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I. INTRODUCTION

Respondent (the Washington Federation of State Employees (WFSE)) accepts the appellant's (Department of General Administration (GA)) introduction of the case.

II. COUNTERSTATEMENT OF THE ISSUES

A. Did GA exceed the specific narrow grant of authority in RCW 41.06.142(4)(b) to promulgate rules regarding the bidding process for contract services to the state, when it promulgated rules (WAC 236-51-006 and -010(11)) limiting the right of employees, whose positions or work would be displaced by the contract, to offer alternatives or compete for the work to only those situations where the employees would be either laid off or reclassified as a result of the contract for services? Alternatively, are the rules inconsistent with RCW 41.06.142, or arbitrary and capricious?

B. Did GA exceed the specific narrow grant of authority in RCW 41.06.142(4)(b) to promulgate rules regarding the bidding process for contract services to the state, when it promulgated a rule (WAC 236-51-225) prohibiting employees awarded a contract for services (an Employee Bargaining Unit (EBU)) from performing work or bidding on another contract without their employing agency's approval? Alternatively, is the rule inconsistent with the provisions of RCW 41.06.142, or arbitrary and capricious?

III. COUNTERSTATEMENT OF THE CASE

For the most part the WFSE accepts GA's statement of the case. The WFSE agrees that prior to the Personnel System Reform Act of 2002 (PSRA), Laws of 2002, ch. 354 (SHB 1268), state agencies and institutions were prohibited from contracting out work which was customarily and historically performed by civil service employees. The WFSE also agrees that a long line of cases, some of which are cited in the state's brief at footnote 1, found this principle to be part of the state's civil service law. RCW Ch. 41.06.¹

RCW 41.06.380, however, was not enacted to confirm this prohibition as the state suggests, but rather it was an attempt by the Legislature to provide a limited exception to the holding in *WFSE v. Spokane Community College*, 90 Wn.2d 698, 585 P.2d 474 (1978). In that case, the court had applied the contracting out prohibitions to "new work" of the same type previously customarily and historically performed by civil service employees. RCW 41.06.380 was an attempt to "grandfather" contracts pre-dating the legislation as an exemption from the civil service law's general prohibition of contracting for services.

¹ See also CP 24, WFSE Trial Brief, at p. 3.

The WFSE also agrees that the PSRA had three principal components (legs). One component, RCW 41.06.142, increased the state's opportunities to contract out for work historically performed by civil service employees where it would be more efficient to do so. A second component, amending other provisions of RCW Ch. 41.06, dealt with revisions to the state's civil service system principally impacting unrepresented employees. The third component (RCW Ch. 41.80) granted greater collective bargaining rights to represented state employees, including the ability to bargain regarding wages, sometimes referred to as "full scope" collective bargaining. The PSRA included substantial limitations on bargaining, including a specific time limitation (October 1 for a July 1 contract); Legislative approval of the negotiated contract; no provision for impasse (interest) arbitration; and a provision stating that nothing in the PSRA granted state employees the right to strike. RCW 41.80.010 and .060.

While the PSRA involved substantial changes, it also reflected reservations in each of the three areas. The state agreed to engage in collective bargaining, but without any arbitration or right to strike for employees to overcome an employer's failure to agree. An exception to civil service system "reform" was that provisions in collective bargaining agreements for representative employees would control over conflicting civil service regulations. RCW 41.80.020(6). The ability of agencies and institutions to

contract out civil service work was conditioned on the requirement that employees whose position or work was being displaced first be given an opportunity to propose alternatives or compete for the work, so that the greatest efficiencies could be realized. RCW 41.06.142(1)(b).

This meant that the state's ability to contract out was not made unlimited by the PSRA. Rather, the narrow exception to the prohibition against contracting out in RCW 41.06.380 was replaced with a much broader exception found in RCW 41.06.142(1)(b).

41.06.142. Purchasing services by contract--Effect on employees in the classified service--Criteria to be met--Bidding--Definitions (1) Any department, agency, or institution of higher education may purchase services, including services that have been customarily and historically provided by employees in the classified service under this chapter, by contracting with individuals, nonprofit organizations, businesses, employee business units, or other entities if the following criteria are met:

(a) The invitation for bid or request for proposal contains measurable standards for the performance of the contract;

(b) *Employees in the classified service whose positions or work would be displaced by the contract are provided an opportunity to offer alternatives to purchasing services by contract and, if these alternatives are not accepted, compete for the contract under competitive contracting procedures in subsection (4) of this section;*

(c) The contract with an entity other than an employee business unit includes a provision requiring the entity to consider employment of state employees who may be displaced by the contract;

(d) The department, agency, or institution of higher education has established a contract monitoring process to measure contract performance, costs, service delivery quality, and other contract standards, and to cancel contracts that do not meet those standards; and

(e) The department, agency, or institution of higher education has determined that the contract results in savings or efficiency improvements. The contracting agency must consider the consequences and potential mitigation of improper or failed performance by the contractor.

(2) Any provision contrary to or in conflict with this section in any collective bargaining agreement in effect on July 1, 2005, is not effective beyond the expiration date of the agreement.

(3) Contracting for services that is expressly mandated by the legislature or was authorized by law prior to July 1, 2005, including contracts and agreements between public entities, shall not be subject to the processes set forth in subsections (1) and (4) through (6) of this section.

(4) Competitive contracting shall be implemented as follows:

(a) At least ninety days prior to the date the contracting agency requests bids from private entities for a contract for services provided by classified employees, the contracting agency shall notify the classified employees whose positions or work would be displaced by the contract. The employees shall have sixty days from the date of notification to offer alternatives to purchasing services by contract, and the agency shall consider the alternatives before requesting bids.

