

70541-5

70541-5

NO. 70541-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON – OFFICE OF THE GOVERNOR,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent,

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Intervenor.

SEP 30 11:10:07
COURT OF APPEALS
STATE OF WASHINGTON

INTERVENOR'S BRIEF

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I. INTRODUCTION

This case deals with the question of whether certain interpreters who interpret for Medicaid enrollee patients in the State of Washington should have collective bargaining rights under ESSB 6726 (Laws of 2010, ch. 296), which made independent contractor, foreign language interpreters public employees of the State for the purpose of collective bargaining. In September 2010, the bargaining unit of interpreters, formally known as Language Access Providers (LAPs), elected the Washington Federation of State Employees (WFSE) to be their exclusive bargaining representative. The Public Employment Relations Commission (PERC) issued an Interim Certification describing the bargaining unit in language identical to the language of the statute (codified from ESSB 6726) in RCW 41.56.030(10)(a):

All language access providers who are persons defined as any independent contractor who provides spoken language interpreter services for department of social and health services appointments or Medicaid enrollee appointments, or provided these services on or after January 1, 2009, and before June 10, 2010, whether paid by a broker, language access agency, or the department of social and health services. AR 117.

A hearing was held before PERC to determine the appropriateness of the inclusion of LAPs who provided services for Medicaid enrollee appointments which are reimbursed through the State administered

Medicaid Administrative Match program. After PERC conducted a hearing regarding these challenges to the make-up of the bargaining unit, the Executive Director determined they were properly included. The State appealed to the full Commission which affirmed the decision. The State then appealed the Commission's decision to court.¹ The King County Superior Court upheld the Commission's decision to include LAPs providing interpreting services to Medicaid enrollees in public hospitals who receive Medicaid funding under the MAM program in the bargaining unit. The State has appealed that decision.

The Commission determined under the plain language of the statute that the MAM interpreters are appropriately included in the single, statewide bargaining unit of LAPs, because they provide spoken language interpretation for Medicaid enrollee appointments, and the fact the public hospitals who participate in the program are partially reimbursed through federal monies is not a relevant factor. This Court should uphold the Commission's decision.

¹ The State also appealed the Commission's decision that a limited number of LAPs working in court settings were appropriate for inclusion in the bargaining unit. The Superior Court reversed the Commission's decision with regard to that group. The WFSE did not appeal that reversal.

II. COUNTER STATEMENT OF ASSIGNMENT OF ERROR

The WFSE submits that the trial court appropriately affirmed the Commission's decision as should this Court.

A. The Commission Committed No Error

1. The Commission correctly included Language Access Providers hired by third party agencies but paid for in part under the Medicaid Administrative Match program in the bargaining unit.

B. Counter Statement to Issues Pertaining to Assignment of Error

1. The Commission correctly interpreted the statute at issue in deciding that interpreters contracted by private foreign language agencies to provide services to Medicaid enrollees paid for in part under the Medicaid Administrative Match program were Language Access Providers under RCW 41.56.030(10)(a).
2. Substantial evidence supports the Commission's finding that Language Access Providers providing services under the Medicaid Administrative Match program are paid by private foreign language agencies, and the parties agreed that if the Commission determined these interpreters were appropriately in the unit, the parties would review each challenged interpreter's eligibility individually.
3. The Commission's order does not bind third party entities and it does not exceed its authority.

III. STATEMENT OF THE CASE

After the interim certification of the WFSE as the exclusive bargaining representative, a hearing was held to resolve the status of challenged employees by answering the question of whether Medicaid Administrative Match (MAM) interpreters should be included in the bargaining unit.²

PERC's Executive Director issued her decision in which she found the two disputed categories of employees, the legal setting interpreters and the MAM interpreters, were LAPs under RCW 41.56.030(10)(a) and appropriately within the bargaining unit. AR 826-834. The State appealed this decision to PERC's Commission which unanimously affirmed the Executive Director's ruling. The State seeks review of the Commission's decision.

