification and on October 4 the Federation filed a representation petition. Processing of these petitions was placed on hold by the pending unfair labor practice charges. CP 10 (AR 13-14).

its business decision to consolidate its call centers; (2) was required to bargain over the effects of the business decision; (3) unlawfully removed work from the bargaining unit when it moved the work to unrepresented positions without bargaining to impasse; (4) breached its good faith bargaining obligation during effects bargaining; and (5) interfered with employee rights. PERC also affirmed the remedial order requiring the University to pay union dues not withheld under Federation contract.

PERC reversed the Examiner's remedial order restoring the employees to the previous call center and directing interest arbitration. Finally, PERC ordered the University to restore eight specific employment conditions to former Federation bargaining unit members to *status quo ante* pending the bargaining process.³ The order recognized that a full return to the *status quo ante* was not possible. CP 10 (AR 1008-1026). The Commission later clarified that the Harborview employees who were previously represented by the Federation would continue to be represented by the Federation until resolution of the unit clarification and representation issues. CP 10 (AR 1059-1061).

³ The order restored a seven minute grace period for attendance, the sick leave call-in rules, the pay scale and any step increases that would have been granted, the bilingual pay premium, and benefits related to status as essential staff.

The University filed a petition for judicial review in King County Superior Court. CP 1-36. The superior court, in affirming PERC's decision, found:

There is no basis to find that the legislature, in adopting 41.80.020(5), granting significant right to the employer, intended to disturb the long-established jurisdiction of the [PERC] over the certification and modification of bargaining units, and in this case the Employer overreached the authority provided it in RCW Ch. 41.80.

PERC is also granted discretion in determining an appropriate remedial order, to which the court must give great deference. The Employer advances the argument that PERC's Order requiring it to pay the Union an amount equivalent to the dues that the employees did not pay after the Employer wrongfully instructed them that they were no longer represented by the Union, would constitute an unlawful support of a union by an employer. However, the penalty against the Employer was for damages caused [by] its unlawful acts, and is not prohibited financial support.

CP 188.

The University then filed a notice of appeal to this Court.

IV. STANDARD OF REVIEW

PERC's decisions in unfair labor practice proceedings are reviewed under the Administrative Procedure Act (APA). RCW 41.56.165; *Pub. Sch. Emps. of Quincy v. Pub. Emp't Relations Comm'n*, 77 Wn. App. 741, 744, 893 P.2d 1132, *review denied*, 127 Wn.2d 1019 (1995). The standards for judicial review of an agency order under the APA are set forth in RCW 34.05.570(3)(a)-(i). Of these, only subsections

(b), (d), (e), (h) and (i) are alleged by the University. “The burden of demonstrating invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a).

PERC's interpretation of the collective bargaining statutes “is entitled to substantial weight and great deference” in view of its expertise in the area of collective bargaining. *Univ. of Wash. v. Wash. Fed'n of State Emps.*, 175 Wn. App. 251, 258-259, 303 P.3d 1101, 1105 (2013) (citing to *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382, 831 P.2d 738 (1992)).

“A reviewing court must uphold an agency’s determination of fact ‘unless the court’s review of the entire record leaves it with the definite and firm conviction that a mistake has been made. When reviewing questions of law, the court may substitute its determination for that of the agency. But because PERC’s members have considerable expertise in labor relations, the court gives substantial weight to PERC’s interpretations of the collective bargaining statutes. Where an administrative decision involves a mixed question of law and fact, “the court does not try the facts de novo but it determines the law independently of the agency’s decision and applies it to facts as found by the agency.” *City of Seattle v. Pub. Emp’t Relations Comm’n*, 160 Wn. App. 382, 388, 249 P.3d 650, *review denied*, 172 Wn.2d 1005,

257 P.3d 666 (2011) (citations and footnotes omitted). *See also Xenith Grp., Inc. v. Dep't of Labor & Indus.*, 167 Wn. App. 389, 393, 269 P.3d 414 (2012).

V. ARGUMENT

The University argues that PERC's decisions should be overturned because the University either did bargain in good faith over the effect of its management decision prior to implementation of the decision, or conversely, that it was not required to do so because: a) bargaining the effects before implementation of its management decision renders its right to make the decision meaningless; or b) under federal law, the positions automatically transferred to a new unrepresented bargaining unit, and thus the University was not required to bargain with the Federation.

The University also argues that PERC's remedy exceeded its authority. For the reasons described below, the University's argument is based on an incorrect description of the law, state civil service policy, and PERC's authority.

