

70165-7

70165-7

NO. 70165-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

UNIVERSITY OF WASHINGTON,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent,

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Intervenor.

INTERVENOR'S BRIEF

Edward Earl Younglove III, WSBA #5873
of Younglove & Coker, P.L.L.C.
Attorney for Intervenor

YOUNGLOVE & COKER, P.L.L.C.
1800 Cooper Point Road SW, Bldg. 16
PO Box 7846
Olympia, WA 98507-7846
Tel: 360/357-7791
Fax: 360/754-9268
edy@ylclaw.com

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SUMMARY DESCRIPTION OF THE UNIVERSITY’S UNFAIR LABOR PRACTICES

The 2002 Personnel System Reform Act (PSRA) granted full scope collective bargaining to employees of agencies and institutions of the State. RCW Ch. 41.80. Laws of 2002, ch. 354.¹ It preserved to state employers, such as the University, the right to unilaterally decide “the structure of the organization” by making it a management right, not subject to collective bargaining. RCW 41.80.040(1).

Consistent with basic labor law tenets, the PSRA confirmed employees “right... to bargain collectively through representatives of their own choosing.” RCW 41.80.050. It transferred exclusive authority to the Public Employment Relations Commission (PERC or Commission) to “decide...the unit appropriate for certification” within which employees exercise their bargaining rights. RCW 41.80.070.

The PSRA continued to make it illegal (an unfair labor practice) for employers to refuse to bargain or to interfere with employee bargaining and representation rights. RCW 41.80.110. It “empowered” PERC exclusively to “prevent any unfair labor practice and to issue appropriate remedial orders.” RCW 41.80.120.

¹ This was full scope in that for the first time unions could bargain wages (RCW 41.80.030) and contracts which could supersede civil service rule provisions (RCW 41.80.020(6)).

In this appeal, the University argues that its right to determine organizational structure trumps the other provisions of the PSRA. The Commission's decision, on the other hand, balances the appropriate application of all these provisions.²

In the fall of 2010, the University changed the organizational reporting structure within its department of University Medicine, which includes the Harborview Medical Center. It then physically relocated the employees in its Harborview "call center" who were responsible for registering and scheduling patients for Harborview's clinics. At the same time it changed the employees' job classification to one it considered outside of the bargaining unit previously certified by the Commission and historically represented by the Washington Federation of State Employees (WFSE/Intervenor).

The University never bargained the decision to remove the work of registering and scheduling Harborview clinic patients from the bargaining unit. After a few initial discussions, it also refused to bargain with the WFSE

² The University appears confused by the Commission's decision which acknowledged that RCW 41.80.040(1) prevented the University from bargaining its decision to restructure (organizationally moving the call center from under Harborview Administration to the University of Washington Medicine) while holding that the decision to remove the work from the bargaining unit by having the employees continue to perform the work in new job classifications the University considered not part of the bargaining unit was a mandatory subject of bargaining.

regarding the substantial effects of that decision on the call center employees, claiming that because of its organizational change the WFSE no longer represented them.

Exercising the authority expressly granted to it by RCW 41.80.110 and applying well established principles, PERC found that the University's actions constituted a "refusal to bargain" unfair labor practice ("skimming").³ The Commission additionally found that the University's direct communications with the call center employees concerning the restructure and its effects on the employees when they were represented by a Union (WFSE) interfered with the employees' representation and bargaining rights guaranteed by RCW Ch. 41.80, a separate unfair labor practice.

As a remedy, the Commission ordered that pending completion of proceedings on a WFSE petition that the Commission "clarify" the bargaining unit that the University restore a few of the employees previous working conditions; bargain with the WFSE; and pay the employees' back union dues which it had refused to deduct. The Commission did not "undo" the University's reorganization. The University refused to comply and appealed.

³ "Skimming" is when the employer assigns bargaining unit work to employees outside the bargaining unit without first bargaining the decision and the effects with the union. See *South Kitsap School District*, Decision 472 (1978).

COUNTER STATEMENT OF THE ISSUES

WFSE agrees that this court's review of the Commission's decision is conducted under the Administrative Procedure Act and is a *de novo* review of the record before the agency. (Amended Brief of Appellant at 14 (Br. 14)) The University's assignments of error to the trial court decision affirming the Commission and the accompanying issue statements are repetitive and unnecessary. In any event, the WFSE submits that the trial court appropriately affirmed the Commission decision as should this court.

The issues raised by the University's appeal are:

Issue 1: Are Findings of Fact (FOF) 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16 and 17 in Decision 11075 (AR 908) adopted by the Commission (Decision 11075-A, AR 1025) supported by substantial evidence in the record of the proceedings before the Commission? (University's Issues 8-11.)⁴

Issue 2: Did the Commission err in holding the University's decision to remove work from the WFSE bargaining unit was a mandatory subject of bargaining and that the University's admitted refusal to bargain the decision (as described in Findings 7-17) constituted a violation of RCW

⁴ The University's assignments of error do not assign error that any specific finding is not supported by the record. Instead, it simply refers to "the challenged portions" of the Commission decision. The "challenged portions" are presumably the Findings identified in the Petition for Review and despite the University's failure to address each of these findings, we show the court herein that each is supported by substantial evidence in the record.

41.80.110(1)(e) (a “refusal to bargain” unfair labor practice)? AR 928 (Conclusion of Law 3). (University’s Issues 1-6.)

Issue 3: Did the Commission err in holding that the University refused to fulfill its duty to bargain the effects on WFSE bargaining unit members (as described in Findings 7, 8, 10, 14 and 16) of the University’s decision to consolidate its call center operations (which the University admits are mandatory subjects of bargaining), a violation of RCW 41.80.110(1)(e) (a “refusal to bargain” unfair labor practice)? AR 928 (Conclusion of Law 6). (University’s Issue 7.)

Issue 4: Did the Commission err in holding that the University’s conduct in dealing directly with bargaining unit members represented by the WFSE about the changes in their job classifications and working conditions (as described in Findings 7, 8, 10, 14 and 16), interfered with the employees’ rights guaranteed by RCW 41.80 in violation of RCW 41.80.110(1)(a) (an “interference” unfair labor practice)? AR 928 (Conclusion of Law 5). (University’s Issues 8-11.)

Issue 5: Did the Commission’s remedy requiring the University to pay the back union dues for the employees it had illegally removed from the bargaining unit (and ceased deducting union dues) violate RCW

41.80.110(1)(b) (prohibiting an employer from providing financial support to a union)? AR 1055 (University's Issue 12).

COUNTER STATEMENT OF PRIOR PROCEEDINGS

On September 21, 2010, the WFSE filed an unfair labor practice charge alleging the University committed refusal to bargain and interference violations of RCW 41.80.110(1)(e) and (a). AR 1. A Commission Examiner agreed. AR 908-30; Decision 11075.

The University appealed to the Commission. AR 993. The Commission affirmed the Examiner's decision with modifications to the remedy. AR. 1008; Decision 11075-A.

The WFSE requested that the Commission clarify its decision pursuant to RCW 34.06.470. AR 1037. Specifically, the WFSE requested clarification regarding the representation and contract rights of the employees in light of those portions of both the Examiner and the Commission decisions ordering the University to bargain with the Union and pay the employees' back union dues. The University's response argued that the employees were unrepresented. AR. 1052. The Commission ruled that pending decisions on the WFSE's clarification and representation petitions (which it ordered be expedited), that the employees remained represented by the

WFSE. It also affirmed the remedy that the University pay the dues it had refused to deduct.⁵ AR 1059; Decision 11075-B.