(b) If the employees decide to compete for the contract, they shall notify the contracting agency of their decision. Employees must form one or more employee business units for the purpose of submitting a bid or bids to perform the services.

(c) The director of personnel, with the advice and assistance of the department of general administration, shall develop and make available to employee business units training in the bidding process and general bid preparation.

(d) *The director of general administration, with the advice and assistance of the department of personnel, shall, by rule, establish procedures to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service. Such rules shall include, but not be limited to: (i) Prohibitions against participation in the bid evaluation process by employees who prepared the business unit's bid or who perform any of the services to be contracted; (ii) provisions to ensure no bidder receives an advantage over other bidders and that bid requirements are applied equitably to all parties; and (iii) procedures that require the contracting agency to receive complaints regarding the bidding process and to consider them before awarding the contract.* Appeal of an agency's actions under this subsection is an adjudicative proceeding and subject to the applicable provisions of chapter 34.05 RCW, the administrative procedure act, with the final decision to be rendered by an administrative law judge assigned under chapter 34.12 RCW.

(e) An employee business unit's bid must include the fully allocated costs of the service, including the cost of the employees' salaries and benefits, space, equipment, materials, and other costs necessary to perform the function. An employee business unit's cost shall not include the state's indirect overhead costs unless those costs can be attributed directly to the function in question and would not exist if that function were not performed in state service.

(f) A department, agency, or institution of higher education may contract with the department of general administration to conduct the bidding process.

(5) As used in this section:

(a) "Employee business unit" means a group of employees who perform services to be contracted under this section and who submit a bid for the performance of those services under subsection (4) of this section.

(b) "Indirect overhead costs" means the pro rata share of existing agency administrative salaries and benefits, and rent, equipment costs, utilities, and materials associated with those administrative functions.

(c) "Competitive contracting" means the process by which classified employees of a department, agency, or institution of higher education compete with businesses, individuals, nonprofit organizations, or other entities for contracts authorized by subsection (1) of this section.

(6) The joint legislative audit and review committee shall conduct a performance audit of the implementation of this section, including the adequacy of the appeals process in subsection (4)(d) of this section, and report to the legislature by January 1, 2007, on the results of the audit.²

(Emphasis supplied.)

The courts had long held that the state could avoid the civil service prohibition against contracting out by amending the civil service law. See, e.g., *Cunningham v. Community College Dist. No. 3*, 79 Wn.2d 793, 803-04, 489 P.2d 891 (1971); and *WWU v. WFSE*, 58 Wn. App. 433, 439, 793 P.2d 989 (1990). RCW 41.06.142 is such an amendment. As the

² RCW 41.06.142 was recently amended to delete the requirement in (6) and to exclude the law's application to RCW 74.13.031(5), dealing with the monitoring of child placement by the Department of Social and Health Services. Laws 2008, ch. 267 § 9.

state points out, the statute permits the state to purchase services customarily and historically provided by employees. However, this exception is conditioned on certain criteria being met. RCW 41.06.142(1). A couple of the required criteria are that employees "whose positions or work would be displaced" by the contract are provided an opportunity to offer alternatives, and, if the alternatives are not accepted, they may compete for the contract as an EBU. RCW 41.06.142(1)(b). While phrased as providing "certain opportunities" to employees whose position or work would be displaced, they are clearly conditions which must be met by the state prior to any purchasing of services.

The WFSE agrees that the statute does not provide a definition of what the Legislature meant by the phrase "whose positions or work would be displaced."

The statute, RCW 41.06.142, has five discreet parts. Part (1), as previously discussed, permits contracting provided certain criteria are met. Part (2) overrides any collective bargaining agreement after its expiration date. Part (3) exempts contracts which either are expressly directed by the Legislature or were authorized under the prior law (continuing the grandfathering exception in RCW 41.06.380). Part (4) concerns the bidding process to be utilized after an agency determines to purchase services by contract and after the criteria in RCW 41.06.142(1)(a) through

(e) have been met. It is in this subsection that the Director of General Administration is directed to "establish procedures to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service." Part (5) of the statute provides definitions of certain terms used in the statute; however, it does not define the meaning of the phrase "whose positions or work would be displaced." Finally, Part (6) of the original statute required an audit regarding implementation of the statute, presumably to determine whether implementation of the statute results in any efficiencies.

Purporting to exercise the authority granted in Section 4 to promulgate rules "to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists as competitive market for the service," GA promulgated the challenged rules, WAC 236-51-006, 236-51-010(11), and 236-51-225.

WAC 236-51-006. If state employees will not be displaced. If state employees will not be displaced, agencies shall comply with RCW 41.06.142 (1)(a), (d) and (e), and applicable laws and rules governing the purchase of such services.

WAC 236-51-010. Definitions. The following words, terms, and phrases, used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

* * *

(11) 'Displaced employee' means a classified employee whose position or work would be eliminated, resulting in the

employee being laid off or assigned to a different job classification, as a result of an award via the competitive contracting process.

WAC 236-51-225. Limits on performance of services not contained in a contract. An employee business unit awarded a contract by an agency shall not perform or bid on solicitations for services not contained in its contract unless their agency approves in writing.