A. PERC's Decisions Should Be Upheld Because the Legislature Vested PERC With the Exclusive Authority to Enact Public Employee Labor Relations Policy, and PERC's Decisions Are Well Grounded in Its Authority, Policy and Precedent, Which Require Effects Bargaining on All Subjects of Mandatory Bargaining, Even When the Underlying Management Decision Is Not Subject to Bargaining

1. Background of Washington Public Employment Labor Laws

In 1967, the Legislature enacted the Public Employees' Collective Bargaining Act, RCW 41.56, declaring in RCW 41.56.010:

The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

See also Nucleonics Alliance, Local Union No. 1-369, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Wash. Pub. Power Supply Sys. (WPPSS), 101 Wn.2d 24, 28, 677 P.2d 108, (1984); Local Union No. 469, Int'l Ass'n of Firefighters, AFL-CIO v. Yakima, 91 Wn.2d 101, 109, 587 P.2d 165 (1978).

The Act recognizes the right of public employees to organize and designate representatives of their own choosing for collective bargaining purposes by prohibiting interference with such rights and designating such

interference an unfair labor practice. RCW 41.56.040, 41.56.140(1), (2).
Nucleonics, 101 Wn.2d at 31.

This law was extended to state employees with the passage of the Personnel System Reform Act, RCW 41.80, which requires the University, and other state agencies, to bargain collectively with unions representing its employees. “[M]atters subject to bargaining include wages, hours, and other terms and conditions of employment, and the negotiation of any question arising under a collective bargaining agreement.” RCW 41.80.020(1). RCW 41.80.040 states that the employer shall not bargain over some management decisions:

The employer shall not bargain over rights of management which, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:

- (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
- (2) The employer's budget and the size of the agency workforce, including determining the financial basis for layoffs;
- (3) The right to direct and supervise employees;
- (4) The right to take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies; and
- (5) Retirement plans and retirement benefits.

However, as explained *infra*, the statute does not otherwise change the longstanding principle that employers are required to bargain the effects of such management decisions prior to implementation.

2. PERC Has Well Developed Policy on Mandatory Bargaining Through Its Considerable Collection of Decisions, Which Requires Bargaining Over the Effects of Decisions within Managerial Prerogative on Mandatory Subjects of Bargaining

Collective bargaining subjects are characterized as mandatory or permissive. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Empl. Relations Comm'n*, 113 Wn.2d 197, 200-01, 778 P.2d 32 (1989); *Wash. State Patrol Lieutenants Ass'n v. Sandberg*, 88 Wn. App. 652, 657-58, 946 P.2d 404 (1997) (a case involving a state agency). In addition, under RCW 41.80.040, certain management decisions are not subject to bargaining at all.

The terms and conditions of employment that directly affect employees, such as wages, hours and workload, are mandatory bargaining subjects. *Fire Fighters Local 1052*, 113 Wn.2d at 200-01; *Lieutenants Ass'n*, 88 Wn. App. at 657. Significantly, when an employer's decisions on a non-mandatory subject may have an effect on a mandatory subject (such as the terms and conditions of employment), that effect must be bargained when requested by the union. *Fire Fighter, Local Union 1052*, at 210. A decision to transfer bargaining unit work from one bargaining unit to another is such a mandatory subject of bargaining. *South Kitsap*

Sch. Dist., Decision 472 (1978 WL 182726)⁴; *see also City of Kelso*, Decision 2120-A (1985 WL 291945) (both the decision to contract out bargaining unit work and its effects on the employees are mandatory subjects of bargaining); *Univ. of Wash.*, Decision 9410 (2006)⁵ (decision to transfer bargaining unit work to non-bargaining unit employees of the employer is a mandatory subject of bargaining).

As a result, while the University could make a management decision to consolidate its call centers without bargaining that decision with the Federation, the University was required to bargain the effect of that decision on the terms and conditions of employment and it was required to do so before implementing its management decision. Employers must maintain the *status quo* regarding mandatory subjects of bargaining unless the employer makes changes in conformity with the statute or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (1990, WL 656209), *aff'd*, *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 818 P.2d 1076 (1991); *Spokane Cnty. Fire Dist. 8*, Decision 3661-A (1991, WL 733708).

⁴ All PERC Decisions cited in this brief can be found on Westlaw and on the PERC website at www.PERC.wa.gov/hearings-decisions.asp.

⁵ No Westlaw citation available; see attached Decision.

