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COURT OF APPEALS
DIVISION II

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NO. 38222-9-II

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

ALANNA GEHR AND WASHINGTON FEDERATION OF STATE
EMPLOYEES,

Appellants,

v.

SOUTH PUGET SOUND COMMUNITY COLLEGE,

Respondent.

**BRIEF OF RESPONDENT SOUTH PUGET SOUND COMMUNITY
COLLEGE**

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R.M. 2-9-2009

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I. INTRODUCTION

Appellants, Alanna Gehr and the Washington Federation of State Employees (WFSE), seek reversal of the trial court's discretionary ruling denying their Petition for Common Law Writ of Certiorari. Appellants filed their Petition seeking to overturn a decision of the Personnel Resources Board (PRB) dismissing their appeal of South Puget Sound Community College's (SPSCC) decision to exempt a position from state civil service. Because neither Ms. Gehr, a union shop steward, nor the WFSE had standing under the applicable statute and WAC to appeal the initial decision to the PRB, Appellants cannot satisfy the criteria for obtaining a common law writ of certiorari. The trial court's denial of Appellants' petition was well-reasoned and based on tenable grounds. Additionally, WFSE had the opportunity to file a complaint with the Public Employment Relation Commission (PERC) to address concerns related to the college's decision to exempt the position. Therefore, this Court should not disturb the trial court's decision.

II. COUNTERSTATEMENT OF ISSUE

Did the trial court abuse its discretion when it denied Appellants' request for a common law writ of certiorari, declining to disturb the PRB's interpretation of RCW 41.06.170(3) and WAC 357-52-010(1)(d), which

only permits an employee in the position exempted from civil service under RCW 41.06.070(2) to file any appeal?

III. COUNTERSTATEMENT OF FACTS

A. Factual Background.

This appeal stems from SPSCC's decision to exempt an administrative office assistant position in the College Foundation Office from the state classified civil service. RCW 41.06.070 identifies state positions that are exempt from the civil service requirements. *See* RCW 41.06.040(2). In a letter dated September 28, 2006, SPSCC informed the WFSE, the union representing classified state employees at SPSCC, that it was considering exempting the administrative office assistant position in the College Foundation Office pursuant to RCW 41.06.070(2). Clerk's Papers (CP) at 19. In the letter, SPSCC offered to meet with WFSE to discuss the impact this decision would have on the bargaining unit of employees that WFSE represents. CP at 19. After a meeting with WFSE on October 27, 2006, SPSCC sent a letter on November 14, 2006, reiterating its intention to exempt the administrative office assistant position, but again extended WFSE an opportunity to meet and discuss the impact the exemption would have on the bargaining unit. CP at 21-22. SPSCC sent a letter to WFSE on January 8, 2007, summarizing the previous meetings and discussions related to the exemption of the

administrative office assistant position and offered to meet again with WFSE to discuss possible issues related to exempting the position. CP at 24-25.

Unable to resolve the disagreement over whether or not the position was exempt under RCW 41.06.070(2), SPSCC ultimately designated the position as exempt on April 19, 2007. CP at 5.

B. Procedural Background.

After receiving notification of SPSCC's decision to exempt the administrative office assistant position in the College Foundation Office, Appellants filed an appeal with the PRB contesting SPSCC's decision to exempt the position under RCW 41.06.070(2). CP at 7. At the outset of the hearing, SPSCC moved for dismissal arguing that this matter was not properly before the PRB since both RCW 41.06.170(3) and WAC 357-52-010 require "an employee whose position has been exempted" to file an appeal with the PRB. Neither party to this appeal was an employee in the position exempted. *See* CP at 15. The PRB took the motion under advisement and conducted a hearing on the merits.

After receiving briefing and deliberating on this matter, the PRB dismissed Appellants' appeal holding that "[d]isputes regarding bargaining units are outside of this Board's jurisdiction." CP at 16.

Appellants filed a Petition for Common Law Writ of Certiorari and Review of Administrative Decision in Thurston County Superior Court. CP at 3-10. SPSCC filed a Motion to Dismiss the Writ of Certiorari. CP at 56-65. After a hearing on the motion to dismiss, Judge Richard Hicks granted SPSCC's motion, denying the Petition for Common Law Writ of Certiorari. CP at 79-81; Verbatim Report of Proceedings (VRP) at 12.