The University petitioned for review to the King County Superior Court. Clerk's Papers (CP) 1-36. Following extensive briefing and a review of the entire record, Judge Richard Eadie affirmed the Commission decisions and dismissed the University's petition. CP 187-188. The University filed this appeal. CP 189-192.

ARGUMENT IN SUPPORT OF THE COMMISSION'S DECISION

1. This Court's review is conducted with considerable deference to the Commission's decision.

The WFSE agrees that this court's review is under the Administrative Procedures Act (RCW 34.05.570(3)) and is applied directly to the PERC record. There is also no substantial dispute regarding the standards of review. Br 13-14.

"The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders...." RCW 41.80.120. "Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. *City of Pasco v.*

⁵ RCW 41.80.100(3) specifically requires employer to deduct and pay an employee's union dues upon an employee's authorization.

PERC, 119 Wn.2d 504, 506, 833 P.2d 381 (1992).” *Pasco Police Officers’ Ass’n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

Factual findings will be upheld on appeal if they are supported by substantial evidence. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Substantial means ‘in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.’ *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 157, 776 P.2d 676 (1989). Our review is confined to examining the record for the requisite evidence. *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999).

Pasco Housing Authority v. PERC, 98 Wn. App. 809, 810, 991 P.2d 1177 (2000).

The substantial evidence standard is deferential; it does not permit a reviewing court to substitute its view of the facts for that of the agency if substantial evidence is found. Washington Administrative Law Practice Manual § 10.05[C] at 10–29 (2008).

Yakima Police Patrolmen’s Ass’n v. City of Yakima, 153 Wn. App. 541, 552-553, 222 P.3d 1217 (2009).

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.” *Renton Educ. Ass’n*, 101 Wash.2d at 440, 680 P.2d 40. When reviewing questions of law, the court may substitute its determination for that of the agency. *Pasco Police Officers’ Ass’n v. City of Pasco*, 132 Wash.2d 450, 458, 938 P.2d 827 (1997). **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.** *City of Bellevue v. Int’l Ass’n of Fire*

Fighters, Local 1604, 119 Wash.2d 373, 381, 831 P.2d 738 (1992).

City of Seattle v. Public Employment Relations Com'n, 160 Wn. App. 382, 388-389, 249 P.3d 650, 653 (Div. 1, 2011). [Emphasis Supplied.]

“Whether a party has failed to negotiate in good faith, although involving a substantial factual component, is a mixed question of law and fact. [Citations omitted.]” *City of Pasco*, 132 Wn.2d at 469.

The University also challenges the Commission’s remedy that the University pay the back dues it had refused to withhold on the basis the employees were no longer represented.

The reviewing court may not substitute its judgment for PERC’s [regarding the appropriate remedy], contrary to the general rule. [Citation omitted]... **In the matter of remedies, therefore, intervention is appropriate only if the remedy exceeds the mandate of RCW 41.56.160 [RCW 41.80.120 that PERC issue “appropriate remedial orders”].** [Citation omitted.]

Pasco Housing Authority v. PERC, 98 Wn. App. at 810-813. [Emphasis supplied.]

2. Substantial evidence supports the Commission’s Findings of Fact “challenged” by the University. (Intervenor’s Issue No. 1)⁶

University employees in a “call center,” known as the “Patient Access Center” (PAC), telephonically registered and scheduled patients, primarily for the Harborview Hospital clinic system located as far away as Bellevue and downtown Seattle. (Transcript (Tr.),⁷ at 30, line 6 through 33, line 22 (30:6-33:22)). The PAC employees were civil service employees covered by both Ch. 41.06 and Ch. 41.80 RCW.⁸ Their Patient Service Specialist (PSS) civil service job classification is part of the large Harborview bargaining unit represented by the WFSE. AR 641-2 (Ex. 1).

The University of Washington Physicians’ Network (UWPN) is a private nonprofit organization. It is not part of the University. Tr. 474:24-477:16. The UWPN had its own call center, the Virtual Front Desk (VFD), to schedule patients for UWPN’s “neighborhood clinics.” Tr. 474:24-477:16. VFD employees were covered by neither RCW 41.06 nor RCW 41.80.

⁶The Commission adopted the Examiner’s findings which are at AR 924-27.

⁷ Consistent with the University’s method of citing to the record, references to the transcript are to the transcript’s page and line numbers located in the Certified Appeal Board Record abbreviated hereafter as “AR” at 30-571.

⁸ In its answer to the WFSE unfair labor practice complaint, the University denied that the employees were covered by RCW Ch. 41.06 and alleged they were only covered by RCW Ch. 41.80. AR 23 at ¶1. Its Labor Relations Assistant Director testified similarly. Tr. 507:21-25. The University is clearly wrong. RCW Ch. 41.80 only applies to employees covered by RCW Ch. 41.06. See RCW 41.80.005(6).

VFD employees did not provide the same range of services for UWPN patients as those provided by the PAC employees. They did not pre-register or perform insurance verification. Tr. 254:24-255:3 and 301:12-21. A PAC employee (Nancy Srey) who later went to the Contact Center testified “[t]he [VFD] work was different, they only handle seven clinics. And they don’t do insurance verification, they only schedule appointment [sic], but no prelude, no preregistration, or anything.” Tr. 301:18-21. Another (Kim Hardy) testified “we [the former PAC employees] do it a lot more than they [the VFD employees] do [such as referrals].” Tr. 255:1-5. The University cites to no evidence that contradicts the Commission challenged finding (FOF 4) regarding the differences in the VFD and PAC work.

Employees in the University of Washington Medical Center (UWMC) clinics, a different department of University Medicine, register and schedule patients only for the UWMC clinic that they work in. They do not work in a centralized “call center.” Their additional duties include reception and clerical services. They are part of a bargaining unit represented by the Service Employees International Union (SEIU). Tr. 45:10-46:10; 455:12-17; and 479:13-480:4.

Based on a study done of its patient registration, the University decided to consolidate the PAC and the VFD into a new call center known as

the “Contact Center.” The VFD employees would apply for civil service employment with the University. Tr. 455:20-460:15. In its Statement of the Case, the University argues that it hired a consultant (Flexsource) to assess its patient services and that Flexsource recommended physical consolidation of the Harborview, UWMC and UWPN work. Br. 9. Much later, the consultant’s recommendation was provided to the Union. AR 696-721 (Ex. 7). The University argues that “the University decided to adopt the consultant’s recommendations.” Br. 10. It is therefore difficult to understand the University’s challenge to the Commission finding (FOF 5) that it commissioned and adopted the consultant’s recommendations.

University management met with the PAC employees, showed them a PowerPoint presentation, and advised them of the University’s decision to relocate the PAC and merge with the VFD. Longer term, they referenced the possibility of also including the UWMC patient registration and scheduling work in the Contact Center, and allowing the UWMC employees to apply for positions in the Contact Center. Tr. 67:19-69:14; 79:16-80:19; 84:14-25; 252:2-260:12; 303:8-308:19; 341:7-347:7; 370:3-378:4 and AR 684 (Ex. 2). There was no plan to eliminate the UWMC positions as was done with the PAC since UWMC clinic employees also do other work. Tr. 482:24-483:20 and 55:14-19.