As a general rule, an employer must refrain from “unilaterally changing terms or conditions of employment unless it: (1) gives notice to the union; (2) *provides an opportunity for bargaining prior to making a final decision*; (3) bargains in good faith, upon request; and (4) bargains to agreement or impasse concerning any mandatory subjects of bargaining.” *Skagit Cnty.*, Decision 8746-A (PECB, 2006, WL 516262) (emphasis added); *Univ. of Wash.*, Decision 9410 (2006), (see attached) (an employer must satisfy its bargaining obligations under RCW 41.80 before making a final decision to remove work from an existing bargaining unit); *State-Soc. & Health Servs.*, Decision 9551-A (2008, WL 2002005) (before transferring work out of the bargaining unit, the employer must notify the union of the employer’s interest in transferring work out of the bargaining unit and provide an opportunity for the union to request bargaining over the decision and the effects of the decision).

This obligation applies to all bargaining unit work. *City of Vancouver*, Decision 808-A (1980, WL 309480); *see also City of Kennewick*, Decision 482-B (1980, WL 309468); *City of Mercer Island*, Decision 1026-B (1982, WL 591671); *Cnty. Transit*, Decision 3069 (1988, WL 524528). If the employer fails to comply with these requirements, the employer commits an unfair labor practice in violation of RCW 41.80.110(1)(a).

3. The University Could Have Implemented its Management Decision in a Timely Manner without Committing an Unfair Labor Practice by Using the Process Available in RCW 41.80

The University argues that due to the words “shall not bargain” in RCW 41.80.040 the prohibition on bargaining a management decision also necessarily prohibits any interference with the University’s immediate implementation of that decision, even if implementation impacts the employees’ conditions of employment that are subject to mandatory bargaining. In other words, the University is attempting to expand the definition of non-bargainable management decisions to allow it to impact employees’ conditions of employment without prior bargaining. The University contends that requiring the University to bargain the effects of its decision prior to implementation would violate the prohibition on bargaining management decisions, claiming in essence that the decision and its effects are inseparable. The University contends that bargaining after the impacts have been implemented is permissible. The University is incorrect. RCW 41.80.040 prohibits only bargaining about the University’s management decision; the statute does not prohibit bargaining about implementation and the effects of that decision. As RCW 41.80.040 states, in pertinent part:

The employer shall not bargain over rights of management which, in addition to all powers, duties, and rights

established by constitutional provision or statute, shall include but not be limited to the following:

- (1) The **functions** and **programs** of the employer, the use of **technology**, and the **structure** of the organization; . . .

Id. (Emphasis added.)

Decades of PERC decisional law mandates that before an employer impacts an employee's working conditions, the employer must bargain those impacts with the employee's PERC-certified bargaining representative. The fact that an employer has a statutory right to make a decision does not mean that the employer has a corollary statutory right to immediately implement that decision, regardless of the impacts on employees. To the contrary, the employer may implement its management decision only after complying with the requirement to bargain the effect on terms and conditions of employment and, where necessary, seek PERC clarification or modification of an existing bargaining unit.

Contrary to the University's argument, nothing in RCW 41.80 prevented or excused the University from bargaining over effects to mandatory subjects of bargaining before implementing its management decision. The University was not prevented from deciding to consolidate its call centers. It was simply required to do it in accordance with the law by notifying the Federation (rather than the employees or other unions),

bargaining over the effect on terms and conditions of employment and seeking PERC clarification or modification of the new bargaining unit.

By moving the location of the work without bargaining the effects of the move and then informing the employees that they were no longer represented, the University committed an unfair labor practice. PERC's decision was within its authority and policy.

B. Application of National Labor Relations Board Decisions Pertaining to the Union Representation of Consolidated Bargaining Units Is Inappropriate Where PERC's Rules Are Different from the NLRB's Rules and PERC's Proper Application of Its Own Rules Should Be Upheld

1. National Labor Relations Board decisions on representation of consolidated units do not apply to public employers in Washington, especially if PERC's own rules and precedent conflict with federal decisions

In an alternative argument, the University argues that it was not required to bargain over the effects of its management decision because the employees should have automatically accreted to the bargaining unit with a majority of employees transferred to the new call centers. The University bases this argument on a 1992 National Labor Relations Board (NLRB) decision in *Gitano Grp.*, 308 NLRB 1172 (1992).⁶ The *Gitano* decision holds that when an employer transfers a portion of its employees

⁶ In *Gitano*, the NLRB found that the employer committed unfair labor practices when it laid off workers at one facility and refused to transfer them to a new facility when the employer transferred the work. *Id.*, at 1172.

at one location to a new location, the new facility is presumptively a separate bargaining unit. *U.S. Tsubaki, Inc., Roller Chain & Auto. Divisions, Petitioner & U.S. Steelworkers of Am., & Its Local 7912, Afl-Cio, Clc*, 331 NLRB 327 (2000).