In granting SPSCC's motion, the trial court held that the PRB's decision was not arbitrary and capricious or illegal. VRP at 12. The court held that RCW 41.06.170(3) contemplates that an employee who has had his or her position exempted from civil service may file an appeal to the PRB. VRP at 12. However, here dismissal was appropriate since Ms. Gehr was not an employee or even an applicant to the position in question. VRP at 12. The court stated: "I don't see anything that's whimsical or arbitrary or capricious. Reasonable minds could differ about this." VRP at 12 ll. 18-20. Additionally, the court held that the PRB's decision was not illegal. VRP at 12 ll. 17-18. As part of its holding, the court observed that a possible avenue for the Appellants here was to seek review by PERC. VRP at 11-12.

Appellants filed this appeal alleging that the Superior Court's dismissal of its Writ of Certiorari was an abuse of discretion.

IV. SUMMARY OF ARGUMENT

The underlying issue is SPSCC's decision to exempt a position from state civil service. RCW 41.06.070(2) specifies positions in institutions of higher education which are exempted from coverage of civil service rules. An employee in a position exempted under RCW 41.06.070(2) is entitled to appeal a college's decision to the PRB. The plain language of RCW 41.06.170(3) and WAC 357-52-010(1)(d), which grants the right to review a college's decision to exempt a position, specifies that only an employee in the position exempted may appeal the decision. Ms. Gehr and WFSE filed an appeal contesting SPSCC's decision. However, because Ms. Gehr was not an employee in the position or even an applicant to the position exempted, the PRB correctly dismissed the appeal.

The trial court did not abuse its discretion by declining to grant Appellants' Petition for Common Law Writ of Certiorari. The trial court correctly concluded that the PRB had not acted illegally. In order to show that the PRB acted illegally, Appellants must show that the PRB acted outside of its authority when it dismissed the appeal. Here, the PRB did not act outside its authority when it held that the plain language of the statute did not confer the right to appeal on the Appellants.

The trial court properly gave deference to the PRB, which is tasked with interpreting the state's personnel rules. The PRB here correctly held that the plain language of RCW 41.06.170(3) and WAC 357-52-010(1)(d) only permits an employee whose position has been exempted to appeal SPSCC's decision. The trial court correctly declined to disturb the PRB's reasoned decision to remain within the confines of the plain language of the statute and rule. Nothing in the record below warrants disturbing the PRB's reasonable interpretation of RCW 41.06.170(3) and WAC 357-52-010(1)(d). Additionally, the trial court correctly concluded that PERC was an appropriate avenue for WFSE to address any concerns it had over the composition of the bargaining unit.

V. ARGUMENT

A. Standard Of Review.

A common law writ of certiorari is a discretionary decision which rests with the trial court. *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986). The standard of review for a trial court's denial of a constitutional writ of certiorari is abuse of discretion. *Klickitat Cy. v. Beck*, 104 Wn. App. 453, 458, 16 P.3d 692 (2001). A discretionary decision of the trial court will not be disturbed absent a clear showing of abuse of discretion which is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 27, 482 P.2d 775 (1971); *Bridle Trails*, 45 Wn. App. at 251-52 (noting that a superior court may exercise its inherent power of review as long as tenable reasons are given to support the discretionary ruling).

The constitutional writ of certiorari, embodied in art. IV, § 6 (amend. 87) of the Washington Constitution is available in specific circumstances. See *Bridle Trails*, 45 Wn. App. at 253; *Saldin Sec., Inc. v. Snohomish Cy.*, 134 Wn.2d 288, 294-95, 949 P.2d 370 (1998) (a court may grant a constitutional writ if no other avenue of appeal, such as a statutory writ, is available). Under art. IV, § 6 (amend. 87), a superior court possesses the power to review arbitrary decisions by issuing constitutional writs of certiorari. See *Saldin*, 134 Wn.2d at 292. The purpose of such a writ is “to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority.” *Id.* (citing *Bridle Trails*, 45 Wn. App. at 252-53). Thus, a court will accept review only if the petitioner can allege facts that, if verified, establish the lower tribunal's decision was arbitrary and capricious or illegal. See *Saldin*, 134 Wn.2d at 294; *Pierce v. King Cy.*, 62 Wn.2d 324, 333, 382 P.2d 628 (1963).

The trial court exercises substantial discretion in determining whether to exercise certiorari under its inherent power of review. *Clark*

Cy. Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 846, 991 P.2d 1161 (2000); *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 242 n.1, 821 P.2d 1204 (1992) ("the grant of a common law writ of review is entirely discretionary and cannot be mandated by anyone, including an appellate court."). "The superior court may in its discretion refuse to exercise its inherent powers of review so long as tenable reasons are given to support that discretionary ruling." *Bridle Trails*, 45 Wn. App. at 252.