The University's objection to FOF 6 is presumably that it found that the University proceeded with implementation of the recommendations "without consulting the union." At the same time, the University admits that "[t]he University told employees [of its decision] a few days prior to notifying the Union." Br. at 41.

In a meeting with PAC employees, University representatives told them it had been communicating with "the union" about the consolidation plans. Although the University was communicating with SEIU, it had not communicated with the WFSE. PAC employees understood the employer was referring to their Union (the WFSE) and became concerned, mistrustful that their Union was in communication with the employer on these plans, but had not said anything to the employees. They were "suspicious, furious and confused" believing that the WFSE was "negotiating behind their backs." Tr. 80:6-81:7.

In fact, the WFSE only learned of the University's plans from an email from one of the employees who had been at the meeting. AR 684 (Ex. 2⁹); Tr. 79:16-80:19; 84:14-25; 252:2-260:12; 303:8-308:19; 341:7-347:7 and 370:3-378:4. Only after a Union representative (Addley Tole) called the

⁹ The email asked if the Union had "been in or aware of any discussions with management regarding; 1) Unilateral changes in working conditions in PAC? 2) PAC merging with UWPN, VFD, UWMC, Northwest hospital? 3) PAC relocation summer 2010?"

University labor relations office and inquired did the University send a letter to the WFSE confirming the employer's decision. AR 685 (Ex. 3). The Commission finding that the University proceeded with the consolidation without bargaining with the union (FOF 6) and that the employer made a presentation to the PAC employees prior to notifying the union (FOF 7) are supported by substantial evidence.

The University letter (AR 685 (Ex. 3)) advised the union of its decision to consolidate the PAC and VFD operations and that the University was "eventually considering the additional consolidation of the current decentralized model at UW Medical Center." The letter stated it hadn't "finalized the timeline" and does not mention that the Contact Center employees would be unrepresented. The Commission's finding (FOF 8) accurately reflects these facts.

On March 26, 2010, Banks Evans, another WFSE representative, had sent the University a demand to bargain the consolidation. AR 695 (Ex. 6). Although the University management was continuing to meet with PAC employees about the consolidation, the first response to this demand was when Evans received a packet of information in a May 12, 2010 email in which he was cc'd. Tr. 67:11-15 and AR 696 (Ex. 7). The attachments to the email indicated a decision had already been made with a "move" date

of early September. AR 709. This is consistent with the Commission finding (FOF 9).

On June 14, 2010, Evans, the WFSE negotiator, attended the first bargaining session in response to the union's demand. Tr. 81:8-89:20. The University advised the Union the consolidation decision had been made and they would **not** negotiate it. Tr. 83:17-84:2. It told the Union the PAC employees would be in new unrepresented positions out of the WFSE bargaining unit. Tr. 81:22-82:7. Between May and September 2010, the parties had several discussions regarding the University's intentions and Evans made several requests for information from the University for information. See e.g. AR 722 (Ex. 8), 724 (Ex. 9), 733 (Ex. 15) & 754 (Ex. 23). However, the University refused to ever discuss its decision to take the work from the unit. Tr. 177:12-17.

Although the University agreed there were many unresolved impacts from its decision including "parking, trial service periods, rehire rights, and possibly others" and professed that it was "very willing to continue discussions on effects bargaining for the PAC staff as they transition to the consolidated contact center," (AR 792 (Ex. 27)) in August it had already advised the 27 PAC employees in individual letters of their new "Non-Union" positions effective October 1, 2010. AR 763-90 (Ex. 25). The

employees' salaries were to be frozen. Tr. 93:9-124:6. After October 1, 2010, the University treated the employees as unrepresented and refused to even bargain the effects on employees. For example, it refused to release a Contact Center employee for bargaining on the basis she was no longer in the unit. Tr. 131:5-133:2 and AR 791 (Ex. 26).

Evans identified numerous examples of impacts from the consolidation and transfer of work, including higher workloads, different parking payment arrangements (it had to be paid in advance), availability of restrooms on site, different security, a prohibition of the practice of combining lunch and break time, freedom to move about the new worksite, less pay for at least some employees and a new designation as essential employees requiring them to now work holidays. He testified none of those items had been bargained as of the November PERC hearing dates. Tr. 137:1-140:1.

Several former PAC employees testified that the work they performed in the Contact Center was *exactly* the same work they had previously performed in the PAC. Tr. 264:19-266:14; 312:23-313:3; 353:9-16 and 381:17-20. This testimony was not disputed. However, several of the employees provided evidence of changes in their working conditions. Their dues were stopped, *infra*. They paid a lower rate for parking (as the University points out in its brief), but they had to pay it in advance. Tr. 271:20-

272:22 (Kim Hardy). Shinelle Stills described the parking change as “horrible.” Tr. 354:15-16. Nancy Srey lost her extra bilingual pay when the consolidation was implemented. Tr. 323:12-25. The employees had not been required to work holidays in the PAC but were told they would be expected to in the Contact Center. Tr. 382:25-383:2 and 139:16-22. One employee (Srey) lost her lead position and pay. Tr. 178:3-9 and 297:7-24. In fact, the union representative testified when the consolidation was implemented and bargaining stopped the issues with most of the employees’ conditions and benefits were unresolved. Tr. 137:6-140:1 and 178:10-14.

As of August 2010, Evans testified as to the discussions “I wouldn’t classify them as negotiated...We talked about a lot of things but nothing was, you know, bargained to completion, we hadn’t agreed on anything.” Tr. 115:12-17.

While the WFSE persisted in wanting to bargain, once the employees were in the new job class (October 1, 2010), the University was unwilling to bargain with the union. No further bargaining sessions occurred. In fact, in the intervening years the University has been found guilty of two additional unfair labor practices related to these employees. *University of*

Washington, Decisions 11181-A (Feb. 2013)¹⁰ (the University interfered with a Contact Center employee's right to grievance arbitration claiming the WFSE contract no longer applied) and in Decision 11414-A (Jan. 2013) (the University persisted in refusing to bargain with the WFSE regarding these and other changes to the PAC employees working conditions). The University did not appeal either decision. In the later decision, the Commission warned the University it was "not above the law" and could not continue to "flout or callously disregard" its bargaining obligations.

During limited discussions prior to October 2010, the University offered to agree on a very few of the working condition issues, but only if the WFSE would agree that the University had fully negotiated in good faith about the effects related to its decision, even though they hadn't discussed most effects, and would agree not to file a skimming unfair labor practice (ULP) charge. AR 751 (Ex. 22). The Commission finding regarding these events (FOF 11) is supported by this substantial evidence in the record.

In June 2010, the University made a request to the Department of Personnel for "a salary range increase for the existing non-represented Patient Services Representative (PSR) job class, state class code 284E, as well

¹⁰ All PERC decisions are published on the Commission website at <http://www.perc.wa.gov/hearings-decisions.asp>.

as for the related Patient Services Lead (PS Lead), state class code 284G.” AR 734-41 (Ex. 16) at 735. These were the PAC employees’ new classifications.