The WFSE agrees with GA's statement that taken together, WAC 236-51-006 and -010(11) require that employees be given the opportunity to offer alternatives and to form an EBU only where the employee would be laid off or assigned to a different job classification.³

GA points out that RCW 41.06.142(4)(a) requires the contracting agency to notify displaced employees. While GA suggests that the purpose of this notification is so that the employees may participate in bidding procedures, the statute actually provides that the purpose of the notification is so that "[t]he employees shall have sixty days from the date of notification to offer alternatives to purchasing services by contract, and the agency shall consider the alternatives before requesting bids."

As GA correctly notes, the other rule challenged by the WFSE is WAC 236-51-225. This rule prohibits an EBU, which previously has been

³ Brief of Appellant, p. 11.

awarded a contract, from performing or bidding on another contract without their employing agency's permission or approval. The WFSE disagrees with GA's "argument" that the rule is necessary or, as shown hereinafter, that it relates to the subject of GA's rulemaking authority.

The WFSE accepts GA's description of the administrative and judicial proceedings on the rules.

IV. ARGUMENT

A. WAC 236-51-006 and -010(11) exceed GA's rule-making authority, conflict with the statute and are arbitrary and capricious.

"This court may declare an agency rule invalid if it: (1) violates constitutional provisions, (2) exceeds statutory authority of the agency, (3) was adopted without compliance to statutory rule-making procedures, or (4) is arbitrary and capricious." *Washington Public Ports Ass'n v. State Dept. of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003) (citing RCW 34.05.570(2)(c)). "Determining the extent of [the agency's] rule-making authority is a question of law' which is reviewed de novo. *Id.*" *Ass'n of Washington Business v. State Dept. of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005).

"An agency cannot legislate, its rules must be within its statutory framework." *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Board*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978), citing *Kitsap-*

Mason Dairymen's Ass'n v. State Tax Comm'n, 77 Wn.2d 812, 467 P.2d 312 (1970); and *State ex rel. West v. Seattle*, 50 Wn.2d 94, 309 P.2d 751 (1957).

The following principles enunciated in *Green River Community College v. Higher Education Personnel Board*, 95 Wash.2d 108, 112, 117, 118, 622 P.2d 826 (1980), are particularly appropriate to the task before us:

Certain well settled principles govern the scope of an administrative agency's rule-making authority. First, an agency has only those powers either expressly granted or necessarily implied from statutory grants of authority. *Anderson, Leach [Leech] & Morse, Inc. v. State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978). Second, an agency does not have the power to promulgate rules that amend or change legislative enactments. *Fahn v. Cowlitz County*, 93 Wn.2d 368, 383, 610 P.2d 857 (1980). Third, rules may "fill in the gaps" in legislation if such rules are "necessary to the effectuation of a general statutory scheme." *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). Fourth, administrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented. *Fahn*, [93 Wash.2d] at 374, [610 P.2d 857]. Fifth, a party attacking the validity of an administrative rule has the burden of showing compelling reasons that the rule is in conflict with the intent and purpose of the legislation. *Weyerhaeuser Co. v. Department of Ecology*, 86 Wn.2d 310, 314-17, 545 P.2d 5 (1976).

ASARCO, Inc. v. Puget Sound Air Pollution Control Agency, 51 Wn. App. 49, 52-53, 751 P.2d 1229 (1988), affirmed in 112 Wn.2d 314, 771 P.2d 335, 74 A.L.R. 4th 557.

GA argues that the administrative rules are presumed to be valid and that the WFSE must present compelling reasons why the rule conflicts with the statute [RCW 41.06.142].⁴ However, the rules of judicial deference assume that the administrative rule was promulgated within the agency's authority.

If an enabling statute does not authorize either expressly or by necessary implication a particular regulation, that regulation must be declared invalid despite its practical necessity or appropriateness. See *In re Consolidated Cases*, 123 Wash.2d 530, 536-40, 869 P.2d 1045 (1994) ("we do not defer to an agency the power to determine the scope of its own authority"); cf. *Hillis Homes, Inc. v. Snohomish Cy.*, 97 Wash.2d 804, 808, 650 P.2d 193 (1982).

Washington Independent Telephone Ass'n v. Telecommunications Rate-payers Ass'n for Cost-Based and Equitable Rates (TRACER), 75 Wn. App. 356, 363, 880 P.2d 50 (1994).

In addition, although we generally accord substantial deference to agency decisions, *Impehoven v. Department of Rev.*, 120 Wash.2d 357, 363, 841 P.2d 752 (1992), we do not defer to an agency the power to determine the scope of its own authority.

In re Electric Lightwave, Inc., 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

It is only where the agency is acting within its rule-making authority that regulations are presumed valid. See *Weyerhaeuser Co. v. Dept. of Ecology*, 86 Wn.2d 310, 545 P.2d 5 (1976).

⁴ Brief of Appellant, p. 16.

In *Anderson, Leech & Morse, Inc., supra*, the case upon which GA relies for the proposition that the administrative rules are presumed to be valid, the court prefaced that principle by noting that the Legislature had specifically delegated broad rule-making power to the Liquor Control Board regarding the state's liquor laws.

The first question presented in this case is whether GA had authority to promulgate a definition of "displaced employee," which has the effect of severely limiting the right of employees to preserve their work by offering more efficient alternatives or competing for the work.

GA does have a broad grant of rule-making authority from the Legislature. GA has express general rule-making authority in RCW 43.19.011(d). That statute empowers the GA Director to "[a]dopt rules in accordance with chapter 34.05 RCW [APA] and perform all other functions necessary and proper to carry out the purposes of this chapter [RCW Ch. 43.19][.]" This provision, however, does not provide any basis for GA's rule-making authority with regard to the meaning of provisions in RCW 41.06.142, which is not a part of RCW Ch. 43.19. These rules are thus beyond the purview of the Director's general rule-making authority pursuant to the express delegation in RCW 43.19.011(d).