B. The Trial Court Did Not Abuse Its Discretion When It Held That The PRB's Dismissal Of Appellants' Appeal Was Not Illegal Since The PRB Acted Within Its Constitutional, Statutory, And Regulatory Authority.

Review of whether or not an act was illegal is limited to an "an examination of whether the agency has acted within its authority as defined by the constitution, statutes, and regulations." *King Cy. v. Bd. of Tax Appeals*, 28 Wn. App. 230, 242-43, 622 P.2d 898 (1981). The standard to act within an agency's authority also includes an agency's violation of the rules governing its discretion. "[T]he illegal act requirement does not empower a court under its constitutional review power to review alleged errors of law committed by an administrative agency." *King Cy.*, 28 Wn. App. at 242-43. An allegation of an error of law does not equate an allegation of an illegal act prompting a common

law writ. *Id.* The PRB did not exceed its authority in concluding that it did not have jurisdiction to hear Appellants' appeal.

The PRB's action here was not illegal. The PRB acted within its statutory and regulatory authority by dismissing the appeal since the appeal was not filed by an employee in the exempted position. The Legislature specifically granted the PRB the authority to review a decision to exempt a position under RCW 41.06.070. RCW 41.06.170(3) provides that:

[a]ny 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)

Likewise, WAC 357-52-010 states that within Washington general services, “[a]n **employee whose position has been exempted** from chapter 41.06 RCW may appeal the exemption to the board.” WAC 357-52-010(1)(d) (emphasis added). “When statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. . . . [The] Court is obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh.” *Chelan Cy. v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002).

The plain language of both the statute and the applicable board rule specify that only an employee whose position has been exempted may appeal SPSCC's decision to exempt the position. The statute granting the PRB's authority, and its related rule, unequivocally contemplate that the employee, is able to appeal the decision to exempt the position. Here, Ms. Gehr was neither the incumbent in nor an applicant for the exempted position. CP at 4-5, 15. Accordingly, given the plain language of the statutes and related rules, the PRB correctly declined to act outside of its statutory authority and consider a dispute not involving an employee in an exempt position. There is no evidence that the PRB acted outside of its statutory and regulatory authority by following the plain language of RCW 41.06.170(3) and WAC 357-52-010(1)(d) which specifies that only an employee may appeal a decision to exempt a position under RCW 41.06.070. If the PRB had gone forward with hearing this matter despite the absence of an employee appealing, the PRB would have acted outside of its statutory authority under RCW 41.06.170(3) and WAC 357-52-010 and therefore conducted an illegal act.

Courts give state civil service boards, such as the PRB, great deference in their interpretation and application of the unique provisions of the civil service law which they are charged with administering. *See, e.g., Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Personnel Bd.,*

95 Wn.2d 108, 117-18, 622 P.2d 826 (1981); *Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 561 P.2d 195 (1977); *Gogerty v. Dep't of Inst.*, 71 Wn.2d 1, 426 P.2d 476 (1967) (cautioning the court to not place themselves into the role of super personnel boards). Here, the PRB interpreted the plain language of civil service rules as only allowing an appeal from an employee in a position exempted; it declined to read past the plain language of the applicable statute and rule. The trial court's decision to not disturb this interpretation is not manifestly unreasonable or based on untenable grounds. Instead, it is an exercise of appropriate deference to the entity charged with interpreting the civil service rules.

Following the plain language of RCW 41.06.170(3) and WAC 357-52-010(1)(d), is not an illegal act. Moreover, the trial court's upholding of this proper interpretation is not an abuse of discretion. Appellants attempt to challenge the underlying facts of SPSCC's decision to exempt the assistant to the foundation director position but they fail to meet the threshold issue of how the issue is illegal. In light of the very limited review for abuse of discretion, the trial court's reasoned decision that the PRB's correct interpretation of the plain language of its statutory authority was not illegal should not be disturbed.