The job description for the employees’ positions in the PAC as PSS 2s and as PSRs in the Contact Center described the same work, registering and scheduling patients. Compare AR 799 (Ex. 32) with AR 806 (Ex. 36).¹¹ In fact the PSS is a more accurate description of call center work. The Commission finding as to the pay request and similarity in the positions (FOF 12) is amply supported by this evidence.

Evans had sent a request on July 7, 2010 asking whether the University had “an ETA on the Position Description we talked about.” AR 742 (Ex. 17). The University’s responded on July 16, 2010 providing the description. AR 743 (Ex. 18). The recruitment for the new positions shows that it was also posted on July 16, 2010. AR 746 (Ex. 19). These three documents substantiate the challenged finding (FOF 13) regarding these facts and make the University’s challenge frivolous.

¹¹ The WFSE Harborview bargaining unit actually included both the PSR and PSS job classifications. AR 641-2 (Ex. 1 at 66-67) and Tr. 121:17-122:20.

The University required that the PAC employees apply for positions as Patient Service Representatives (PSR) in the new Contact Center to remain employed. Tr. 86:21-89:10 and 95:11-96:17. The Union encouraged the employees to apply under protest on the grounds that they shouldn't have to apply at all and only because otherwise they would have lost their jobs. Tr. 166:6-167:19.

As Evans testified, and the Commission found, there was no meaningful bargaining on the important impacts of seniority and wages which the Union proposed the parties negotiate nor was there ever any agreement. Tr. 116:12-117:25. Evans asked the University if its position was that employees would have to serve a trial service period (probation) in the Contact Center positions. The University's only response was that the civil service rules would apply.¹² Tr. 90:20-92:25. Since a union can negotiate variations that control over the civil service rules for represented employees, this response was consistent with the University's position the employees would be unrepresented in their new positions. RCW 41.80.020(6).

The University ceased deducting employee's union dues after October 1, 2010. Former PAC employees showed Tole their paychecks without

¹² Civil Service rules require probation or a trial service following appointments. WAC 357-19-017 through 155.

the deductions. Tr. 44:3-7. Several of the employees testified that after October 1, 2010, the University just stopped deducting dues from their paychecks even though they had signed authorizations for the deduction. Tr. 279:16-280:9 (Kim Hardy); Tr. 323:2-25 (Nancy Srey); Tr. 280:2-9 (Kim Hardy); and Tr. 355:11-356:1 (Shinelle Stills).

The record more than adequately substantiates the Commission's finding that many effects of the consolidation on the employees' working conditions were never bargained in good faith (FOF 14).

The University clearly considered these positions to be outside the WFSE bargaining unit after October 1, 2010. Tr. 137:13-140:1; 263:10-280:9; 315:18-324:17; 353:19-356:11 and 382:11-385:6. It advised each of the former PAC employees they were unrepresented as of October 1, 2010. AR 763-790 (Ex. 25).

The parties never bargained at all regarding the University's decision and did not reach agreement or impasse on the issues surrounding the effects of the University's decision on the employees. Tr. 115:7-23; 117:21-118:3; 134:8-135:6; 137:13-140:1; and 216:16-23. After October 1, 2010, the University admits it refused to bargain its decision at all and that it refused to continue bargaining effects with the WFSE or to withhold the employees' union dues even though the parties hadn't reached an agreement.

Tr. 513:16-515:8. Although the Union persisted in trying to bargain there was no bargaining. The only willingness the University expressed to address the effects of its decision was in the contract Labor Management process which the agreement expressly provided is **not** bargaining and has “no bargaining authority.” AR 580 (Ex. 1 at Article 6.4). The University was willing to “bargain” the impacts of its decision only in a process the parties agreed “was not bargaining.” Tr. 516:12-517:3.

The Commission correctly found (FOF 16) that the University never bargained the decision to remove the employee/work that it made unilaterally and it had not fulfilled its good faith effects bargaining obligation.

Although the University hired most of the former VFD employees as new civil service employees in the Contact Center to assist in handling the increased volume of calls due to the University’s assuming the scheduling and registration work for the UWPN clinics, no employee from the UWMC clinics was employed as a PSR in the new Contact Center. The record reflects there was never a plan to eliminate any UWMC (SEIU) positions because, as previously pointed out, they did other work in the UWMC clinics in addition to scheduling. Tr. 482:24-483:20 and 55:14-19. While the scheduling for some UWMC clinics was possibly to be done by

Contact Center employees sometime in the future, none of that work was being done at the time of the Commission's hearing.¹³

In September 2010, the WFSE had filed a clarification petition under PERC's rules (WAC Ch. 391-35) to have the Commission clarify that the former PAC employees remained in the WFSE bargaining unit despite the University's unilateral actions. Over the WFSE's objection, the petition proceedings were held in abeyance for more than two years. Br. App. A.

The former PAC employees universally testified that they continued to do the same work that they had been doing in the PAC after they went to the Contact Center—just more of it. Regina Pugh testified that there was absolutely no difference. Tr. 381:14-382:3. Kim Hardy testified that she

¹³ The University attempts to bootstrap facts into the record regarding the later “onboarding” of some UWMC clinics by attaching the 2013 clarification decision (Br. App. A) based on a record of events more than two years after the record in these proceedings closed. The August 13, 2013 clarification decision of the PERC Executive Director on the petitions filed by the WFSE, the University and SEIU which the University attached to its Brief of Appellant as Appendix A was entered almost three years after these proceedings were commenced in September 2010. It is based on its own record compiled during eight days of hearing (Br. App. A at 9) and reflects mostly events transpiring after the record in this case was closed. *Id.* at 21-23. The University's citations to evidence reflected in the clarification decision is improper and should be stricken. This case presents the question regarding the legality of the University's treatment of its call center employees at a time that they were indisputably represented by the WFSE. The case does not turn on how the representation rights of those employees are ultimately resolved through other proceedings based on a different record and a different time. It is from the record in *this* case that the court must determine whether the evidence supports the Commission's challenged findings. In a letter, the University's attorney claimed that 12 employees would come from the UWMC clinics. AR 970. It is disingenuous for the University to suggest UWMC employees went to the Contact Center as PSRs to perform the work that the former PAC employees are performing given that in the proceeding before PERC to clarify the WFSE bargaining unit, the University agreed that no UWMC employee has been so employed, even to this day, more than three years later.

was “doing same job I had been doing for three years” Tr. 264:24-25. Nancy Srey and Shinelle Stills testified similarly. Tr. 297:2-4 and 312:23-313:3 (Nancy Srey) and Tr. 353:11-16 (Shinelle Stills).

The movement of the work from the PAC to the Contact Center, and out of the bargaining unit as far as the University was concerned, was a “done deal” on October 1, 2010. The University considered and treated the former PAC employees as unrepresented, no more bargaining occurred, no more dues were deducted, and the employee’s working conditions changed. It was as the Commission found a *fait accompli* (a completed irreversible deed).

As previously demonstrated, although they continued to do the same work, after October 1, 2010, the University drastically and unilaterally altered the former PAC employees’ wages, duties and working conditions, e.g. different pay scale; new physical location; on “probation”; more work; working holidays; no contract rights; and no Union dues deductions. After September, the University refused to bargain any longer with the WFSE. The last “challenged” finding (FOF 17), as with the others, is well supported by the record. The University’s suggestion that it was willing to bargain at the same time it steadfastly maintained the employees were unrepresented is a *non-sequitur*.