The uncontested members of the current, state-wide bargaining unit are LAPs who provide spoken language services for department of social and health services (DSHS) and Medicaid enrollee appointments. Medicaid is a federal and State program which provides health care services to low income women and children, families and other eligible Washington State residents. LAPs in the bargaining unit typically provide

² As stated in the previous footnote, legal setting interpreters were also a part of this hearing; however, that issue has no bearing on this case.

services for these Medicaid enrollees at medical offices and community health clinics. AR 196-97. At the time of hearing, LAPs were dispatched to these appointments under subcontracts they held with private foreign language agencies. AR 197-98. While this case regarding challenges to the inclusion of the MAM interpreters was pending before PERC, the State and the WFSE negotiated the first collective bargaining agreement for the bargaining unit. AR 880-909.

RCW 41.56.030(10)(a) recognizes that LAPs included in the unit may be paid by broker, language access agency, or the department of social and health services. RCW 41.56.510(2)(c) allows the parties to negotiate over a limited number of subjects, one of which is “economic compensation, such as the manner and rate of payments.” At the time the first collective bargaining agreement was signed, June 11, 2011, the State agreed on, among other things, the same rate of pay for interpreters whether the interpreter contracted through a broker, a private foreign language agency, or directly with DSHS. AR 887. The interpreters are independent contractors who are public employees “solely for the purposes of collective bargaining.” RCW 41.56.510(1). At the time of hearing, the majority of interpreters were dispatched to their appointments by private foreign language agencies which contracted with one or more

non-profit brokers. DSHS then directly contracted with these non-profit brokers which were obligated to ensure that interpreting services were provided. AR 156-57.

At the time of hearing, the joint Federal/State program was administered by the Office of Community Services (OCS) of the DSHS, but shortly thereafter was transferred to the Health Care Authority (HCA) of the State of Washington.³ AR 389-90. DSHS was tasked with delivering medical services to those who were eligible. DSHS oversaw the payment of direct Medicaid billable services: services provided by a professional directly to a Medicaid recipient for which the professional receives a fee. This would be a direct medical service such as a physical, vaccination, or treatment of some kind. DSHS also oversaw the reimbursement of nonmedical Medicaid services under its Medicaid Outreach section. These nonmedical services are reimbursable as activities that support Medicaid covered services and are services that assure access to direct Medicaid services. Examples include transportation to medical appointments and interpreting for patients who have limited English proficiency. AR 391-92. DSHS was obligated to follow the federal standards regarding eligibility

³ As the State indicated in their brief, the Medicaid Purchasing Agency moved to the State Health Care Authority in July 2011. The WFSE, too, will refer to the State agency as DSHS for purposes of this case.

for Medicaid services, even though the State made the voluntary choice to pay for interpreter services for Medicaid covered appointments. If the State chose not to pay for these services, they would be the responsibility of the health care provider. AR 400. Interpreters providing services under the State's joint partnership with the Federal government must meet certain requirements set by DSHS.

At the time of hearing, DSHS also administered the Medicaid Administrative Match (MAM) program which is the subject of the case at hand. MAM is a federal reimbursement program in which states may participate. The Federal agency overseeing the MAM program, Centers for Medicare and Medicaid Services, provides the option for governmental and public entities to be reimbursed a portion of their total expenses for performing activities that support the goals of the state Medicaid plan. These administrative services include activities that help support Medicaid, such as outreach to inform people about Medicaid, helping people apply for Medicaid, and facilitating referrals. DSHS has contracted with various public entities including public hospitals, which by participating in the voluntary MAM program administered by the State, are reimbursed 50% of the expenses they incur for administrative services supportive of Medicaid. The public entity must cover the other 50% of the

costs with its own funds. At the time of hearing, DSHS had a staff of seven employees who did nothing but administer the MAM program, and who were fully funded by administrative fees paid by the entities and by a 50% match of those fees paid by the federal government. The MAM staff received no state funding.⁴ AR 317.

Before approving an entity to participate in MAM, DSHS staff would first determine whether the entity was an eligible governmental or public entity, and then whether the activities of the entity supported the goals of the State Medicaid plan. DSHS is required by the federal government to actually write and enter into the contracts with the entities which allow the entities to participate in the MAM program. DSHS is also tasked with monitoring the MAM activities and pays the participating entities from DSHS accounts. AR 401-420. The federal government never deals directly with these entities; instead, it is DSHS that pays the federal money to the entities. AR 319.