The University's argument that NLRB decisions should be followed is meritless. NLRB decisions can constitute persuasive authority under appropriate circumstances, *Pasco Police Officers Ass'n v. City of Pasco*, 132 Wn.2d 450, 458-59, 938 P.2d 287 (1997), citation omitted. However, they are not persuasive if, as here, they conflict with Washington law. In Washington, the formation of bargaining units is a function vested by the legislature in PERC, which has the exclusive authority to certify bargaining units, including "determining the new units or modifications of existing units." RCW 41.80.070(1). Once PERC certifies a bargaining unit, as it did in this case, the work performed by the employees in that bargaining unit becomes the "historical work jurisdiction" of that unit. *See, e.g., Kitsap Cnty. Fire Dist. 7*, Decision 7064-A (2001, WL 1076552). Thus the work cannot be moved without a modification of the bargaining unit. *See Univ. of Wash. v. Wash. Fed'n of State Emps.*, 175 Wn. App. 251; *Cent. Wash. Univ.*, Decision 10215-B (PSRA, 2010, WL 2150412).

WAC 391-35-020 establishes when unit clarification petitions may be filed so as to minimize the impact on the parties and employees. That rule states, in part:

(1) A unit clarification petition may be filed at any time, with regard to:

- (a) Disputes concerning positions which have been newly created by an employer.
- (b) Disputes concerning the allocation of employees or positions claimed by two or more bargaining units.

Here, in the face of clear rules and PERC precedent, the University nonetheless asks this Court to apply “the majority federal rule on accretion” which, the University claims, is not contrary to the rule in Washington where no “automatic accretion” occurs and parties must request a bargaining unit clarification from PERC as necessary. The University is incorrect.

“While interpretation of the NLRA may be used to assist in interpreting the Public Employees’ Collective Bargaining Act, a provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision.” *Nucleonics Alliance, Local Union No. 1-369, Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. Wash. Pub. Power Supply Sys. (WPPSS)*, 101 Wn. 2d 24, 33-34, 677 P.2d 108, 113 (1984). “[T]he NLRA regulates labor relations only in

the private sector. Private sector bargaining and public sector bargaining are radically different.” *Id.*, at 34.

The University’s argument that PERC is at fault for not conducting an “automatic majority accretion analysis” is not supported by Washington law and should be rejected.

2. PERC Did Not Order the University to Bargain Over Representation

The University further argues that PERC “required it” to recognize the Federation as the former Harborview Center employees’ representative, when the University lacks authority to do so. PERC did not order the University to bargain over representation of the employees, as argued by the University, but ordered it to recognize the existing representative until its duty to bargain was completed and any questions regarding representation were resolved through the appropriate PERC proceedings.

The University here was not only authorized, but required, to recognize the existing certified unit and bargaining representative. The University was recently reminded of this in *Univ. of Wash. v. Wash. Fed’n of State Emps.*, *supra*, 175 Wn. App. 251 (the University was found to have committed an unfair labor practice by insisting to bargaining with the Federation, in a similar situation, that employees be transferred out of a

bargaining unit represented by the Federation to a bargaining unit represented by SEIU). Representation was limited to those employees transferred from the existing bargaining unit until this occurred. Moreover, the University had ample opportunity to file its own unit modification petition from the date it decided to consolidate its call centers up to the time it filed its petition, a year after implementing its management decision.

Finally, the University incorrectly argues that PERC should have issued a decision on the clarification issue prior to issuing a decision on the unfair labor practice. The order of issuance of these decisions is irrelevant. The Director of PERC has discretion to withhold the processing of a unit clarification proceeding pending the outcome of an unfair labor practice proceeding “involving all or any part of the same bargaining unit.” WAC 391-35-110.

Whether there is a question regarding continued union representation *after* the University implemented the consolidation does not relieve the University from its duty to bargain, in good faith and to impasse, *prior* to implementing the consolidation. The employer committed the unfair labor practice when it attempted to move work from, and terminate, the existing bargaining unit before obtaining unit

clarification or modification from PERC. A clarification decision by PERC would not have changed the University's unfair practice.