Each of the Commission findings challenged by the University in its appeal (most without argument) is supported by substantial evidence in the record.

3. The University had a right to restructure its operations, but also a duty to bargain regarding both the decision and the effects of the removal of bargaining unit work. (Intervenor's Issues 2 and 3)

The WFSE agrees RCW 41.80.040(1) exempts a state employer's decision about its organizational structure from bargaining. Br. 15. It also agrees that both the decision to change a mandatory subject and the effects of that decision are subject to the duty to bargain, and that even if a particular decision is not subject to the duty to bargain, the duty to bargain attaches to any impacts on bargainable subjects. Br. 16.

The University, however, mistakenly contends that it had no duty to bargain removal of the PAC work from the bargaining unit because it was "integral" to its restructure decision and therefore not subject to the mandatory duty to bargain. Br. 19. Consistent with this position, it admits it didn't bargain the decision to remove work from the WFSE unit. Tr. 513:13-15. Conversely, the University admits that it had a duty to bargain the effects of its decision, but it contends it fulfilled that obligation. Br. 34. The Commission correctly found that it did not.

3.1 *The University had a duty to bargain the decision to remove work from the WFSE bargaining unit.*

Although RCW 41.80.040(1) relieves the University of any duty to bargain decisions regarding its organizational structure, well established case law makes the attendant decision to remove work from a bargaining unit a mandatory subject of bargaining. The Commission appropriately applied both rules in this case. While it held the University had breached its duty to bargain the removal of unit work, it did not undo the University's consolidation and restored the *status quo* as to only a few effects of the consolidation. AR 1025-26.

International Assoc. of Fire Fighters, Local 1052 v. Public Employment Relations Commission, 113 Wn.2d 197, 778 P.2d 32 (1989) recognized the balancing approach to the scope of bargaining utilized by the Commission in deciding this case.

Every case presents unique circumstances, in which the relative strengths of the public employer's need for managerial control on the one hand and the employees' concern with working conditions on the other will vary. . . . [C]are must be taken to recognize meaningful distinctions in the circumstances of different cases.

113 Wn.2d 207.

In that case, the Supreme Court found that decisions regarding staffing levels were primarily ones of "entrepreneurial control" and thus were

not mandatory subjects of bargaining (effects were). Conversely, the decision to transfer work from a bargaining unit has been consistently held to bear directly on wages, hours and working conditions and to be of direct concern to employees and thus a mandatory subject of bargaining under a long-established test from *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). That was the test the Commission thoughtfully applied in this case. AR 1013-17.

Transferring bargaining unit work is a well-established mandatory subject of bargaining.

Commission precedent established that an *employer's decision to transfer work from the bargaining unit* that has traditionally performed the work to employees outside the bargaining unit (skimming) or to non-employees (contracting out) is a mandatory subject of bargaining. *City of Snoqualmie*, Decision 9892-A (PECB, 2009).

King County, Decision 10576-A (2010). This is a fundamental labor law principle. See *Fibreboard Paper Products, Corp. v. N.L.R.B.*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964) (subcontracting); *Regal Cinemas, Inc. v. N.L.R.B.*, 317 F.3d 300, (D.C. Cir., 2003) (transferring to employees out of the bargaining unit [skimming]); and *The Developing Labor Law*, Ch. 16.IV.2.m, Sixth Edition, 2012.

A bargaining unit has a legitimate interest in preserving the work it has historically performed, and under *South Kitsap School District*, Decision 472 (PECB, 1978), unlawful

“skimming” of bargaining unit work occurs when an employer fails to give notice to or bargain with the union **before** transferring work historically performed within the bargaining unit to employees outside of the bargaining unit. [Citations and footnote omitted] ***Both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees may be mandatory subjects of bargaining.*** [Citations omitted, Emphasis supplied.]

City of Anacortes, Decision 6863-B (2001).

In past decisions, the Commission has employed a multi-factor analysis to determine whether an employer has a duty to bargain over the transfer of bargaining unit work. [Citations omitted] . . . the facts here describe a classic skimming case that does not require a belabored analysis. ***It is a plain and simple transfer of work from one unit to another, and there is no doubt the employer is still “in the business” of serving warrants and protection orders. The decision to make such a change is undoubtedly a mandatory subject of bargaining, and therefore both parties have a duty to bargain [decision and effects] in good faith to agreement or impasse.*** (Footnotes omitted.)

Snohomish County, Decision 9180 (2005). [Emphasis supplied]

Because the University remained in the business of registering and scheduling Harborview patients using non-union employees, this is also “a classic skimming case.”

This case involves a transfer of work out of the unit as a result of the employers changing the employee’s job to one it considers to be out of the unit. The University was well aware of the obligation to bargain in this type of situation. In *University of Washington*, PERC Decision 9410 (2006), the

University participated in a declaratory proceeding before PERC on the issue of “whether the employer has the prerogative to alter the bargaining units under the [the commission’s] jurisdiction by application of the RCW 41.06.070 exemptions [from RCW 41.06-the civil service law]?” While bargaining unit configuration is not a permissible subject of bargaining,¹⁴ the removal of bargaining unit work is a well-established mandatory subject of bargaining.

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 . . . bargain in good faith to agreement or impasse. [Citations omitted] Additionally, the employer must bargain in good faith concerning the effects of any such transfer, if requested by the union. [Citation omitted]¹⁵

* * *

[t]his employer [the University of Washington] cannot modify any bargaining unit existing among its employees under Chapter 41.80 RCW. [Emphasis supplied.]

University of Washington, Decision 9410 (2006).

The University has previously been found guilty of skimming violations by claiming employees lost their bargaining unit status based on the

¹⁴ The University seems to now agree that only PERC can modify bargaining units. Br. 18. Although it inconsistently suggests unit modification is a permissible subject of bargaining. Br. 17. Its suggestion that it couldn’t be guilty of skimming because it couldn’t legally modify the unit by removing the employees begs the question.

¹⁵ The duty to bargain effects of the transfer is dealt with *infra*.

University's unilateral reclassification of the employees to job classifications it considered out of the unit. *University of Washington*, Decision 8878-A (2006); and *University of Washington*, Decision 8818-A (2006). In the present case, by deciding to staff the Contact Center with the very similar PSR job classification (instead of the PSS job classification it had used in the PAC), and moving the employees off the Harborview campus, the University "coerced" the PAC employees into applying for positions that the University considered to be outside the bargaining unit.¹⁶ By having them continue to do the work, it "skimmed" the work from the WFSE unit.

In *University of Washington v. Washington Federation of State Employees*, __ Wn. App. ___, 303 P.3d 1101 (2013), this court recently affirmed the Commission holding that the University committed still another unfair labor practice by insisting that the union agree that reclassification of bargaining unit employees to higher paying positions would remove the employees from the bargaining unit.¹⁷

¹⁶ The PAC employees applied for the positions under protest. Tr. 166:6-167:19.

¹⁷ In this case, the University argues it was the WFSE that was bargaining "unit configuration" by insisting the PAC employees remained in the WFSE unit because PERC had not modified the unit, and that the University therefore had to bargain with the Union regarding its decision to remove work from the unit and the effects of that decision. Of course, the Union was merely fulfilling its bargaining representative role and defending the unit under PERC's latest certification.

