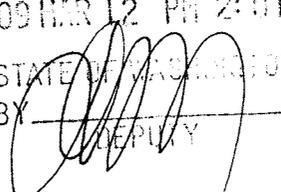


FILED  
COURT OF APPEALS  
DIVISION II

NO. 38222-9-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY  DEPUTY

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ALANNA GEHR and WASHINGTON FEDERATION  
OF STATE EMPLOYEES,

Appellants,

v.

SOUTH PUGET SOUND COMMUNITY COLLEGE,

Respondent.

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REPLY BRIEF OF APPELLANTS

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Attorney for Appellants

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**A. Reply Arguments of Appellants**

***1. Whether or not South Puget Sound Community College (SPSCC) bargained the issue of the proposed exemption in accordance with RCW Ch. 41.80 is not, and never has been, an issue in this case.***

The Public Employment Relations Commission (PERC) case law is clear that while an employer may utilize the exemption provisions under RCW 41.06.070 to remove individual employees from bargaining unit positions, such action does not relieve the employer of their duty to bargain said transfer under RCW Ch. 41.80.<sup>1</sup> If a decision to "exempt" a bargaining unit employee from civil service is accompanied by any transfer of work historically performed by the bargaining unit to the exempted individual or any other person outside of the bargaining unit, then the employer is obligated to fulfill its collective bargaining obligations. That includes:

- \* Provide notice to the union;
- \* Provide an opportunity to bargain before making a final decision on the proposed change; and

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<sup>1</sup> *University of Wash.*, Decision 9410 at p. 1 (PSRA, 2006), Appendix A; CP at 47.

\* Upon timely request, bargain in good faith to agreement or impasse.<sup>2</sup>

The authority of institutions to exempt employees from coverage under RCW Ch. 41.06 by operation of RCW 41.06.070(2) is limited by collective bargaining obligations imposed by RCW Ch. 41.80, if an exemption is accompanied by a transfer of bargaining unit work.<sup>3</sup> In the case at hand, there is no dispute (1) that the Washington Federation of State Employees (WFSE) and Alanna Gehr (Gehr) were given notice of SPSCC's intention to exempt; (2) that the various reasons for the exemptions asserted by SPSCC were conveyed to the WFSE and Gehr; and (3) that the WFSE and Gehr believed that the basis for exemption asserted by SPSCC did not comply with the legitimate basis under RCW Ch. 41.06. Hence, they appealed on the merits.

The parties in this case had two options: bargain in good faith to agreement or to impasse. Here, they did bargain in good faith but did not bargain to an agreement. They bargained in good faith to an impasse. The

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<sup>2</sup> *University of Wash.*, Decision 9410 at p. 1 (PSRA, 2006), Appendix A; CP at 53; *City of Anacortes*, Decision 6863-A (PECB, 2000); see also *Skagit County*, Decision 6348-A (PECB, 1998.)

<sup>3</sup> *University of Wash.*, Decision 9410 at p. 1 (PSRA, 2006), Appendix A; CP at 53.

statutory remedy provided to the parties if an impasse is reached on an exemption is RCW 41.06.170(3), which provides for an appeal by an employee individually, or through their authorized representative to the Washington Personnel Resources Board (PRB). In the case at hand, the PRB illegally refused to exercise its given statutory authority, thus precluding any review of the merits of the exemption. Because there is no statutory review of the PRB action, the only remedy available to the WFSE and Gehr was a Petition for Common Law Writ of Certiorari. Judge Richard Hicks improperly denied said Petition on grounds that PERC was a proper avenue for the WFSE to pursue an appeal of the merits of a proposed exemption.

***2. The decision of the PRB was both arbitrary and capricious and illegal, because the WFSE clearly has representational legal standing to challenge the exemption of an unoccupied position within one of its represented bargaining units.***

In the case at hand, it is uncontested that the decision by SPSCC to exempt the position at issue was made while the position was vacant. According to Respondent, if SPSCC chooses to exempt a position while it is vacant, then there is no ability for the WFSE or any individual to challenge the merits of the proposed exemption because there is no "employee." This position may have been adopted by the PRB, and may

have been adopted by Judge Hicks as well. If it was, then this position is clearly arbitrary and capricious and contrary to law.