Interpreting is considered an allowable, reimbursable MAM activity. AR 415. At hearing, an example of a contract under the MAM program for interpreting services between the State and a public hospital, the

⁴ DSHS MAM staff are public employees of the State of Washington. As the State indicated in their brief, the Medicaid Purchasing Agency moved to the State Health Care Authority in July 2011.

University of Washington Medical Center (UWMC), was entered into evidence. AR 725-748. In that contract, UWMC agreed it would only use interpreters who were certified, qualified, or authorized by DSHS. AR 740. DSHS also required that UWMC only use interpreters who complied with DSHS's Language Interpreter and Translator Code of Professional Conduct, and required that UWMC ensure that any interpreter with access to children or vulnerable adults served under the agreement have a criminal background check required under State statute. AR 741,745.

At hearing, DSHS's witness, Alan Himsl, the section manager for the Medicaid Outreach section within the Medicaid Purchasing Administration, testified that DSHS had the authority to impose the requirement for interpreters to meet and abide by the DSHS code for professional conduct for interpreters, explaining DSHS had the authority to impose that requirement because "we write the contract, we determine what the minimum requirements are going to be for people providing interpreter service." AR 335. Mr. Himsl testified that DSHS was the body that determined what the minimum standard would be for provision of interpreter services. "We determined there has to be a minimum standard. I mean, we can't have people conducting interpreter services with a seventh grade education... We determined there has to be a minimum

standard.” AR 335-36. Mr. Himsl confirmed that DSHS has a monitoring process to ensure these standards are being met. AR 335-36. Mr. Himsl testified that under the contract (also known as an inter-local agreement), the public hospital was required to maintain records of each individual interpreter who provided each MAM eligible service, and that such information was available to DSHS. AR 341. Mr. Himsl also testified that the state would have discretion to disallow payments for interpreting that DSHS deemed to be too high, and conversely, that DSHS would take issue with payments made to interpreters that were unreasonably low. AR 342-343. There is nothing that would preclude DSHS from requiring in its contracts for MAM interpreting services, that interpreters be paid no less than a specific rate. AR 343-344.

The interpreters who provide these services to public hospitals under the MAM program are often completely unaware that fifty percent of the payment of their fee is reimbursed through MAM. These interpreters provide services for clients who are obtaining medical care and who are all Medicaid enrollees. Many of the LAPs who are already in the bargaining unit provide services for Medicaid enrollees in private settings, but then also in public clinics and public hospitals. The only difference with regard to the work is how the appointment is ultimately paid for (the

source of funds), a distinction never made known to the LAP. In fact, the LAPs often have no idea and no reason to know, whether the person for whom they are interpreting is a Medicaid enrollee whose medical services are being paid for through the MAM program or whether they are being paid for through the 50% State funded Medicaid program. AR 203-206. The interpreters providing MAM services are hired and paid by a private foreign language agency to provide the services. AR 207.

The State has asserted the MAM LAPs are not properly included in the single, statewide bargaining unit. The WFSE has asserted, and both the Commission and the trial court confirmed, that the MAM LAPs meet the plain language of the statute which sets forth the requirements for inclusion in the bargaining unit.

IV. ARGUMENT IN SUPPORT OF THE COMMISSION'S DECISION

A. This Court's review is conducted with considerable deference.

The WFSE agrees that this Court's review is under the Administrative Procedure Act, (RCW 34.05.570(3)) and is applied directly to the PERC record. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The reviewing court may grant relief to the challenging party only if the party can show the order is invalid for one of the reasons set

forth under RCW 34.05.570(3).⁵ *University of Washington v. Washington Federation of State Employees*, ___ Wn. App. ___, 303 P.3d 1101 (2013), citing *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 154 Wn. App. 541, 222 P.3d 1217 (2009).

The Commission's findings of fact are reviewed for substantial evidence, and the conclusions of law are reviewed de novo. *Id.* at 1105. As this Court has found before, the Commission's interpretations of collective bargaining statutes are "entitled to substantial weight and great deference." *Id.* at 1105 citing *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn. 2d 373, 382, 831 P.2d 738 (1992).