An employer's committing a skimming violation by changing employees' job classifications is not a novel concept. The employer in *Wapato School District*, Decision 10744 (2010), was found guilty of a skimming violation by updating its job descriptions resulting in the transfer of work out of the bargaining unit.¹⁸

In *Community College District 10 – Green River*, Decision 9676 (2007) the employer's modification of an existing bargaining unit through the transfer of work by changing bargaining unit employees' job classifications was held to constitute a ULP when it was presented to the union as a *fait accompli* in violation of the employer's duty to bargain removal of the work.¹⁹ The Commission reiterated that modifying bargaining units is a role reserved exclusively for the Commission. *Id.* fn. 8.

When this Commission certifies a bargaining unit, the work performed by the employees in that bargaining unit becomes the historic work jurisdiction of that unit. *See, e.g., Washington State University*, Decision 11498 (PSRA, 2012)(bargaining unit work is defined as "work that bargaining unit employees have historically performed").

University of Washington, Decision 11590 (2012).

¹⁸ Although in that case the union was found to have waived an opportunity to bargain before the employer transferred the work, the employer was found guilty of a ULP for refusing to bargain the effects of its decision to update the employees' job descriptions.

¹⁹ The employer didn't have to bargain the decision to exempt the positions (just as the University doesn't have to bargain its organization structure), only the removal of work because it had the employees continue to perform the work out of the unit-skimming. The same as here.

In another case holding that an employer's transferring work by re-classifying employees to positions outside of the bargaining unit prior to completing bargaining is skimming, PERC stated:

Once a bargaining unit becomes certified, the work associated with those positions within the bargaining unit becomes bargaining unit work. *See Kitsap County Fire District 7, Decision 7064-A* (PECB, 2001).

* * *

To allow the employer to exclude the positions from the bargaining unit based on mere title changes would permit the employer to unilaterally exclude work from the bargaining unit without involving the certified bargaining representative.

Central Washington University, Decisions 10215-B and 10216-B (2010).

The University cites *City of Bellevue, Decision 10830-A* (2012) for the proposition that in deciding this case the Commission has departed from its own previous rulings. Br. 18. The city had a feasibility study done regarding consolidation of its emergency dispatch services into a regional service. The regional service (NORCOM) was a separate incorporated entity and employer, not another department of the same employer as in this case. NORCOM solicited the employment of the City's dispatchers whose employment with the City ended. The city was getting out of the dispatch business altogether when the work went to NORCOM. The Commission held:

When distinguishing between the decision to go out of business and the decision to contract out the work, the Commission has applied United State Supreme Court precedent in interpreting

the National Labor Relations Act, because it is similar to Chapter 41.56.²⁰ [Citations of authority omitted.]

Bellevue at 6.

The Commission then applied the same five step analysis from *Fibreboard Paper Products Corp. v. NLRB, supra*. It concluded that *because* the City had gone out of the dispatch business and not contracted out the work, the decision was a management prerogative, as opposed to one primarily affecting employees' conditions of employment and therefore the City had no duty to bargain the decision.

The reasoning in *Bellevue* actually supports the Commission's decision in this case because of at least one critical factual difference. In consolidating its call center, the University was expanding its call center business, not going out of the call center business. When it removed the work from the PAC to the Contact Center and out of the bargaining unit without bargaining, it committed a classic skimming unfair labor practice. *Snohomish County*, Decision 9540-A (2007). (The employer removed work and the individual performing work from the unit.)

²⁰ RCW 41.80 is modeled on RCW 41.56 which is the collective bargaining law applicable to other public employers than the state.

In *Kennewick Public Hospital District #1 d/b/a Kennewick General Hospital*, Decision 4815-A (1996), the employer operated two clinics employing a number of nurses in the hospital's bargaining unit.²¹ The hospital announced that it would cease operating the two clinics, but that the clinics would continue to be operated by a "sister organization." The hospital would eliminate all the positions in the clinics, but the new organization had agreed to maintain current salary levels for a period of time and the hospital employees were encouraged to reapply for their positions with the new organization. The hospital contended that the new positions in the clinics were not part of the hospital bargaining unit and the employees were not covered by the Collective Bargaining Agreement with the union. As in this case, the hospital met with its employees and announced that it would cease operating the clinics, that the clinics would be operated by the nonprofit, and that they would no longer be part of the bargaining unit since they were not working for the hospital. The union contended the clinics were still covered by its contract. PERC found that the sister organization was a nonprofit corporation with several of the hospital's district commissioners on its board. The Commission engaged in a "qualitative evaluation" of the employer's

²¹ As a public employer the hospital was covered by RCW Ch. 41.56. The labor relations law for other public employers similar to RCW Ch. 41.80.

course of conduct during negotiations and found a lack of good faith bargaining. The Commission concluded:

The employer has threatened to unilaterally remove bargaining unit positions from the bargaining unit without adequate notice to and bargaining with the union, and attempted to put the positions under a “new separate corporation” without union representation which is an unfair labor practice under RCW 41.56.140(1) and (4).

Kennewick Public Hospital District No. 1, supra.

Relying in part on *Metro*, Decision 2845-A (1988), the Commission ordered that the employer restore the *status quo ante* and rejected the employer’s argument that it was requiring the employer to dismantle its organizational structure. In this case, the Commission did not even order the University to restore the *status quo ante*, only a few working conditions.

The University argues that the work in the Contact Center was not bargaining unit work because the bargaining unit was described as consisting of employees “working at Harborview Hospital.” Br. 27. This argument flies directly in the face of the substantial and un-rebutted testimony of the employees regarding the similarities in the work. Without exception, they testified that the work was *exactly* the same. There was just more of it. The work in the Contact Center performed by the former PAC employees was work they had historically performed and was therefore bargaining unit work. It is beyond question that this work was “removed” from the unit

when the former PAC employees were required to continue to perform it in unrepresented classifications.

A bargaining unit is defined by its work. *Central Washington University, supra*. The PAC work went to the new Contact Center which is not, as the University points out, located at Harborview Hospital (like several of the Harborview clinics serviced by the PAC). By removing the work without bargaining, the University committed a classic skimming violation.

The Union agrees with the University that bargaining unit determinations are exclusively within PERC's authority.²² Yet, the University incongruously argues that the parties' contract granted it the right to create job classifications and designate whether they are represented or not. Br. 28. This argument also misinterprets the contract and is contrary to the holding in *University of Washington, Decision 9410 (2006), supra*.

RCW 41.80.020(6) prohibits the parties' contract from conflicting with a statute. The University's interpretation would place the contract in conflict with at least two statutes. RCW 41.06.150 empowers the Director

²²The WFSE filed a clarification petition, to clarify the description to follow the work. Bargaining unit configuration involves the substantive rights of employees and is exclusively something for PERC to decide. "The Commission... shall decide... the [bargaining] unit appropriate for certification." RCW 41.80.070. It was up to PERC to modify the unit description in the clarification process, however, the University attempted to illegally usurp that function by assigning the employees a job classification that it considered to be unrepresented.

of the Department of Personnel (now part of the Office of Financial Management, see ESSB 5931, Laws of 2011, 62d Leg. Sess., 1st Spec. Sess., ch. 43, § 1006) to maintain the civil service job classification system. Further, RCW 41.80.070(1) empowers PERC exclusively to create and modify bargaining units. The University misstates the Union's position by claiming that the WFSE wanted to bargain the Harborview unit configuration. The Union's position was that it continued to represent the employees doing the work unless PERC said otherwise. In fact, it filed a clarification petition for PERC to confirm its continued representation.