RCW 41.06.170(3) provides:

(3) Any employee whose position has been exempted after July 1, 1993, shall have the right to appeal, **either individually or through his or her authorized representative**, not later than thirty days after the effective date of such action to the personnel appeals board through June 30, 2005, and to the Washington personnel resources board after June 30, 2005.

(Emphasis added.) The statute is clear and unequivocal that an employee or his or her authorized representative may bring an appeal under RCW 41.06.170. Here there was no employee. The position put forth by the Respondent, that because there was no employee the WFSE does not have standing, is without merit.

The basic test for standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."<sup>4</sup> The Washington State Supreme Court has criticized "unrealistically strict" considerations of standing, and it has noted that Washington is increasingly taking a broader, less restrictive view.<sup>5</sup>

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<sup>4</sup> *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 493, 585 P.2d 71 (1978) (quoting *Association of Data Processing Serv. Org'n, Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)).

<sup>5</sup> *Seattle Sch.*, 90 Wn.2d at 493.

Respondent contends that the WFSE lacks standing because there was no employee incumbent in the exempted position at the time of its exemption. However, it is clear that state law anticipates and favors the concept of a labor union's representational standing in a multitude of scenarios, much like the present case.

The exclusive bargaining representative has a vested interest in its bargaining unit members, its bargaining unit positions and the integrity thereof. RCW 41.06.070(2) allows certain positions to be exempted under state civil service law. If an agency chooses to exempt a position, then the merits of said exemption may be appealed by the employee or his or her authorized representative. In the case at hand, Gehr is an employee of SPSCC, is an active union member, and has an interest in the exempted position remaining within the designated bargaining unit. As such, Gehr, through the empty position's exclusive bargaining representative, filed an appeal to challenge the merits of the exemption. Even if Gehr was not a named party, the WFSE would have standing to challenge the merits behind the exemption on behalf of a future unnamed employee. The PRB's and Judge Hicks' decision regarding representational standing of the WFSE in this matter is clearly arbitrary and capricious.

**B. Conclusion**

Contrary to arguments made by Respondent, PERC is not an alternative process for the WFSE to challenge the merits of an exemption brought under RCW 41.06.070. The only process whereby the merits may be challenged is via the PRB. In this case, the PRB failed and refused to exercise its statutory authority. This constitutes an illegal act, thus justifying issuance of a Common Law Writ of Certiorari.

In addition, the denial of the WFSE and/or Gehr's ability to challenge the merits of the exemption in a representational or direct capacity also constitutes a clear error of law.

Judge Hicks improperly denied issuance of said Writ. Based on the above argument and law, Appellants respectfully request that their appeal be granted, and that this matter be remanded to Thurston County Superior Court Judge Richard Hicks for issuance of a Common Law Writ of Certiorari.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of March, 2009.

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

  
\_\_\_\_\_  
Christopher J. Coker  
WSBA#28229  
Attorney for Appellants

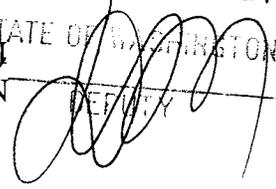
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AFFIDAVIT OF SERVICE

vs. )

SOUTH PUGET SOUND )  
COMMUNITY COLLEGE, )  
Respondent. )

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF THURSTON )

The undersigned, being first duly sworn on oath, now deposes and states:

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 March 11, 2009, I caused to be hand delivered via ABC Legal Services, Inc., a true and correct copy of the Reply Brief of Appellants upon the following individuals:

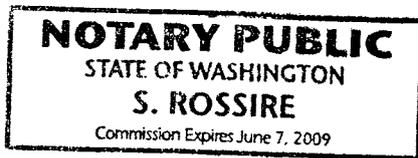
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Mr. Franklin J. Plaistowe  
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7141 Cleanwater Drive SW  
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DATED this 11<sup>th</sup> day of March, 2009, at Olympia,  
Washington.

Angelique Dowell  
Angelique Dowell, Paralegal for  
YOUNGLOVE & COKER, P.L.L.C.

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of  
March, 2009, by Angelique Dowell.



Rossire  
Notary Public in and for the State of  
Washington, residing at Olympia  
My commission expires June 7, 2009