C. Review Under A Statutory Writ Is Improper Since It Was Not Raised Before The Trial Court.

In their section discussing the “standard for issuance of a common law certiorari,” Appellants cite to RCW 7.16.040 as the jurisdictional basis for issuance of a writ of review. Brief of Appellants Alanna Gehr and Washington Federation of State Employees at 6-7. RCW 7.16.040 addresses the standard for a statutory writ of review. *See Clark Cy.*, 139 Wn.2d at 845. Appellants did not cite to or contend that the trial court should grant a statutory writ of review in their Petition to the trial court. *See CP* at 5 ll. 12-19. Instead in their Petition to the trial court, Appellants only argued that the PRB decision should be reviewed pursuant to a common law writ of certiorari. Since Appellants did not seek review by the trial court under a statutory writ of review, it is not proper for the Appellants to now argue that this Court should grant review under a statutory writ of review.

D. The Trial Court Correctly Held That The WFSE Had An Opportunity To Seek Review Of The Bargaining Process Between The Parties Through PERC Because PERC Is Responsible To Ensure That SPSCC Meets Its Bargaining Obligations.

As a preliminary matter, the trial court’s observation that the WFSE could seek review from PERC is not germane to the issue over whether or not the PRB’s decision is illegal. As discussed above, the trial

court correctly held that the PRB's decision was not illegal. Regardless, the trial court correctly concluded that WFSE could have addressed the decision to exempt this position through PERC. An employee in a position exempted is able to file an appeal with the PRB contesting an employer's decision to exempt a position under RCW 41.06.070; however, a union retains the ability to file an action with PERC regarding the transfer of bargaining unit work to persons outside of an existing bargaining unit.

PERC issued a declaratory order addressing a situation substantially similar to the circumstances here. There, the union sought a declaratory ruling on "[w]hether the [employer] has the prerogative to alter the bargaining units under [the Commission's] jurisdiction by application of the RCW 41.06.070 exemptions." *Univ. of Wash.*, Decision 9410 at 1 (PSRA, 2006), Appendix A; CP at 47-53. PERC held that while an employer is free to exempt positions from civil service under RCW 41.06.070, the employer is not able to unilaterally modify bargaining units, since the Legislature delegated the determination and modification of bargaining units under RCW 41.80 to PERC. *Univ. of Wash.*, Decision 9410 at 6.

As part of the process to exempt a position under RCW 41.06.070, "[t]he employer must satisfy its bargaining obligations under Chapter

41.80 RCW before making a final decision to remove work from an existing bargaining unit.” *Univ. of Wash.*, Decision 9410 at 6-7. If an employer fails to effectively bargain with the union regarding the exemption under RCW 41.06.070, the union is able to file an unfair labor practice with PERC. *See Univ. of Wash.*, Decision 9410. An unfair labor practice for an employer includes refusal to bargain collectively with the representatives of its employees.¹

Here, SPSCC, which is an employer covered by RCW 41.80, and WFSE engaged in discussions regarding exempting the assistant to the foundation director position under RCW 41.06.070. CP at 19-25. In its letters on September 28, 2006, November 14, 2006, and January 8, 2007, SPSCC offered to meet with WFSE to discuss the impact SPSCC’s decision to exempt the position would have on the bargaining unit that WFSE represents. *See CP* at 19-25. As the trial court correctly observed, if WFSE remained dissatisfied with the efforts by SPSCC to resolve this issue, WFSE was free to file an action with PERC. VRP at 12.

The PRB concluded that “[d]isputes regarding bargaining units are outside of this Board’s jurisdiction.” CP at 16. Instead, as discussed above, the proper forum for disputes between the employer and unions over the composition of bargaining units is before PERC. Accordingly,

¹ RCW 41.80.120 specifies that an unfair labor practice must be filed within six months of the conduct giving rise to the alleged unfair labor practice.

based on the plain language of the PRB statute and rule, the PRB properly declined to extend jurisdiction on this appeal. WFSE was not left without an avenue to protect its interests in this matter. The appropriate recourse for WFSE was PERC, not the PRB.

VI. CONCLUSION

The trial court did not abuse its discretion when it declined to issue the common law writ of certiorari. The PRB's decision was not illegal since the PRB did not act outside its authority when it declined to extend the right to appeal to a party other than an employee who' in the position exempted. The trial court had a reasonable basis to conclude that the PRB correctly applied the plain language of RCW 41.06.170(3) and WAC 357-52-010(1)(d) which required an employee in the position to appeal SPSCC's decision to exempt the position. Following the plain language of the applicable statute and WAC is not illegal. Additionally, the PRB appropriately declined to extend the right to appeal to other parties other than the employee in the position exempted. The evidence does not support a finding that the trial court abused its discretion when it refrained from disturbing the PRB's dismissal of Appellants' appeal. Finally, the trial court correctly held that PERC was an appropriate avenue for WFSE to seek review of whether or not the parties had met their obligations to

bargain over this matter. Accordingly, this Court should deny the Appellants' appeal.