The University mistakenly argues that by concluding that the University had not bargained regarding its decision to remove the employees and their work from the WFSE unit to either an agreement or to impasse before it implemented its decision, the Commission decision said it should have bargained the unit configuration with the WFSE. Br. 25. PERC did not say that the University had to bargain the scope of the units as the University claims. It held that the University should have bargained the decision to remove employees and their work from the bargaining unit (and its effects) **and** filed a clarification petition with PERC. AR 1017. As the Commission's Examiner noted, "It [the University] could have retained the current

unit configuration despite the movement to the new call center location. Instead it moved the work and assigned it to new unrepresented positions.” AR 913.

The Commission did not hold that the University was prohibited from unilaterally changing its organizational structure without bargaining as the University argues. It expressly recognized the University’s right to restructure, consistent with RCW 41.80.040(1), however, the Commission correctly held that the University had a duty to bargain removal of unit work as a result of the consolidation. AR 1017. In arguing it had no such duty, the University concedes the violation.

3.2 *The University refused to continue bargaining the effects of its decision after the October 1, 2010 consolidation.*

Regardless of whether it had to bargain the decision, the University admits it had a duty to bargain the effects of its decision to consolidate the call centers. Br. 34. As the Commission properly concluded, it did not fulfill that obligation. AR 1017-20.

A refusal to bargain occurs when a party refuses to bargain in fact, or effectively refuses to bargain through bad faith, demonstrating an overall subjective intent to frustrate or avoid agreement. *N.L.R.B. v. Katz*, 369 U.S. 736, 742-43, 82 S.Ct. 1107 (1962); *Sultan School District*, Decision 1930

(1984). The elements of a refusal to bargain ULP are that the exclusive bargaining representative requested negotiations on a mandatory subject of bargaining and the employer either failed or refused to meet, or imposed unreasonable conditions or limitations which frustrated the collective bargaining process. *City of Clarkston*, Decision 3246 (1989).

Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. An employer must . . . **bargain in good faith until reaching agreement or impasse.**

Wapato School District, Decision 10744 (2010). [Emphasis Supplied.]

The policy basis for the long-standing prohibition against “unilateral change” was articulated by the Supreme Court of the United States in a case decided under the NLRA:

We hold that **an employer’s unilateral change** in conditions of employment under negotiation is... a violation of paragraph 8(a)(5), for it **is a circumvention of the duty to negotiate which frustrates the objectives** of paragraph 8(a)(5) much as does a flat refusal.” *NLRB v. Katz*, 369 US 736 (1962) at page 743. [Emphasis supplied.]

City of Pasco, Decision 4695 (1994).

An employer violates RCW 41.56.140(4) and (1) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligations. [Footnote omitted] As a general rule, an employer has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: . . . (4) **bargains to agreement or impasse concerning any mandatory subjects of bargaining.** [Emphasis Supplied].

Skagit County, Decision 8746-A (2006).

The University argues it did engage in some bargaining regarding the effects of its decision. However, the University misses the point of its clear legal obligation to have bargained to either an agreement or to impasse *prior* to implementation. In fact, once it implemented the decision (on October 1, 2010), the University refused to bargain with the Union because the Union team included former PAC employees who the University considered unrepresented and inappropriate members of the Union bargaining team. Tr. 131:3-134:7 and AR 1066-7 (Ex. 26).

The federal case, *Gitano Group*, 308 NLRB 1172 (1992), the University cites (Br. 30) about an employer consolidating its operations has no application here. This is not a case of an employer consolidating only *its* operations as the University argues. The employees employed in the new Contact Center were not just University employees from the PAC but also newly hired civil service employees, mostly former Physician's Network employees from the VFD.²³

The University also argues that *City of Anacortes*, Decision 6830-A (2000) supports its argument that it didn't refuse to bargain the effects of its decision. In that case, the Commission found that the employer did not have

²³ The University's future plans to perhaps "consolidate" some of its UWMC clinic scheduling work into the Contact Center were merely speculative at this point in time. While some work of the UWMC clinics eventually went to the Contact Center, no SEIU bargaining unit employees have even been scheduled to go as PSRs.

to bargain its decision to switch from its own response system to a county wide 911 system (going out of the business). However, the city would have had to bargain the effects of that decision, except that the union was found to have waived its right to bargain by inaction. Since there is no contention that the WFSE waived bargaining, the *Anacortes* decision does nothing to support the University's position.

The University never bargained the decision to remove the work from the unit, which was presented as a *fait accompli*, (AR 927, Finding 17) and it refused to continue the effects bargaining after October 1, 2010. This clearly distinguishes this case from *City of Bainbridge Island*, Decision 11465 (2012) upon which the University also relies. Br. 43. In that case, the Commission explained in some detail the employer's bargaining efforts:

The parties in fact met and bargained, made and accepted concessions, made and accepted proposals, and eventually mediated over the reorganizations impacts between at least October 22, 2010, and March 18, 2011...

City of Bainbridge Island, supra.

Here, the University waited six weeks to even respond to the demand to bargain, never bargained the effects on the employees to any agreement and never met with the WFSE in bargaining after the employees were transferred to the Contact Center, despite the Union's efforts to meet.

The University also argues that it is free to implement a decision it need not bargain, while it bargains the effects of the decision. Br. 17. (Citing *State-Social & Health Services*, Decision 9690-A (2008) and *Central Washington University*, Decision 10413-A (2011)). It misconstrues those decisions.

In *Social & Health*, the union had agreed to a contract provision “clearly and unequivocally” waiving any right to bargain the employer’s change in employees’ schedules. Therefore even though the employer had a duty to give notice and bargain any effects not already addressed in the contract, it was permitted to implement the schedule changes while it concluded the effects bargaining order by the Commission. The University was free to implement the change to its organizational structure. In fact, it had no real impact on the PAC employees’ supervision which remained the same through several layers of management, i.e. same supervisors, same manager (Vasiliades) the same administrator (Gussin).

In the *Central* case, the Commission held that the employer’s decision to leave a position vacant was primarily a managerial prerogative because it did not involve safety issues, and therefore, it was not a mandatory subject of bargaining. Contrary to the University’s position in this case, the Commission stated the well-established rule that the employer was required

to maintain the status quo until the parties reached agreement or a bona fide impasse on effects. *Id.* at 4. There is no dispute that when the University stopped bargaining on October 1, 2010, there was no agreement or impasse on the effects of its consolidation decisions.

4. The University interfered with call center employees' representation rights by meeting directly with the employees. (Intervenor's Issue No. 4)

It is a well-established violation for an employer to deal directly with employees on mandatory subjects of bargaining. *City of Seattle*, Decision 8916 (2005); *State – Social and Health Services*, Decision 9690 (2007); *Royal School District*, Decision 1419-A (1982); and *City of Raymond*, Decision 2475 (1986). The rule announced in *City of Seattle, supra*, is derived from previous cases, *City of Pasco*, Decision 4197-A (1994); and *Whatcom County*, Decision 7244-A (2003), and is a long standing bedrock principle of labor relations. See 29 U.S.C. § 158(a)(1) and *J.I. Case Co. v. NLRB*, 321 U.S. 332, 64 S.Ct. 576 (1944).