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). We conclude that the Commission's findings are supported by substantial evidence. The factual findings are, therefore, verities on appeal. *Id.*

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

⁵ The State has requested review for three reasons: the order is outside PERC's statutory authority, PERC erroneously interpreted the law, and that PERC's order exceeded its authority.

This court “review[s] challenges to the factual findings for substantial evidence in light of the whole record, i.e., evidence sufficient to persuade a fair-minded person of their truth.” *City of Federal Way*, 93 Wash. App. at 512, 970 P.2d 752. ***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). [Emphasis Supplied.]

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 (2011). [Emphasis Supplied.]

Collective bargaining for certain public employees, including LAPs, is governed by the provisions of RCW 41.56. Under RCW 41.56.060(1), the Public Employment Relations Commission is charged with the certification of appropriate bargaining units:

The commission [PERC], after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for collective bargaining.

Where there is a question of law, relief from a PERC (agency) order should only be granted where there is an erroneous interpretation or application of the law. RCW 34.05.570(3)(d). *City of Pasco*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

Where a statute is determined to be ambiguous, when an agency is charged with the administration and enforcement of the statute, the agency's interpretation of the statute is accorded great weight by the court in determining legislative intent. *City of Pasco*, 119 Wn.2d. at 507-08. "Because we find the statute ambiguous as discussed hereafter, PERC's interpretation is entitled to great weight." *Id.*

B. PERC correctly interpreted the plain language of RCW 41.56.030(10)(a) and 41.56.510 to include Medicaid Administrative Match Language Access Providers in the statewide bargaining unit.

1. Neither statute at issue creates a requirement that LAPs must be paid from State funds in order to enjoy collective bargaining.

In arriving at its conclusion that the MAM interpreters were appropriately included in the bargaining unit, PERC correctly considered

the three criteria set forth in RCW 41.56.030(10)(a): interpreters must be independent contractors, they must provide spoken language services, and they must provide them for department of social and health services appointments or medical enrollee appointments. The State argues that the Commission erroneously found that the “legislation does not reference a funding source” stating that the “statute authorizes collective bargaining only by Language Access Providers paid from State funds.” Brief 8. First, this misstatement by the State must be addressed. The LAPs are not paid by State funds, unless they are in the situation of performing services directly scheduled and paid for by DSHS. Rather, at the time of hearing, LAPs were typically paid by a private, for-profit, foreign language agency.

The budgetary review requirements of RCW 41.56 mirror, to a large degree, the budgetary review requirements of RCW 41.80, e.g., the requirements in RCW 41.56.510(7) that the request for funds necessary to implement the compensation and benefit provisions of a collective bargaining agreement be submitted to the director of the office of financial management by October 1, that it be certified by the director as financially feasible, that it be submitted in the governor’s budget to the legislature, and that the legislature must approve or reject the submission of the request for funds as a whole. Yet, no one would argue that those state

employees whose positions are funded by federal dollars who would otherwise be in bargaining units under RCW 41.80 are somehow excluded because the position funding is not dealt with in the state budget appropriation process. In fact, the State makes the union's argument for it by raising the fact that the DSHS state employees who administer the MAM program are not funded by state appropriations. Rather, their salaries are paid for from an administrative fee charged to the local entities and matched by the federal government. AR 801. The State employees who administer the MAM program are paid from the *exact same* source of funds (half from the local entities, half from a federal match) as the MAM interpreters, yet the State is trying to claim the MAM interpreters cannot be public employees based on source of funds. This argument must fail.

The State argues that the budget bill appears to show a specific intention by the legislature to exclude MAM interpreters from the bargaining bill. This argument fails as a matter of law since a budget bill cannot make a substantive change to another statute.

Article II, section 19 of the Washington Constitution provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.” The legislature has greater latitude under section 19 in appropriations bills, because budget bills allocate funds to a number of state needs. An appropriations bill violates the single subject rule if it is substantive, i.e., if it defines rights or alters existing law.FN20 Indicators of the presence of substantive content

include whether (1) the bill's subject has been treated in a separate substantive bill in the past; (2) its duration extends beyond the two-year budget period; or (3) the policy defines rights or eligibility for services. *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 629, 62 P.3d 470 (2003).