In contrast to RCW 43.19.011(d)'s general grant of authority to GA, RCW 41.06.142 sets forth the express rule-making authority of GA with regard to subjects covered by that statute in specific narrow terms.

(d) The director of general administration, with the advice and assistance of the department of personnel, ***shall, by rule, establish procedures to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service.*** Such rules shall include, but not be limited to: (i) Prohibitions against participation in the bid evaluation process by employees who prepared the business unit's bid or who perform any of the services to be contracted; (ii) provisions to ensure no bidder receives an advantage over other bidders and that bid requirements are applied equitably to all parties; and (iii) procedures that require the contracting agency to receive complaints regarding the bidding process and to consider them before awarding the contract. Appeal of an agency's actions under this subsection is an adjudicative proceeding and subject to the applicable provisions of chapter 34.05 RCW, the administrative procedure act, with the final decision to be rendered by an administrative law judge assigned under chapter 34.12 RCW.

RCW 41.06.142(4)(d) (emphasis supplied).⁵

Section (4)(d) of RCW 41.06.142 deals with the competitive contracting process *after* the employer has proposed having work contracted out and has presumably already complied with the requirements

⁵ In contrast to the narrow authority granted GA in RCW 41.06.142(4)(d), the civil service law grants broad rule-making authority regarding the civil service system, of which RCW 41.06.142 is a part, to the State Department of Personnel Director. RCW 41.06.150. The Director has exercised that authority to define many of the terms and exceptions for the civil service law. See WAC Chs. 357-01 and -04.

in RCW 41.06.142(1), which includes permitting employees whose work or positions would be displaced to first offer alternatives for the employer's consideration. Nothing in RCW 41.06.142(4)(d), dealing with the bid process and GA's rule-making regarding that process, authorizes GA to determine by rule under what circumstances employees may offer alternatives to an employer's proposal to contract out for services.

In its argument, GA points out that the specific examples in the statute of rules which GA is directed to promulgate are not exclusive; however, they do reflect the subject matters which the statute authorizes GA to promulgate rules concerning. All of the examples in the statute concern the bid process itself. This is consistent with the directive that GA promulgate rules to "establish procedures to ensure that bids are submitted and evaluated in a fair and objective manner and that there exists a competitive market for the service. . . ." RCW 41.06.142(4)(d).

"Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature" *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969), cited with approval in *Spain v. Employment Security Dept.*, 164 Wn.2d 251, 258 (June 2008). Thus, it should be inferred the Legislature did not intend GA to

promulgate rules on other subjects, such as exemptions from the civil service law. *Inclusio unius est exclusio alterius*.

It may be, as GA argues, that the bidding processes which GA is statutorily authorized to regulate through its rules do not come into play or are not "triggered," unless and until an agency determines to contract out civil service work pursuant to RCW 41.06.142(1)(b). However, that does not necessarily imply that GA must therefore have authority to determine when an employee or an employee's work is "displaced."

GA argued before the trial court that "[s]urely the Legislature intended that its grant of rule-making authority to GA would include the ability to provide guidance on this threshold issue."⁶ It makes a similar argument to this court.⁷ This is not necessarily so. Had the Legislature intended that GA have such broad rule-making authority, it could have used broad general terms, as in RCW 43.19.011(d), *supra*. Had that been the Legislature's intent, it would not have included GA's rule-making authority as a subsection in the section of the statute dealing only with the bidding process, and it would not have added the language limiting the scope of the rules to that process. The statutory grant is a narrow one expressly restricted in scope by the statute's own language.

⁶ CP 55, State's Trial Brief p. 11.

⁷ Brief of Appellant, p. 21.

In *In re Impoundment of Chevrolet Truck, WA License No. A00125A ex rel.*, 148 Wn.2d 145, 60 P.3d 53 (2002), the court struck down a rule promulgated by the state patrol which the patrol argued was within its authority. The court stated:

RCW 46.55.113 merely empowers the State Patrol to impound vehicles under lawful circumstances "at the direction of a law enforcement officer." The State Patrol may not act beyond that because administrative agencies have no inherent powers. *State ex rel. Pub. Util. Dist. No. 1 of Okanogan County v. Dep't of Pub. Serv.*, 21 Wash.2d 201, 208-09, 150 P.2d 709 (1944). Agencies may exercise only those powers conferred on them expressly or by necessary implication. *Id.* If an enabling statute does not authorize a particular regulation, either expressly or by necessary implication, "that regulation must be declared invalid despite its practical necessity or appropriateness." *Wash. Indep. Telephone Ass'n v. Telecomm. Ratepayers Ass'n for Cost-Based & Equitable Rates*, 75 Wash.App. 356, 363, 880 P.2d 50 (1994). To hold otherwise would be to "defer to an agency the power to determine the scope of its own authority." *In re Elec. Lightwave, Inc.*, 123 Wash.2d 530, 540, 869 P.2d 1045 (1994). [Footnote omitted.]

In re Impoundment of Chevrolet Truck, at 156-57.

Since GA has no rule-making authority with regard to any other subject of RCW 41.06.142 other than the bidding process, WAC 236-51-010(11) and -006 exceed GA's rule-making authority.