C. This Court Should Uphold the Remedy Imposed by PERC because PERC Possesses Great Latitude to Formulate Remedies That Resolve an Immediate Labor Relations Issue and Prevent Future Rule Violations

Under the circumstances of this case, PERC's requirement that the University continue to recognize the Federation as the representative of the employees transferred from the Harborview employees' bargaining unit is well within PERC's remedial authority. The University's contention to the contrary is meritless. As PERC noted, at the time of the unfair labor practice decision, unit clarification and representation petitions were pending before the Commission awaiting resolution of the unfair labor practice charges. CP 10 (AR 1060). PERC reasoned:

In normal case processing, when a unit clarification petition or a petition for investigation of a question concerning representation is filed, the incumbent union remains the representative of the employees at issue until the petition is resolved. If a petition for investigation of a question concerning representation is filed, the employer is obligated to maintain the status quo. The union's representational rights, such as grievance processing, continue as normal until the resolution of the petition.

To remain consistent with normal case processing, in this case, the union's representational rights continue until processing of the unit clarification and representation petitions are complete.

*Id.*⁷

The courts have recognized that PERC's authority with respect to imposing remedies is very broad. As stated by the Court of Appeals in *Pasco Hous. Auth. v. State Pub. Empl. Relations Comm'n*:

Both the Washington Legislature and Supreme Court have recognized that public employee labor relations policy is best managed by creating an expert administration, giving it extensive jurisdiction to fashion equitable remedies, and severely limiting judicial review. That is the scheme in Washington.

98 Wn. App. 809, 813, 991 P.2d 1177 (2000). As a result, "[t]he judicial deference accorded all PERC decisions is especially great in the matter of remedies." *Id.* at 814. "Agencies enjoy substantial freedom in developing remedies." *Municipality of Metro. Seattle v. Pub. Empl. Relations Comm'n*, 118 Wn.2d 621, 634, 826 P.2d 158 (1992).

Here, PERC found that the University had not bargained in good faith and had committed an unfair labor practice by moving bargaining unit work to new, unrepresented positions without bargaining the effects of that change. The remedy crafted by PERC recognized the employees' continued union representation, restored pre-existing working conditions pending the decisions in related cases pending before PERC, and was designed to prevent future unfair labor practices by the University. This

⁷ See WAC 391-25-140(2) (changes of *status quo* concerning wages, hours, and other terms and conditions of employment are prohibited during the period that a representation petition is pending before the Commission).

remedy is within PERC's authority to grant, and this Court should uphold it.

VI. CONCLUSION

For the reasons set forth above, PERC respectfully asks this Court to affirm its decision finding an unfair labor practice and to affirm the remedy PERC imposed.

RESPECTFULLY SUBMITTED this 30th day of September, 2013.

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NO. 70165-7-I

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

UNIVERSITY OF WASHINGTON,

Appellant,

v.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION,

Respondent,

WASHINGTON FEDERATION OF
STATE EMPLOYEES,

Intervenor/Respondent.

CERTIFICATE OF
SERVICE

2013 OCT -2 PM 1:11
STATE COURT OF APPEALS
DIVISION I

I certify that on September 30, 2013, I caused the original and one set of true and correct copies of the Washington Public Employment Relations Commission Brief to be sent by U.S. Mail, postage pre-paid via Consolidated Mail Services upon the following:

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

I further certify that on September 30, 2013, true and correct copies of the Respondent's Brief were sent by electronic mail and by U.S. Mail, postage prepaid via Consolidated Mail Services to:

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DEBBIE ANDERSON
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University of Washington, Decision 9410 (PSRA, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	CASE 20331-D-06-0125
UNION, LOCAL 925)	
)	DECISION 9410 - PSRA
For a declaratory order involving:)	
)	
UNIVERSITY OF WASHINGTON)	DECLARATORY ORDER
_____)	

Douglas, Drachler & McKee, by Martha Barron, Attorney at Law, appeared for the union.

Rob McKenna, Attorney General, by Paul A. Olsen, Assistant Attorney General, appeared for the employer.

On April 10, 2006, Service Employees International Union, Local 925 (union) filed a petition for declaratory order with the Public Employment Relations Commission, naming the University of Washington (employer) as an interested party. On May 8, 2006, the employer consented to the processing of the union's petition under RCW 34.05.240 and WAC 391-08-520, and the matter was forwarded to the Commission. At the May 15, 2006, public meeting, the Commission discussed the union's petition and received an unsolicited statement from the union's attorney. We accepted the case for processing under RCW 34.05.240 and WAC 391-08-520, and directed our Executive Director to provide written confirmation that we would issue a declaratory order in this case.