RESPECTFULLY SUBMITTED this 9th day of February, 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Franklin Plaistowe", written over the printed name.

FRANKLIN PLAISTOWE
WSBA No. 34228
Assistant Attorney General

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

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

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

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

ISSUE PRESENTED

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

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

APPLICABLE LEGAL PRINCIPLES

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

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

Early History of Civil Service in Washington

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

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

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

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

Early History of Collective Bargaining Laws

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

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

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

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

Collective Bargaining Consolidation and Precedents

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

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

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

- * Employee "wages, hours, and other terms and conditions of employment" are mandatory subjects over which the parties must bargain in good faith. It is an unfair labor practice for either an employer or an exclusive bargaining representative to refuse to bargain a mandatory subject.
- * Management and union prerogatives, along with procedures for bargaining mandatory subjects, are permissive subjects over which the parties may negotiate, but are not obliged to do so. As to permissive subjects, each party is free to bargain or not

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

- * Matters that parties may not agree upon because of statutory or constitutional prohibitions are illegal subjects of bargaining. Neither party has an obligation to bargain such matters. City of Seattle, Decision 4687-B (PECB, 1997), aff'd 93 Wn. App. 235 (1998), review denied, 137 Wn.2d 1035 (1999).

In deciding whether a particular issue is a mandatory subject of bargaining, this Commission considers two factors: (1) the extent to which managerial action impacts upon the wages, hours, and working conditions of employees; and (2) the extent to which a managerial action is deemed to be an essential management prerogative. International Association of Fire Fighters, Local 1052 v. PERC, 113 Wn.2d 197, 200 (1989) (City of Richland). The Supreme Court held in City of Richland that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives,' are classified as non-mandatory subjects." City of Richland, 113 Wn.2d at 200.

Whether a subject must be bargained becomes a question of law and fact for the Commission to determine on a case-by-case basis. City of Richland, 113 Wn.2d at 203; WAC 391-45-550. The National Labor Relations Board (NLRB) and various state labor relations boards generally accept that the level of services to be offered by an employer is a management prerogative and, as such, a permissive subject of bargaining. See Federal Way School District, Decision 232-A. This Commission recognizes that public employers have the right to "entrepreneurial" control over nonmandatory subjects of bargaining. Snohomish County Fire District 1, Decision 6008-A (1998), Wenatchee School District, Decision 3240-A (PECB, 1990). Even then, an employer exercising its right to make a decision on a matter will have a duty to bargain with the union representing its employees on the effects of the decision on the employees. See Grays Harbor County, Decision 8043-A (PECB, 2004).

In *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), the United States Supreme Court held that the decision to contract out work previously performed by members of an established bargaining unit that results in the termination of bargaining unit employees is a mandatory subject of bargaining. In *South Kitsap School District*, Decision 482 (PECB, 1978), this Commission held that any decision to transfer or "skim" bargaining unit work was also a mandatory subject of bargaining. Exclusive bargaining representatives have a legitimate interest in preserving work that their bargaining units historically perform, at least where an employer has not cut back services and personnel. *South Kitsap School District*, Decision 482.(9) Thus, both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees may be mandatory subjects of bargaining. See *City of Kelso*, Decision 2120-A (PECB, 1985); *Peninsula School District v. Public School Employees*, 130 Wn.2d 401, 407 (1996).

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

outside of the bargaining unit.

The PSRA Changes

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

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

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

Exemptions from Civil Service Rights

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

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

(2) The following classifications, positions, and employees of institutions of higher education and related boards are hereby exempted from coverage of this chapter:

(a) Members of the governing board of each institution of higher education and related boards, all presidents,

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

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

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

ANALYSIS

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

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

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

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

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

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

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

DECLARATORY ORDER

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

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

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NO. 38222-9-II

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

ALANNA GEHR AND WASHINGTON
FEDERATION OF STATE
EMPLOYEES,

Appellants,

v.

SOUTH PUGET SOUND COMMUNITY
COLLEGE,

Respondent.

**CERTIFICATE OF
SERVICE**

I certify that I served a copy of the Brief of Respondent, filed by the State of Washington, South Puget Sound Community College on all parties or their counsel of record on February 9, 2009, as follows:

- US Mail
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

TO:
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of February, 2009 at Olympia, WA.

[Signature]
STACY L. MASSEY