Not only are the rules defining "displaced employee" beyond GA's rule-making authority, they are contrary to the statute itself. RCW 41.06.142(1)(b) plainly provides that "[e]mployees in the classified service whose positions or work would be displaced by the contract are provided

an opportunity to offer alternatives" By promulgating rules limiting the right of employees to offer alternatives, GA severely curtails the rights of employees whose positions *or work* would be affected by an agency's proposal to contract for services. The conflict between the statute and GA's rules could not be more clear. While the statute talks in terms of displacement of either an employee or the work of an employee, the rule would limit this statutory "trigger" to the removal of an employee from their position by layoff or reclassification to a new position.

The provision in WAC 236-51-010(11) defining a "displaced employee" as one who is assigned a new job classification⁸ does not equate to the statute's application to displaced work, as GA argues. Civil service job classifications relate to the type, not the quantity, of work an employee performs. See WAC 357-13-055. Removing work from an employee could, but not necessarily would, result in a job reclassification only if the remaining job duties were more appropriate for a different job classification.

GA also argues that its interpretation is consistent with the provisions of RCW 41.06.142(1)(c), requiring that a contract with an entity other than an EBU must include a provision requiring the entity to

⁸ In the civil service system this is referred to as a classification reallocation.

consider employment of state employees who may be displaced by the contract. This provision does nothing more than recognize the reality that while employees will often offer alternatives to an employer's proposal to contract out for services, they are most likely to form EBUs only when the extent of the contracting would result in the elimination of their positions.⁹

More importantly, the agency's interpretation is inconsistent with the basic policies behind RCW 41.06.142. The argument for contracting out of civil service work has long been efficiencies and cost savings which could be realized by the state. See, e.g., *Cunningham, supra*. Limiting employees' opportunities to offer alternatives to the employer, which might offer greater efficiencies and cost-savings than a proposed contract, to only those situations where an employee would lose their position, by layoff or reallocation, is contrary to this basic policy. There is no legitimate purpose to be served by taking away the right of employees to offer more efficient, less costly alternatives to an employer considering contracting out some, but not all, of their work.

⁹ These points are all somewhat academic, because to respondent's knowledge, and as both parties admitted to the trial judge, there have been few, if any, EBUs actually formed.

GA argues that its interpretation is consistent with the political tradeoff made in the PSRA "three-legged stool" that both parties have discussed in their briefs. Essentially, GA argues that RCW 41.06.142 was intended to completely eliminate the restrictions on the state's contracting out in return for state employees obtaining full-scope collective bargaining. This argument would have more weight if it were true. Even GA admits that RCW 41.06.142 does not completely eliminate the restrictions on the state's contracting out of civil service work. Despite GA's rules, which have the effect of substantially emasculating employees' rights, the statute still contains substantial restrictions on the state's ability to contract for services. This mirrors restrictions on what employees received in the way of full-scope collective bargaining. State employees' full-scope collective bargaining also has substantial restrictions, including those specified in RCW 41.80.020 (e.g., healthcare and retirement benefits cannot be bargained), as well as the requirement for legislative approval, deadlines for completion of bargaining, lack of impasse arbitration, and, according to the state, no right to strike. It is clear that neither party was willing to completely relinquish its position to the other on these subjects.

Consistent with this measured tradeoff, in RCW 41.06.142(1)(b) employees retained the right to offer alternatives to their employer before the employer contracted for services, except in those situations where

contracting had historically been allowed. Those situations were generally limited to contracts which had only a *de minimis* effect on civil service work.

This interpretation is entirely consistent with the express language of the statute, the policy behind the statute, and the political "tradeoff" which led to the promulgation of this statute. It is also consistent with basic labor law. The contracting of bargaining unit work (skimming) by the employer without mandatory bargaining has long been an unfair practice under national labor laws, see *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964); and Washington state public sector labor provisions, see *South Kitsap School District*, 1978 WL 182726, PERC Decision 472 (PECB, 1978). It has been held to apply to state employees under RCW Ch. 41.80, even where no employee is laid off or displaced from their position. See, e.g., *State – Department of Transportation*, PERC Decision 10027 (PSRA, 2008). Employers are already arguing that RCW 41.06.142, as interpreted by GA's rules, means they are statutorily excused from bargaining if no employee is displaced (laid off or reclassified) as a result of the contracting of bargaining unit work. GA's interpretation would *de facto* eliminate almost completely any restriction on the state's ability to contract out. Such a paradigm shift was never contemplated by

the adoption of RCW 41.06.142, and certainly should not be left to an administrative agency not charged with administering labor laws.

GA's rules contradict the express language of the statute, its policy, and the history behind its adoption. The express conflict seems clear. While the statute gives employees the right to offer alternatives where either their position or work is displaced, GA's rules limit the employees' rights to only those situations where their position is displaced (i.e., the employee is laid off or reclassified). It is difficult to find the policy behind such a limitation on an employee's ability to offer more efficient cost-saving alternatives to an employer.

For many years, the civil service boards have had a definition of a civil service employee's "position." A "position" had previously been defined as "a group of duties and responsibilities normally assigned to an employee." A position may be filled or vacant, full time or part time, seasonal, temporary or permanent. See former WAC 356-05-300 (repealed effective July 1, 2005) The current civil service rules contain a similar definition. "WAC 357-01-240, Position. A group of duties and responsibilities to be performed by an employee[.]" (Effective July 1, 2005.)