ISSUE PRESENTED

Paragraph 13 of the union's petition indicates that a dispute exists between the parties as to "Whether the [employer] has the prerogative to alter the bargaining units under [the Commission's] jurisdiction by application of the RCW 41.06.070 exemptions."

We hold that while the employer may continue to utilize the exemption provisions in RCW 41.06.070 to remove individual employees from classified service under Chapter 41.06 RCW, that does not relieve employers of their duty to bargain under Chapter 41.80 RCW concerning any transfer of bargaining unit work to employees or positions outside of the bargaining unit which previously included the exempted employee(s).

APPLICABLE LEGAL PRINCIPLES

A collective bargaining relationship exists under the Personnel System Reform Act of 2002, Chapter 41.80 RCW (PSRA), which is administered by this Commission. Under RCW 41.80.005(6), the PSRA

only applies to individuals who are in classified service under the State Civil Service Law, Chapter 41.06 RCW. This case calls for harmonization of the two statutes.

Early History of Civil Service in Washington

The people of the State of Washington adopted the State Civil Service Law by passing Initiative Measure 207 in 1960. The civil service initiative established a system of personnel administration based on merit principles and scientific methods governing the appointment and allocation of employees. The State Personnel Board (SPB), whose members were appointed by the Governor, along with the Department of Personnel (DOP) administered Chapter 41.06 RCW. The 1960 Civil Service Initiative did not permit employees to directly bargain "wages" with the employer. Wage setting authority for all state civil service employees remained with the Legislature until 2002.

In 1969, the Legislature enacted a merit system similar to Chapter 41.06 RCW for the non-faculty employees of the state institutions of higher education. Codified in Chapter 28.75 RCW, (1) this act created a Higher Education Personnel Board (HEPB) and directed that body to create rules to guide personnel programs to be carried out on each higher education campus under its jurisdiction. Unlike the Civil Service Law, Chapter 28.75 RCW permitted the governing boards of the higher education institutions a certain degree of autonomy in the application of laws and rules governing personnel matters. The HEPB staff assisted the institutions in a variety of matters, including the implementation of HEBP rules, mediating labor disputes, and adjudicating appeals from employees.

1 Chapter 28.75 RCW became Chapter 28B.16 RCW in 1971 when state laws concerning education were reorganized.

In 1993, the Legislature merged these two civil service systems into Chapter 41.06 RCW. The DOP and the newly created Washington Personnel Resources Board (WPRB) administered the merged laws.

Early History of Collective Bargaining Laws

Both the separate and merged civil service laws contained rudimentary components of a collective bargaining process, including determination of appropriate bargaining units, certification of exclusive bargaining representatives, and bargaining on a limited scope of matters controlled by the respective agency head or institution of higher education.

In 1967, the Legislature enacted the Public Employees' Collective Bargaining Act (PECB), Chapter 41.56 RCW, authorizing local government employees to bargain "wages, hours and working conditions" with employers similar to traditional collective bargaining in the private sector. The state Department of Labor and Industries (L&I) administered Chapter 41.56 RCW at that time as it related to local government employees.(2) In 1969, the Legislature added unfair labor practice provisions to Chapter 41.56 RCW and authorized L&I to administer those provisions.(3)

2 In a partial veto message accompanying the PECB, Governor Daniel J. Evans insisted that the "[SPB] retain responsibility for collective bargaining by State employees and that [L&I] retain responsibility for dealing with collective bargaining by other employees".

- 3 The Legislature cross-referenced the Chapter 41.56 RCW unfair labor practices to Chapter 41.06 RCW authorizing the SPB to administer these unfair labor practice laws for State Civil Service employees. Laws of 1969, 1st Ex. Sess. ch. 215 Section 13 (codified as RCW 41.06.340). The Legislature also cross-referenced these unfair labor practices laws to Chapter 28.75 RCW authorizing the HEPB to administer these unfair labor practice laws for higher education non-faculty employees. Laws of 1969, 1st Ex. Sess. ch. 215 Section 14 (codified initially as RCW 28.75.230, and later re-codified as RCW 28B.16.230). The SPB and HEPB developed their own unfair labor practice procedures. RCW 41.06.340 remained in effect under WPRB administration for a time after the merger of the civil service systems in 1993.