Parsons v. State, Dept. of Social and Health Services, 129 Wn. App. 293, 301, 118 P.3d 930 (2005).

The State claims that budget language passed in the 2011 legislative session stating federal monies were not included in subsection (31) of Section 213 proves that MAM interpreters should not be included in the bargaining unit created under RCW 41.56. The clarification of the seemingly obvious fact that federal money is not included in State appropriated money does not prove the MAM interpreters were meant to be excluded from the bargaining unit. If the legislature had wanted to clarify that the MAM LAPs were outside the unit, it simply would have done so by amending RCW 41.56, rather than through a cryptic message in a budget bill.

The State then looks to the fact that DSHS never received a list of the interpreters doing MAM work pursuant to the statute, as further evidence that the statute never intended their inclusion in the bargaining unit. This evidence is not persuasive, since there is no evidence to suggest that DSHS ever *asked* for such a list to be given to them. The State asserts

that DSHS does not contract with local health jurisdictions or public hospitals for interpreter services. The evidence demonstrates otherwise. AR 335, 725-748.

2. The MAM LAPs meet the plain language, statutory requirements for inclusion in the bargaining unit and are therefore “connected” to the State system for interpreters.

The State argues that when the State contracts with a broker who is responsible for contracting itself with a LAP, or by contracting with a private language agency who in turn contracts with an independent contractor LAP, that it is the interpreter who is “in fact, doing business with DSHS.” Brief 14. The union respectfully disagrees. For example, interpreters already in the bargaining unit are not “doing business with DSHS” when they interpret for a patient at a doctor’s office and are paid by a language agency, yet they are appropriately in the bargaining unit. Further, the State’s argument is belied by its own witness at hearing, who was asked specifically how brokers (who are already one step removed from DSHS) interact with interpreters. “The brokers do not contract directly with interpreters and DSHS does not.” AR 157:5-25, 158:1.

The State argues it would be absurd to conclude that the obligations of non-state entities unaffected by State budget appropriations would be at the mercy of the legislature’s budgetary authority. First, the

legislature can only vote up or down the funding of a collective bargaining agreement; it has no authority beyond that. RCW 41.56.029(7). Second, and more importantly, this is *precisely* how RCW 41.56.510 affects entities contracting with LAPs in the current bargaining unit. The foreign language agency hiring the LAP to cover an appointment does not negotiate with the union, does not submit budgetary requests to the legislature, and does not receive money from the legislature, yet it is affected by the collective bargaining agreement and must abide by it. This is the undisputed law. The state argues there is no room to imagine how relationships between third parties and their independent contractors fit into the statutory scheme of 41.56.510. However, again, this is precisely the same arrangement that forms the basis of the existing bargaining unit of language access providers. The State has a contract with a third party, the broker, which has a contract with another third party, the foreign language agency that has a contract with the bargaining unit member, the interpreter. Certainly, this is not the conventional, traditional public employee/employer collective bargaining arrangement, with clear, well-established parameters and processes, but it is the law, and these MAM interpreters are entitled to be part of this new paradigm.

The State's argument that there must be a "connection" with the State for the LAP to be in the bargaining unit, is really the same failed "source of funds" argument it has made from the outset of this case. The State argues that DSHS does not reimburse for the MAM program, rather the federal government does. As the Director pointed out in her decision, which the Commission affirmed, PERC has a long-standing doctrine that source of funds is an inappropriate criterion. Further, even if the Court were to consider source of funds in this case, DSHS does in fact reimburse for MAM interpreting, since DSHS is the agency that signs the contract with the public hospitals, and then sets forth requirements for interpreters that the hospitals must meet in order to be reimbursed. The Federal government may put the money in the purse, but it is DSHS that decides whether the purse strings will be opened.

The State argues there is no basis for the State to dictate the rate of pay for the MAM LAPs. The evidence at hearing proved otherwise. The State's witness, Mr. Himsl, testified that effectively, the State already dictates at least a range of pay by having the authority to disallow reimbursements for unreasonable payments for interpreter services. The State does in fact dictate terms and conditions to the hospitals and has the

authority to do so. AR 741, 745. There is no impediment to the State requiring that MAMs receive a specific rate of pay.