Since the statute does not define either of the terms "work" or "displaced," "the court may refer to dictionary definitions and to common

usage in light of the context in which the word is used. *Mustappa v. Department of Fisheries*, 67 Wash.App. 790, 793, 840 P.2d 235 (1992). *Armstrong v. State*, 91 Wn. App. 530, 538, 958 P.2d 1010 (1998). "Further, in determining the meaning of a word used in a particular instance, we consider the subject matter within which the word is used and the statutory context in which it appears. [Citations of authority omitted.]" *Id.* at 539.

A common dictionary definition of "work" is "the labor, task, or duty that is one's accustomed means of livelihood." See *Webster's 9th New Collegiate Dictionary*. One of the dictionary synonyms for "displaced" is "supplant." See *Webster's 9th New Collegiate Dictionary*. Prior to the adoption of RCW 41.06.142, the courts of this state held in a long line of cases that the state's civil service law prohibited the "supplanting" of civil service work by contracting it out. See, e.g., *Cunningham, supra*; *WFSE v. Spokane Community College, supra*; *WWU v. WFSE, supra*; *Barrington v. EWU*, 41 Wn. App. 259, 703 P.2d 1066 (1985); *WFSE v. Joint Center for Higher Education*, 86 Wn. App. 1, 933 P.2d 1080 (1997); and *WFSE v. DSHS*, 90 Wn. App. 501, 966 P.2d 322 (1998). In several of these cases, the courts held that only "*de minimis*"

amounts of civil service work could be contracted out.¹⁰ The cases did not require an entire position (employee) or equivalent amount of work be displaced. See, e.g., *WFSE v. DSHS, supra*. To the extent GA's rules require the displacement of the work of an entire position, they conflict with this historical judicial interpretation of the term.

The Legislature was presumably aware of the court's historical use of the term when it enacted RCW 41.06.142, *infra*.

'As an aid in the construction of a statute, it is to be assumed or presumed that the legislature was acquainted with, and had in mind, the judicial construction of former statutes on the subject, and that the statute was enacted in the light of the judicial construction that the prior enactment had received, or in the light of such existing judicial decisions as have a direct bearing upon it. Such earlier decisions will accordingly be taken into consideration. Thus, in the interpretation of statutory law after an amendment thereof, the courts may take into consideration the construction by earlier decisions of the statute before its amendment. * * *' 50 Am.Jur., Statutes § 321, p. 312.

* * * Courts do not, however, favor repeals of settled principles by implication, and the legislature in the enactment of a statute will not be presumed to intend to overturn long-established legal principles, unless such intention is made clearly to appear by express declaration or by necessary implication. To the contrary, the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits

¹⁰ After April 1979, RCW 41.06.380 and .382 also permitted the state to contract for services which it had regularly purchased under contract prior to April 1979. These statutes were repealed with the adoption of RCW 41.06.142, *supra*.

of no other reasonable construction. * * *' 50 Am.Jur., Statutes § 340, p. 332.

In *Hatzenbuhler v. Harrison*, 49 Wash.2d 691, 697, 306 P.2d 745, 749 (1957), we said:

'Another rule of statutory construction which the courts observe is that the law-making body is presumed to be familiar not only with its own prior legislation relating to the subject of legislation, but also with the court decisions construing such former legislation. [Citing cases.]'

Ashenbrenner v. Dept. of Labor and Industries, 62 Wn.2d 22, 26-27, 380 P.2d 730 (1963).

Contrary to this history, GA's rules equate the term "displaced" with "eliminated." As a result, only employees removed from their position (e.g., by being laid off) are eligible to offer alternatives to a proposal to contract out the work of their position. However, nothing in the statutory language (RCW 41.06.142) reflects a legislative intent to redefine the historical concept of more than de minimis displacement of either civil service personnel or work as the significant consideration.

The legislative history to RCW 41.06.142 is consistent with an interpretation that something less than the elimination of an employee's position, but more than a de minimis displacement of an employee's work, is sufficient to require permitting the affected employee(s) to offer up alternatives or to compete for the work. The legislative bill reports to SHB 1268 include, as background, references to the decision in *WFSE v.*

*Spokane Community College, supra.*¹¹ In that case, the court struck down the contracting out of "new" work (janitorial services for a new building), which did not involve the diminution of any existing civil service positions. This is consistent with an interpretation of RCW 41.06.142(1)(b) having application to anything more than a de minimis contract for services, not just to those situations where employees are laid off or transferred as a result of the contract.

Our courts have frequently looked to legislative bill reports and analysis to discern the Legislature's intent. See *State v. Reding*, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992), citing *State v. Standifer*, 110 Wn.2d 90, 750 P.2d 258 (1988); and *State v. Turner*, 98 Wn.2d 731, 658 P.2d 658 (1983). The court has said, "[f]inal legislative bill reports are pertinent in this regard." *McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000), citing *Young v. Snell*, 134 Wn.2d 267, 280, 948 P.2d 1291 (1997).

The "Final Bill Report" on SHB 1268 (§ 208, which was later codified as RCW 41.06.142) contained the following regarding this issue:

¹¹ CP 35-39.

II. Contracting Out:

A state agency or institution of higher education may contract out for services, including services traditionally and historically provided by state employees, if the following are met:

- The contract contains performance measures.
- ***Classified employees are allowed to provide alternative solutions to purchasing the services by contract, and, in the event those solutions are not approved, bid for the contract using competitive bidding procedures.***
- The contract contains provisions requiring the contracting entity to consider employing displaced classified employees.
- The agency or institution has established contract monitoring and termination procedures.
- The agency or institution has demonstrated that the contract would lead to savings or efficiencies, taking into account the possibility of improper performance.