Without any notification to the WFSE, University management met with employees of the PAC to advise them of the University's decision to transfer the employees and their work to the Contact Center. It later advised the employees that they would no longer be represented and would have no obligation to pay union dues. In dealing directly with the employees on

these issues, as the Examiner found, the Employer locked itself into a position from which it could not and did not retreat. This constituted an interference with employee bargaining rights guaranteed by RCW 41.80.

For “interference” claims, the quantum of proof required is not particularly high. *City of Mill Creek*, Decision 5699 (PECB, 1996). The test is whether a typical employee in the same circumstances would reasonably perceive respondent’s actions as encouraging or discouraging his or her union activities. It is not necessary to show that the respondent acted with intent or motivation to interfere, nor is it necessary to show that the employee(s) involved actually felt threatened or coerced. Animus or hostility towards union activity may be inferred from all the circumstances, even without direct evidence. *Shattuck Denn Mining Corp. v. NLRB*, 62 LRRM 2401 (9th Cir. 1996)...

State – Department of Corrections, Decision 7870-A (2003).

“A union that is recognized or certified as exclusive bargaining representative holds a unique statutory status, and an employer is required to take the initiative in giving such an organization notice of contemplated changes affecting the employees it represents.” *Lake Washington Technical College*, Decision 4721 (PECB, 1994), *aff’d*, Decision 4721-A (PECB, 1995). If notice is required, it must be given to the union, not just to members of the bargaining unit.

State – Social and Health Services, Decision 9690, *supra*.

The Examiner’s decision in this case laid out the Commission’s criteria regarding whether an employer’s direct communications with employees constitute an interference violation (see *Metro Seattle v. PERC*, 118 Wn.2d 621, 826 P.2d 158 (1992)), and found that the communications were

coercive (they gave the employees no effective choice); they erroneously suggested the parties were negotiating when the truth was even after its demand to bargain, the WFSE was merely being “cc’d” on communications with *another* union; they were threatened with job loss if they didn’t take the unrepresented positions; much of the information went to the employees first before the Union was told; the employer failed to provide the Union with information it needed; the Union objected; and the employer put itself in a position with its communications with the employees from which it couldn’t retreat. AR 919-22. These facts present a solid factual foundation for application of the law regarding interference violations.²⁴

5. The Commission’s remedy is within its authority and does not constitute illegal employer assistance to a union. (Intervenor’s Issue No. 5)

RCW 41.80.120 authorizes the Commission to “issue appropriate remedial orders” to prevent unfair labor practices. WAC 391-45-410 provides “[i]f an unfair labor practice is found to have been committed, the commission or examiner shall issue a remedial order.” The University argues that PERC acted arbitrarily and capriciously and contrary to its own rules by requiring the University to pay the employees’ back dues. Br. 49. The court must give special deference to the Commission’s remedies. “In

²⁴ The WFSE did not appeal the Examiner’s refusal to find a circumvention violation.

the matter of remedies...intervention [by the courts] is appropriate only if the remedy exceeds the mandate of [RCW 41.80.110].” *Pasco Housing Authority v. PERC*, 98 Wn. App. at 810-813.

As the Commission noted in this case, the Supreme Court has approved a liberal construction of the Commission’s remedial authority. *Metro v. PERC*, 118 Wn.2d 621 (1992). AR 1022. In addition to ordering the offending party to cease and desist the illegal behavior, the typical remedy also “return[s] the aggrieved party to the conditions that existed before the unfair labor practice.”

The classic remedy in a skimming case (removal of bargaining unit work to non-bargaining unit employees of the employer) is to return the work to the bargaining unit and to require the employer pay back wages to the employees entitled to have performed the work. See e.g. *City of Anacortes*, Decision 6863-B (2001) and *North Franklin School District*, Decision 3980-A (1993). In this case, the same employees continued to perform the work, however, the employer refused to recognize their continued representation status pending the unfair labor practice decision and the Union’s clarification petition. It also refused to withhold dues.

The Commission did not order the University to restore the *status quo ante* by returning the employees to the PAC or to their former civil

service classifications or even undo the employer's reorganization in any respect. AR 1023-25. It simply ordered the University to recognize the employees as continuing to be represented by their Union (the WFSE); to bargain some specific working condition issues until the clarification petitions could be heard; and because the University had ignored similar orders in the past and to encourage the University to comply with the Commission decision and to not punish the employees, who had not had their dues withheld from their pay and would otherwise be faced with a sudden large expense, it ordered the University to pay their back union dues. The Commission also used its discretion to eliminate several of the extraordinary remedies the Examiner had ordered, e.g. interest arbitration in the event the parties were unable to agree in bargaining.

Nevertheless, the University's appeal argues that the Commission's order that it pay the employees' back union dues is contrary to the Commission's rules and is arbitrary and capricious.

An action of an administrative agency is arbitrary and capricious when it is willful and unreasoning..., without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. *DuPont-Fort Lewis School Dist. 7 v. Bruno*, 79 Wash.2d 736, 739, 489 P.2d 171 (1971).

International Ass'n of Fire Fighters, Local 1052 v. Public Employment Relations Commission, 29 Wn. App. 599, 604, 630 P.2d 470, 473 (1981).

The University does not cite any rule of the Commission it contends was violated and argues only that the requirement constitutes an illegal support of the Union. In support of this argument it cites one case, *Edmonds School District*, Decision 3167 (1989). That case was a clarification case, not an unfair labor practice case. In the decision the Commission did discuss that it is an unfair labor practice for an employer to dominate a union.²⁵ However, as the Commission also noted in *Edmonds*, the violation requires a showing that the employer intended to assist the union. That is certainly not the case here.

This is not a case of the University attempting to illegally assist or dominate the WFSE. For one thing, the Union is not receiving anything but the dues it was entitled to, but for the University's illegal removal of the employees from the bargaining unit. The Commission was attempting to preserve the *status quo* and to fashion a remedy that would encourage the University to comply with the Commission's decision. The sooner the University recognized the employees' representational rights, including the

²⁵ RCW 41.80.110(1)(b) includes in that violation the employer's financial contribution to a union.

right to dues deductions, the sooner the University's obligation would end. Further, the Commission has imposed the duty to pay employees' union dues in other skimming situations, see e.g. *Community College District 10 – Green River, supra*.

The Commission decision carefully tempered the traditional remedy in a skimming case by identifying a few critical items that the University could restore without undoing its structural reorganization. Such a tempering reflects the Commission care in applying the Commission's statutory mandate to fashion "appropriate remedies." Ordering the University to pay the disenfranchised employees' union dues for the period that the University refused to recognize them as represented or as having contract rights was clearly appropriate.

CONCLUSION

The Court should affirm the Commission decision in this case.

DATED this 18th day of September, 2013.

Respectfully submitted,

YOUNGLOVE & COKER, P.L.L.C



Edward Earl Younglove III, WSBA#5873
Attorney for Intervenor