The confusion and disagreement really lie in the fact that this new category of public employee, the language access provider, does not fall under the traditional paradigm of a public employee. It is true that the union for the existing bargaining unit of LAPs who provide Medicaid interpreting for private entities, effectively negotiates what a private language agency will pay to these LAPs without the private language agency ever having a say in the matter. It is absolutely true that the State will bind a private third party entity to an agreement that the State made with the union, which is how the current bargaining unit members provide interpreter services. The real question is whether the State can exert control over the third party's relationship with the LAP. The answer to this is yes. The State and the third parties voluntarily enter into interpreter payment contracts with the full knowledge that the third party must abide by the negotiated outcomes of the collective bargaining agreement, such as a rate of pay for appointments. Under the MAM program, the relationship would be precisely the same; the State would require in its contracts with the public hospitals, that when they contract with agencies for reimbursable interpreting services, the agencies would guarantee a

minimum rate of pay. This would be a condition of the contract, just as are the required interpreter code of conduct, standards of proficiency through DSHS testing, certain background check requirements, and monitoring of the MAM program with the public hospitals. .

3. The State’s “budgetary process” argument is actually a source of funds argument and must fail.

The State attempts to disconnect its funding mechanism argument from the long standing “source of funds” doctrine. The State argues it has to approve what money is going to be spent, which effectively means, the State has to be the source of the money. If anything, the State’s “mechanism of funding argument” would argue for inclusion of the MAM LAPs since the hospitals are reimbursed with a check made out from DSHS. This argument must fail.

The Commission found that the source of funds for the MAM program was irrelevant to their analysis and that the legislation did not reference any funding source. Many State employees are funded by sources other than State funds, including through federal monies. As the Commission has held time and again, the test for inclusion as a public employee in a bargaining unit does not include the inquiry as to the source of funding of the positions. *Benton County*, Decision 7651-A (PECB, 2003), quoting *Kitsap County*, Decision 4314 (PECB, 1993). The

Commission has recognized the multiple funding streams that exist in public employment, as well as the standards the grantor of the funds sometimes attaches thereto. As the Commission held in *Snohomish County Fire District 1*, Decision 6008 (PECB, 1997), “Many positions and programs at the local level are funded by the federal and/or state governments, but remain local employees for the purposes of collective bargaining even where the grantor imposes some general rules governing pay, benefits, and utilization of the employees.” *Id.* at 8.

The method of how interpreters receive payment for their services referenced in the statute simply recognizes that interpreters may be paid more than one way, it does not impute a source of funds requirement to the statute. In fact, the legislation recognized that although the State was ensuring payment of services provided by interpreters, it was doing so through various means, which have since been dramatically streamlined.

The evidence presented at hearing showed quite clearly that the MAM interpreters are in fact paid by private language agencies and not by the hospitals directly, and the Commission recognized this in their decision. The Commission found that MAM interpreters have no way of knowing whether the original source of the funds is federal, state or local money, but they do know it is an agency that cuts their checks. The MAM

interpreters at issue do, in fact, comport with this portion of the RCW. AR 226-231.

The relationship of the MAM interpreters to the state of Washington is the same as LAPs in the bargaining unit now.

C. Substantial evidence supports the Commission's Finding of Fact challenged by the State.

The State mistakenly argues that there was no evidence that interpreters working under the MAM program were paid by one of the three authorized methods. Indeed, two MAM interpreters who performed work at public hospitals testified at hearing that they were paid by foreign language agencies. AR 207, 224-230. It is true the union did not put on evidence of individual interpreter appointments for local health jurisdictions (LHJ). This was simply because the union was unaware of any interpreter providing services for LHJs who otherwise met the criteria necessary for inclusion in the bargaining unit; the union asked only for the inclusion of interpreters who covered MAM appointments at public hospitals.