The following competitive bidding procedure are specified:

- ***The agency or institution must inform the affected classified employees 90 days prior to sending out bids for contracts; the employees then have 60 days to offer alternatives to purchasing the services by contract.***
- Employees must inform the agency or institution if they intend to submit a bid.
- The DOP [Department of Personnel] and the Department of General Administration (GA) must provide training in the bidding process and in bid preparation.
- The GA must establish procedures to ensure that bids are submitted and evaluated fairly, and that there exists a competitive market for the service.
- The employees' bid must contain the full cost of providing the service.
- The agency or institution may contract with the GA to perform the bidding process.

If employees decide to compete for the contract, they must form an employee business unit to submit the bid. An employee business unit is defined as a group of employees who

performs services to be contracted, and who submits a competitive bid for the performance of those services.

Contracts that were authorized by law prior to the effective date of the act, including contracts and agreements between public entities, and contracts expressly mandated by the Legislature are not subject to the new criteria and requirements for contracting out. The Joint Legislative Audit and Review Committee must conduct a performance audit to evaluate the effectiveness of contracting out by January 1, 2007.

(Emphasis supplied.) SHB 1268, pp 3-4.¹²

A parallel bill was proposed in the Senate, but was not adopted.

(SB 5577.) The bill report to SB 5577 contained the following regarding contracting out:

CONTRACTING OUT

Beginning July 1, 2003, state agencies and higher education institutions may contract out for services, including those historically provided by classified employees, if: (a) the bid request contains measurable performance standards and the agency uses these standards in monitoring and cancelling contracts; (b) *displaced employees are allowed to offer alternative proposals and compete for the contract*, and the contract requires new contractors to consider hiring displaced employees; and (c) the agency demonstrates that the contract results in savings or efficiency improvements.

Competitive Contracting. Classified employees may compete for an agency's service contracts. Employees affected by an agency's decision to contract out must be given a 90-day advance notice of the bid request so they can present alternatives to contracting for services and the agency must consider the alternatives before requesting bids. Employees deciding to submit bid requests must form business units to do

¹² CP 35-39, Certified Statement of Edward Earl Younglove III, Exhibit 1.

so and the Director of Personnel must provide them training in the bidding process. The Director of General Administration must adopt rules to ensure a fair and objective bidding process. Employee bids must include the fully allocated costs, including salaries, space, equipment and materials, of any service provided.

The Joint Legislative Audit and Review Committee must conduct a performance audit of the contracting out provisions of this bill and report to the Legislature by January 1, 2005, on the results.

(Emphasis supplied.) SB 5577, p. 3.¹³

As the court can see, while the report on the Senate legislation, which was not adopted, referred to "displaced" employees, the House report on the legislation that was adopted (SHB 1268) referred to the fact that "classified employees are allowed to provide alternative solutions to purchasing the services [an obvious reference to the "services traditionally and historically provided by state employees" contained in the lead paragraph] by contract, and, in the event those solutions are not approved, bid for the contract using competitive bidding procedures."

The Final House Bill Report uses the term "displaced" only with regard to requiring contracting entities "to consider employing displaced classified employees." This distinction is reinforced in the later provision in the Final House Bill Report referring to the requirement of informing

¹³ CP 40-45, Certified Statement of Edward Earl Younglove III, Exhibit 2.

"affected" (as opposed to "displaced") employees of proposals to contract out work.

The GA rules are inconsistent with the bill report language on the bill adopted and reflect the report language on the Senate bill that was not adopted.

Admittedly, while floor debate is less helpful legislative history in determining legislative intent and is certainly not authoritative, see *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 494 P.2d 216 (1972), the floor debate on SHB 1268 on February 13, 2002, concerning Amendment No. 89, includes numerous references from representatives of both political parties that the issue concerned the contracting of **any** services performed by state employees that private-sector enterprises might want to bid for, not only those situations which would involve the elimination of a civil service position. In a debate concerning when the measure should take effect, Representative Talcott gave an example of services that might be contracted for (and bid on by state employees) of a mailing project that was delayed at the state printer's.¹⁴ There was nothing to indicate any employee position would be eliminated by such a contract. These and

¹⁴ CP, Exhibit A.

other portions of the bill's legislative history reflect a legislative intent inconsistent with GA's rules requiring that an employee's position be eliminated (the employee either laid off or transferred) before the employee acquires any rights to offer alternatives or bid to compete for the work.

For the foregoing reasons, WAC 236-51-006 and -010(11) were not only adopted without legislative authority, they are in conflict with the statute and are arbitrary and capricious.

B. WAC 236-51-225 exceeds of GA's rule-making authority, conflicts with the statute and is arbitrary and capricious.

Purporting to exercise authority granted by RCW 41.06.142(4)(d), *supra*, GA promulgated WAC 236-51-225, prohibiting EBUs from even bidding on another contract without their employing agency's (as opposed to GA's) approval.

While this rule is closer to the bidding process, it still does not fall within the authority granted GA in RCW 41.06.142(4)(d). Even though the regulation refers to the ability of employees to "bid," it is not a rule concerning a bidding process, but rather the substantive right of employees to compete for work.

RCW 41.06.142 is remarkably silent with regard to any ban on employees, who perform services as an EBU, from bidding or performing

work on other solicitations. GA is unable to point to any language in the statute which supports this rule. Instead, it argues that there is nothing unusual about the employing agency retaining some control over the activities of the members of the EBU, especially when those activities could directly impact the EBU's performance of its contract with the agency.