Collective Bargaining Consolidation and Precedents

In 1975, the Legislature created this Commission to provide "uniform and impartial . . . efficient and expert" administration of state collective bargaining laws. RCW 41.58.005(1). On January 1, 1976, this Commission took over the administration of a number of collective bargaining laws, including Chapter 28B.52 RCW, (4) Chapter 41.56 RCW, Chapter 41.59 RCW, (5) Chapter 47.64 RCW, (6) Chapter 49.08 RCW, (7) and Chapter 53.18 RCW. (8) The SPB continued to administer the limited bargaining under Chapter 41.06 RCW and the HEPB continued to administer the limited bargaining under Chapter 28B.16 RCW.

-
- 4 Community College Faculty.
- 5 Certificated employees of school districts.
- 6 Washington State Ferry System employees. The Marine Employees' Commission created in 1983 now administers this law.
- 7 A process for mediation and arbitration of labor disputes in existence since 1903.
- 8 Port district employees. A 1983 legislative amendment fully integrated that statute and Chapter 41.56 RCW.

In *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997) (City of Pasco) and *Federal Way School District*, Decision 232-A (EDUC, 1977), the Washington courts and this Commission applied principles enunciated by the Supreme Court of the United States in *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958), to divide the matters discussed by employers and unions into three broad categories:

- * Employee "wages, hours, and other terms and conditions of employment" are 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 a mandatory subject.
- * 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. As to permissive subjects, each party is free to bargain or not

to bargain, and to agree or not to agree. City of Pasco, 132 Wn.2d at 460.

- * 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 a particular issue is a mandatory subject of bargaining, 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 held in City of Richland 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.

Whether a subject must be bargained 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 various state labor relations boards generally accept that the level of services to be offered by an employer is a management prerogative 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). Even then, an employer exercising its right to make a decision on a matter will have a duty to bargain with the union representing its employees on the effects of the decision on the employees. See Grays Harbor County, Decision 8043-A (PECB, 2004).

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 to 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. (9) Thus, both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees may be mandatory subjects of bargaining. See *City of Kelso*, Decision 2120-A (PECB, 1985); *Peninsula School District v. Public School Employees*, 130 Wn.2d 401, 407 (1996).

9 The term "contracting out" is appropriate where bargaining unit work is transferred to employees of another employer; the term "skim" is appropriate and used in our precedents where bargaining unit work is transferred to employees of the same employer who are

outside of the bargaining unit.

The PSRA Changes

In 2002, the Legislature enacted the PSRA, which substantially restructured both the collective bargaining rights of state civil service employees and the administration of the collective bargaining process. Codified in Chapter 41.80 RCW, the PSRA granted state and higher education civil service employees "full scope" collective bargaining rights. These new rights permitted represented employees to negotiate directly with the employer, in this case the Governor or the Governor's designee, all matters affecting employee wages, hours, and working conditions. The Legislature transferred administration of the state civil service collective bargaining from the WPRB to this Commission, including:

- * The authority to determine and modify bargaining units which had been delegated to the WPRB in RCW 41.06.150 was transferred to this Commission by an amendment of RCW 41.06.340 and by enactment of RCW 41.80.070.
- * The authority to resolve questions concerning representation which had been delegated to the WPRB in RCW 41.06.150 was transferred to this Commission by amendment of RCW 41.06.340.
- * The authority to prevent unfair labor practices which had been delegated to the WPRB in RCW 41.06.340 was transferred to this Commission by amendment of RCW 41.06.340.

In implementing the "uniform and impartial . . . efficient and expert" directive in found in RCW 41.58.005, this Commission applies the rules, practices, and precedents it has developed since 1976 to the administration of the PSRA, except where difference in the PSRA explicitly required application of a different standard. See State - Transportation, Decision 8317-B (PSRA, 2005) (Chapter 41.80 RCW explicitly exempts "internal auditors" from coverage of the Act); State - Natural Resources, Decision 8458-B (PSRA, 2005) (Commission's labor nexus test applies to determine if employees covered by Chapter 41.80 RCW are confidential employees).

Exemptions from Civil Service Rights

Both the separate and merged civil service laws have provided for some exemptions from their coverage. From its outset, RCW 41.06.070 contained a list of exemptions, such as employees of the legislative and judicial branches of government, and academic personnel of higher education institutions. Chapter 28.75 RCW also contained a list of exemptions, although it permitted the governing bodies of the institutions broader authority to "exempt" employees from civil service coverage. The merged civil service law combined the exemptions in RCW 41.06.070. As amended by the PSRA, that statute now provides:

RCW 41.06.070 EXEMPTIONS--RIGHT OF REVERSION TO CIVIL SERVICE STATUS--EXCEPTION.