The State argues one interpreter's testimony suggested he normally worked through brokers which would indicate he did not take MAM appointments. Mr. Hidalgo in fact testified that he only worked with foreign language agencies, not with brokerages. AR 207. The State

attempts to rely on one sentence of the Commission's decision to argue the entire decision is unsupported by the evidence, "DSHS paid for interpreter services for Medicaid recipients." AR 913. A careful reading of the full page containing that finding in the decision indicates that PERC had a thorough understanding of the mechanics of the state Medicaid program as well as the MAM program.

The State also disputes PERC's finding that the independent contractor status of the 34 challenged individuals was not in dispute. The union has never asserted that PERC's decision automatically granted the 34 challenged interpreters' unquestioned inclusion in the bargaining unit.

The union has operated under the good faith belief that there was an agreement for purposes of the hearing that the union could, in the interest of judicial economy, provide representatives of each category of interpreter for hearing, rather than call every interpreter the union had on the challenge list as a witness. It was not until after the hearing that the State raised an objection to the sufficiency or the way the evidence was presented at hearing. The parties agreed, that should PERC determine the threshold question that the MAM interpreters and/or legal setting interpreters were appropriately in the unit, the parties would address each individual on the list to determine whether he or she met the additional

requirements for inclusion in the bargaining unit. The union remains committed to this agreement.

D. The Commission acted within its authority when it ordered the inclusion of the MAM interpreters in the bargaining unit.

PERC has the statutory authority to determine whether certain interpreters are public employees solely for the purpose of collective bargaining with the State under RCW 41.56.030(10)(a) and RCW 41.56.510.

PERC acted within the statutory authority granted to it under RCW 41.58.005 when it reviewed RCW 41.56.030(10)(a) and 41.56.510 and made a determination about who should be included in the bargaining unit. Under RCW 41.56.060, PERC has exclusive unit determination authority. The State argues that PERC, through its decision, has determined collective bargaining relationships for third parties. PERC has done nothing of the sort. Neither PERC nor the union has touched the relationships of public hospitals to their employees. The only relationship at issue here is between the interpreters, through its union, and the State of Washington. As argued earlier, the union agrees that third parties, including public hospitals, would have to comply with the rate of pay for LAPs, but the hospital can choose to participate in the MAM program, just

as the foreign language agencies can choose to do business with brokers where the independent contractor interpreters must receive a minimum rate of pay. This consequence to third parties was created by the legislature, a fact recognized by the Commission in its decision. The Commission pointed out that it was constrained by the clear and unambiguous language of the statute, and that if the legislature had intended the exclusion of certain programs or settings, it could have identified them, and that the legislature might do so in the future. AR 918. However, up until now, there have been no legislative changes, and PERC's decision is within its authority.

V. CONCLUSION

PERC's determination that MAM appointments are Medicaid enrollee appointments was well considered and supported by facts and law. Based on the foregoing, the union respectfully requests that the Court uphold the Commission's decision to include interpreters providing services to Medicaid enrollees under the Medicaid Administrative Match program in the bargaining unit.

DATED this 26th day of September, 2013.

Respectfully submitted,

WASHINGTON FEDERATION OF
STATE EMPLOYEES

A handwritten signature in black ink, appearing to read "Anita Hunter", written over a horizontal line.

Anita Hunter, WSBA #25617
Attorney for Intervenor

NO. 70541-5-I

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

STATE OF WASHINGTON – OFFICE OF
THE GOVERNOR,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS
COMMISSION,

Respondent,

WASHINGTON FEDERATION OF
STATE EMPLOYEES,

Intervenor.

DECLARATION
OF SERVICE

2010 SEP 30 11:10:07
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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

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

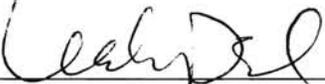
I certify that on September 27, 2013, I caused to be hand delivered via ABC Legal Services the originals and one set of true and correct copies of the Intervenor's Brief and this Declaration of Service upon the following:

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

I further certify that on September 27, 2013, true and correct copies of the Intervenor's Brief and this Declaration of Service were sent by electronic mail and by U.S. Mail, postage prepaid to:

Donna J. Stambaugh
Office of the Attorney General
1116 W. Riverside
Spokane, WA 99201-1194
donnas@atg.wa.gov

DATED this 27th day of September, 2013 at Olympia, Washington.



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