The effect of this rule is to substantially emasculate the right granted elsewhere in the statute to displaced employees to form EBUs and compete for work. See RCW 41.06.142(1)(c). Presumably, any contract which an EBU would be awarded would not be forever. A contract also might not require an employee's full-time commitment to the EBU. In either circumstance, prohibiting employees from bidding on a new solicitation, either for renewal of the services they are currently performing or a new contract, gives an agency unfettered authority to effectively destroy an EBU. GA's rule provides no standards for an agency's granting or withholding its approval for employees in a current EBU to participate by bidding on a renewal of a contract they currently have or on a new contract. Thus, even if GA had authority to prohibit EBUs from bidding on other work, it has inappropriately attempted to delegate that authority in WAC 236-51-225 to the employing agency.

"It is a general principle of law, expressed in the maxim 'delegatus non potest delegare,' that a delegated power may not be further delegated by the person to whom such power is delegated. . . . Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. * * *"

Application of Puget Sound Pilots Ass'n, 63 Wn.2d 142, 145-46, 385 P.2d 711 (1963), quoting 42 Am.Jur., Public Administrative Law § 73. GA, if it could prohibit EBUs from bidding on new work, has through WAC 236-51-225 inappropriately delegated that authority to the employing agencies.

The rule in this state and others is that where the legislature by enabling legislation indicates the legislative body authorized to perform a legislative function, that body may not delegate its power absent specific legislative authorization. *Lutz v. Longview*, 83 Wash.2d 566, 570, 520 P.2d 1374 (1974); *Noe v. Edmonds School Dist. 15*, 83 Wash.2d 97, 515 P.2d 977 (1973); *In re Puget Sound Pilots Ass'n*, 63 Wash.2d 142, 145-46 & n.3, 385 P.2d 711 (1963); *Roehl v. PUD 1*, 43 Wash.2d 214, 240, 261 P.2d 92 (1953); *Neils v. Seattle*, 185 Wash. 269, 53 P.2d 848 (1936); *Benton v. Seattle Elec. Co.*, 50 Wash. 156, 96 P. 1033 (1908); 2 E. McQuillin, *supra* at s 10.40. The rationale underlying this rule is that enabling legislation is a grant rather than a limitation of authority, which means that only those powers enumerated in the statute may be exercised by the agency or municipality. See generally *Moses Lake School Dist. 161 v. Big Bend Community College*, 81 Wash.2d 551, 556, 503 P.2d 86 (1972), appeal dismissed, 412 U.S. 934, 93 S.Ct. 2776, 37 L.Ed.2d 393 (1973); *Union High School Dist. 1 v. Taxpayers of Union High School Dist. 1*, 26 Wash.2d 1, 6-7, 172 P.2d 591 (1946). Given the original delegation by the legislature, what is involved in these cases is a prohibited subdelegation of legislative authority.

City of Seattle v. Auto Sheet Metal Workers Local 387, 27 Wn. App. 669, 685, 620 P.2d 119 (1980).

Employees in an EBU who are not permitted to bid on new contracts by their employer would presumably have a hiatus of some duration before they might hope to bid and receive an award on a new contract. The status of these "employees" during that time would be uncertain. It is doubtful that the Legislature could have intended that employees in EBUs be forced to endure periods of unemployment between bidding on contracts. "[A] reading [of a statute] that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results. . . ." *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003).

It is even unclear whether employees in an EBU whose contract had expired, and who had not been awarded a new contract, would even have the right to bid on new contracts under the statute. Would they lose their civil service status?

Not only does GA's rule have no supporting language in the statute, it also conflicts with the obvious policy behind the statutory provision. The statutory provision that permitted laid-off employees to form EBUs and compete for their work was clearly intended to provide an opportunity for employees to continue to work even if the agency desired to contract

out their work. Allowing the agencies unfettered discretion to prohibit them from bidding is tantamount to the power to effectively destroy an EBU and defeat the purpose behind the statute. The rule conflicts with the statute since the statute does not provide for agency consent as a precondition for an EBU to bid on work. The rule is arbitrary and capricious because it lacks any standards whatsoever for an agency to refuse consent.

WAC 236-51-225 exceeds GA's narrow rule-making authority granted in RCW 41.06.142(4)(d), is contrary to the statute and is arbitrary and capricious.

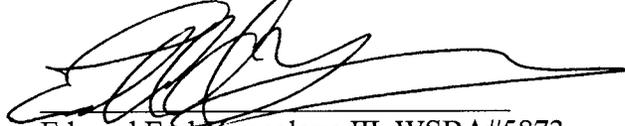
V. CONCLUSION

GA's rules challenged herein are beyond the agency's authority, conflict with the provisions of RCW 41.06.142, and are arbitrary and capricious.

DATED this 30th day of October, 2008.

Respectfully submitted,

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



Edward Earl Younglove III, WSBA#5873
Attorney for Respondent

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DIVISION II

NO. 37897-3-II

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STATE OF WASHINGTON
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DEPUTY

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

WASHINGTON FEDERATION OF
STATE EMPLOYEES,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF GENERAL
ADMINISTRATION,

Appellant.

CERTIFICATE
OF SERVICE

I hereby certify that on October 30, 2008, I served a copy of the Brief
of Respondent on all parties or their counsel of record via legal messenger
service, as follows:

Spencer W. Daniels, AAG
Department of General Administration
Attorney General of Washington
7141 Cleanwater Drive SW
Olympia, WA 98504-0108

DATED this 30th day of October, 2008, at Olympia, Washington.

[Signature]

Sandra Rossire, Legal Assistant

ORIGINAL