- (2) The following classifications, positions, and employees of institutions of higher education and related boards are hereby exempted from coverage of this chapter:
- (a) Members of the governing board of each institution of higher education and related boards, all presidents,

vice-presidents, and their confidential secretaries, administrative, and personal assistants; deans, directors, and chairs; academic personnel; and executive heads of major administrative or academic divisions employed by institutions of higher education; principal assistants to executive heads of major administrative or academic divisions; other managerial or professional employees in an institution or related board having substantial responsibility for directing or controlling program operations and accountable for allocation of resources and program results, or for the formulation of institutional policy, or for carrying out personnel administration or labor relations functions, legislative relations, public information, development, senior computer systems and network programming, or internal audits and investigations; and any employee of a community college district whose place of work is one which is physically located outside the state of Washington and who is employed pursuant to RCW 28B.50.092 and assigned to an educational program operating outside of the state of Washington;

(b) The governing board of each institution, and related boards, may also exempt from this chapter classifications involving research activities, counseling of students, extension or continuing education activities, graphic arts or publications activities requiring prescribed academic preparation or special training as determined by the board: PROVIDED, That no nonacademic employee engaged in office, clerical, maintenance, or food and trade services may be exempted by the board under this provision[.]

Apart from being excluded from all collective bargaining rights under Chapter 41.80 RCW, employees who are "exempt" under RCW 41.06.070 serve at the pleasure of their employers. They can be disciplined or have their employment terminated without any of the protections provided by the State Civil Service Law.

ANALYSIS

This employer can continue to exempt employees from civil service by application of RCW 41.06.070(2). Nothing in Chapter 41.80 RCW expressly repeals or negates the authority to exempt employees, which is reserved to higher education institutions in RCW 41.06.070(2). However, the analysis cannot end there.

This employer cannot modify any bargaining unit existing among its employees under Chapter 41.80 RCW. Nothing in Chapter 41.06 RCW gives a state institution of higher education any authority to modify any bargaining unit. The Legislature delegated the determination and modification of bargaining units under the PSRA to this Commission. RCW 41.06.340; 41.80.070. See also University of Washington, Decision 6659 (1999), aff'd, Decision 6659-A (PECB, 1999) (holding that the Commission's unit determination unit determination and modification precedents apply to university employees covered by Chapter 41.56 RCW). Even if unions and employers agree on unit determination matters (which are not subjects for bargaining in the usual mandatory/permissive/illegal sense), those agreements are not binding on this Commission. City of Richland, Decision 279-A (PECB, 1978), aff'd, 29 Wn. App. 599 (1981), review denied, 96 Wn.2d 1004 (1981).

The employer must satisfy its bargaining obligations under Chapter 41.80 RCW before making a final decision to remove work from an

existing bargaining unit. Nothing in RCW 41.06.070 expressly repeals or negates the duty to bargain which is imposed upon state higher education institutions in RCW 41.80.005(2), as limited by RCW 41.80.020 and .030, and as enforced by RCW 41.80.110(1)(e) and .120. If a decision to "exempt" a bargaining unit employee from civil service is accompanied by any transfer of work historically performed by the bargaining unit to the exempted individual or any other person outside of the bargaining unit, then the employer is obligated to fulfill its collective bargaining obligations. That includes:

- * Provide notice to the union;
- * Provide an opportunity to bargain before making a final decision on the proposed change;
- * Upon timely request, bargain in good faith to agreement or impasse.

City of Anacortes, Decision 6863-A (PECB, 2000); see also Skagit County, Decision 6348-A (PECB, 1998). Additionally, the employer must bargain in good faith concerning the effects of any such transfer, if requested by the union. See Wenatchee School District, Decision 3240-A (PECB, 1990).

NOW, THEREFORE, acting under authority conferred by RCW 34.05.240, the Public Employment Relations Commission makes the following:

DECLARATORY ORDER

The authority of state institutions of higher education to exempt employees from the coverage of Chapter 41.06 RCW by operation of RCW 41.06.070(2) is limited by the collective bargaining obligations imposed by Chapter 41.80 RCW if an exemption under RCW 41.06.070(2) is or will be accompanied by any transfer of bargaining unit work to persons outside of an existing bargaining unit.

Issued at Olympia, Washington, the 15th day of August, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner