COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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Court of Appeals Case No. 42435-5
Thurston County Superior Court Case No. 10-2-00030-2

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a COMMUNITY TRANSIT,

Petitioner/Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYEMENT RELATIONS COMMISSION and AMALGAMATED TRANSIT UNION, LOCAL 1576,

Respondents/Appellees.

BRIEF OF RESPONDENT AMALGAMATED TRANSIT UNION, LOCAL 1576

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ORIGINAL

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I. INTRODUCTION

The Legislature has vested in the Public Employee Relations Commission ("PERC" or "Commission") the primary responsibility for implementing the Public Employees' Collective Bargaining Act ("PECBA"), RCW 41.56. In the lawful exercise of its administrative authority, PERC held in this case that it had erred by previously adopting a line of decisions under the federal National Labor Relations Act ("NLRA") exempting grievance-arbitration clauses from the general rule that the terms of a collective bargaining agreement ("CBA") remain in force following the expiration of the contract. The Commission correctly recognized that the *raison d'etre* of the federal exception for grievance-arbitration clauses is that their nullification frees private-sector employees to exercise their previously surrendered right to strike. Because public sector employees in Washington are prohibited from striking, the Commission reasonably determined that grievance-arbitration clauses should be treated like every other negotiated term and condition of employment, and that enforcement of such clauses survives the expiration of the CBA, unless the parties have specifically provided otherwise.

PERC gave its decision in this case prospective application only, and therefore upheld the dismissal of respondent Amalgamated Transit Union ("ATU") Local 1576's unfair labor practice ("ULP") complaint

against appellant Community Transit ("CT"). Despite prevailing before PERC, CT now asks this Court to substitute its judgment about how the public employee collective bargaining process should operate for that of the administrative agency charged with implementing the Legislature's statutory scheme. As the Superior Court correctly held, CT's petition for review should be dismissed for want of standing. If this Court nevertheless reaches the merits, it should defer to the well-reasoned decision of the Commission majority regarding a matter within its special expertise and find that CT's assertions of error are without merit.

II. STATEMENT OF THE CASE

The facts pertaining to this matter are largely undisputed and are set forth in ATU 1576's Amended Complaint (Dec. 9, 2008):[1]

> Complainant Amalgamated Transit Union Local 1576 (the Union") is a party to a collective bargaining agreement ("CBA") with Respondent Community Transit ("CT"). The CBA expired on December 31, 2007. The parties have been engaging in bargaining, and have met with a mediator.
>
> On June 26, 2008, CT provided notice to the Union that it would not agree to submit to arbitration grievances which have arisen since the contract expired, in reliance upon *Maple Valley v Fire Fighters Local 3062 v King County Fire Protection District No. 43*, 135 Wn. App. 749, 145 P.3d 1247 (2006). The Union asserts that CT is obligated to continue to process all grievances to arbitration

[1] The Union's original Complaint was filed on November 10, 2008. It was reviewed under WAC 391-45-110, and a deficiency notice was issued. The Union timely filed an Amended Complaint on December 9.

> notwithstanding the expiration of the contract, in reliance upon Asotin County Corrections Guild, No. 9549-A (PECB 2007).
>
> Since announcing that it will not process grievances to arbitration, CT has failed to process some grievances, notwithstanding that the grievance arose prior to the expiration of the CBA, and has refused to process other grievances that arose subsequent to the expiration of the contract. For example, and without limitation, CT refused to process the following grievances to arbitration: the grievance of Mary Jennings, filed March 3, 2008, and for which arbitration was requested on July 2, 2008; and the grievance of Tim Lynch, filed July 9, 2008, and for which arbitration was requested on September 23, 2008. This failure to process grievances constitutes an unfair labor practice in violation of RCW 41.56.140 (1) and (4).

The Union's Complaint was dismissed by the PERC Unfair Labor Practice Manager pursuant to WAC 391-45-110 for failure to state a claim. *Amalgamated Transit Union Local 1576 v. Community Transit,* Decision 10267 (PECB 2009). The Unfair Labor Practice Manager based his decision primarily on *Maple Valley Professional Fire Fighters Local 3062, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC v. King County Fire Protection Dist. No. 43*, 135 Wn. App. 749, 759, 145 P.3d 1247 (2006) ("*Maple Valley Fire Fighters*"). In that case, the Washington court of appeals deferred to prior PERC decisions adopting the federal NLRA principle that grievance-arbitration clauses do not survive the expiration of the CBA. The Unfair Labor Practice Manager correctly recognized that PERC had subsequently expressed reservations about the administrative

decisions underlying the court's holding in *Maple Valley Fire Fighters*, but that the Commission had not issued a definitive ruling on the whether those precedents remained valid. The Unfair Labor Practice Manager noted that "[i]t is not possible at the preliminary ruling stage to revisit Commission or Court decisions." The Union filed a timely Notice of Appeal to PERC.

PERC issued its decision in this matter on December 10, 2009. *Amalgamated Transit Union Local 1576 v. Community Transit,* Decision 10267-A (PECB 2009). A majority of the Commission determined that the fundamental differences between the statutory scheme governing collective bargaining for Washington public employees subject to interest arbitration and the one applicable to private-sector employees under the NLRA—most particularly the inability of public employees to strike--rendered inapplicable the federal principle that grievance-arbitration clauses do not survive the expiration of the parties' CBA. PERC held that a grievance-arbitration clause must be maintained upon expiration of the CBA, like other terms and conditions of employment, unless the parties specifically agree to the contrary. The Commission ruled, however, that because CT had reasonably relied on PERC precedent, the agency would apply its decision only prospectively. It affirmed the dismissal of ATU

1576's ULP. One Commissioner, although actually concurring in the judgment, "dissented" from the decision to overrule agency precedent.

CT timely petitioned for review in Thurston County Superior Court on January 6, 2010. CP 7. The Superior Court held oral argument on January 21, 2011. On July 7, 2011, the Superior Court issued a written decision dismissing CT's appeal. The Superior Court entered final judgment against CT on August 12, 2011. CT timely appealed.

III. ARGUMENT

A. THE SUPERIOR COURT CORRECTLY RULED CT LACKED STANDING UNDER THE WAPA TO SEEK JUDICIAL REVIEW OF PERC'S DECISION.

Under the Washington Administrative Procedures Act ("WAPA"), RCW 34.05, a "court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d). The first condition for standing under the WAPA is proof of "injury in fact." *See Seattle Bldg. & Construction Trades Council v. Apprenticeship & Training Council,* 129 Wn.2d 787, 793-94, 920 P.2d 581 (1996); RCW 34.05.530(1). CT does not meet this basic requirement. CT prevailed before the PERC and the agency dismissed ATU's ULP. Nevertheless, it was CT that filed a petition for judicial review in the Superior Court.

After rightly concluding that the agency action at issue was an adjudication rather than rulemaking, the Superior Court dismissed CT's petition for review for lack of standing. CT mischaracterizes the Superior Court's opinion by asserting the court held that "PERC's action was not reviewable as an 'agency order in adjudicative proceedings' under RCW 34.05.570(3)." CT Opening Brief ("CT Br.") at 22. In fact, the Superior Court held "the decision of the Commission affirming the dismissal of the ULP action brought against CT is clearly an agency order subject to review under §.570(3)." CP 116. The Superior Court recognized the obvious fact that CT has no standing to challenge PERC's dismissal of ATU's ULP claim. The Superior Court then went on to hold that CT did not have standing to challenge the agency's declaration of Commission policy for future cases because that policy was not a separate and distinct agency action ripe for judicial review. *Id.* The Superior Court also determined that any prejudice to CT from PERC's declaration of future policy was "too remote to establish standing" under the WAPA. CP 117.

This Court should affirm the Superior Court's determination that CT lacks standing to challenge PERC's action in this case. While RCW 34.05.530(1) permits a party to claim that an agency action "is likely to prejudice" that person, CT did not invoke the "likely to prejudice" prong of the statute in its petition for judicial review. CT's petition claimed only

that PERC's action "substantially prejudices [it] by requiring it to submit grievances to arbitration at a cost to the taxpayers when those grievances were not previously required to be submitted to arbitration." Petition for Review at ¶ 6.2, CP 9. There no evidence in the record supporting this conclusory assertion. Because PERC gave its ruling prospective application only, CT will not have to submit any additional grievances to arbitration at the present time or in the foreseeable future that it would not have been obligated to submit even in the absence of PERC's ruling. There are *no* pending ATU 1576 grievances against CT that will be arbitrated as a result of the agency's decision in this case.

The only way PERC's ruling could possibly affect CT in the manner alleged in its petition for review is if some time in the future a workplace grievance arises *after* the expiration of some *subsequent* CBA between ATU 1576 and CT. In future, ATU 1576 and CT may well reach agreement on a new CBA before the previous one expires. Even if a subsequent CBA between ATU 1576 and CT were to lapse before a new agreement is reached, there may not be any grievances filed about events occurring between expiration of one contract and agreement on the next one. Far from being "substantial" or even "likely," any prejudice from PERC's adjudicative ruling with respect to CT's having to arbitrate additional grievances is purely speculative and remote.

Apparently recognizing that the sole injury set forth in its petition for judicial review is insufficient as a matter of law to confer standing under the WAPA, CT raises two new injuries for the first time on appeal. CT now claims that as a result of PERC's decision it "has lost the negotiating leverage of the union's knowledge that a failure to reach an agreement will mean a loss of the right to arbitrate grievances for some period of time." CT Br. at 40. The Court should reject this argument because (1) CT never raised this alleged injury in its petition for judicial review; (2) there is no evidence in the record supporting CT's new alleged "injury;" and (3) CT's asserted "negotiating leverage" injury is too insubstantial as a matter of law to constitute "injury in fact." CT has cited not a single case suggesting a party suffers a cognizable injury under the WAPA because an agency decision will cause an opposing party in a future contract negotiation to believe that it has greater bargaining power *vis-à-vis* the first party. CT's novel "negotiating leverage" injury is far removed from the "probable economic injury resulting from agency actions that alter competitive conditions" recognized as sufficient in *Seattle Bldg. & Construction Trades Council*, 129 Wn.2d at 795-97, and the authorities cited therein.

There is also no support in law for CT's contention that a party has standing to file a petition for judicial review simply because an agency

"has eliminated a legal standard" that the party had previously relied on. *See* CT Brief at 39. Adoption of CT's argument would render meaningless the WAPA's requirement of a "specific and perceptible harm." *Cf. Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994). CT's reasonable reliance on prior PERC precedent was a legitimate basis for the agency to apply its decision in this case prospectively only. Such reliance does not give CT standing to challenge a PERC adjudication in CT's favor.

CT also does not meet the third WAPA standing requirement: that a "judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action." RCW 34.05.530(3). Contrary to what CT claims on page 39 of its Brief, *National Electrical Contractors Ass'n v. Employment Security Dep't*, 109 Wn. App. 213, 221, 34 P.3d 860 (2001), does not suggest that this condition is automatically met whenever a party is seeking prospective relief. More is required for satisfaction of the third WAPA standing prong. CT has already received a "judgment in [its] favor" from PERC. CT's complaint is that the PERC majority rejected CT's legal analysis and adopted ATU 1576's for future cases. A court judgment affirming PERC's dismissal of ATU 1576's ULP would not "substantially eliminate" any prejudice to CT from PERC's original

agency action because PERC's agency action—a ruling in favor of CT and against ATU—has not caused CT any prejudice in the first place.

In sum, the Superior Court correctly determined that CT has not demonstrated "injury in fact" with respect to PERC's action in this case. This Court should affirm the dismissal of CT's petition for judicial review for lack of standing.[2]

B. STANDARD OF REVIEW.

An appellate court reviews agency action under the same WAPA standards as the Superior Court did. *E.g., Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003). The burden of demonstrating the invalidity of agency action is on the party asserting the impropriety. RCW 34.05.570(1)(a); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 587, 593, 90 P.3d 659 (2004). RCW 34.05.570(3) sets forth the exclusive grounds upon which a court may grant relief from an agency order in an adjudicatory proceeding. CT claims that PERC's decision in this case was (1) outside the Commission's authority; (2) procedurally unlawful; (3) legally erroneous; (4) inconsistent with a prior agency rule;

[2] If the agency action in this case were actually rulemaking, rather than an adjudication, then CT would have standing to challenge any deficiencies in that rulemaking process, as the Superior Court recognized. CP 115. But because, as demonstrated in section F below, and as the Superior Court correctly determined, PERC's action was not rulemaking, CT lacks standing to seek judicial review in this case.

and (5) arbitrary and capricious. CT Br. at 10-11. CT has not met its burden of proof with respect to any of these grounds.

C. THIS COURT MUST GIVE "GREAT WEIGHT" AND "DEFERENCE" TO PERC'S INTEPRETATION OF THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT.

The Washington Legislature has charged PERC with the administration and enforcement of the PECBA, RCW 41.56. *City of Pasco v. PERC*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). The PECBA governs the collective bargaining process for "uniformed" public sector employees such as the members of ATU 1576. The Legislature has directed the governor to appoint to PERC "persons knowledgeable in the area of labor relations in the state." RCW 41.58.010(2). PERC has expertise in Washington public sector labor relations, not the courts. *Maple Valley Fire Fighters*, 135 Wn. App. at 759. "Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment." *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987) (internal quotation omitted). For this reason, a court must give "great weight" and "deference" to PERC's resolution of textual ambiguities within PECBA. *City of Pasco*, 119 Wn.2d at 507-08; *Maple Valley Fire Fighters*, 135 Wn. App. at 759.

Moreover, "it is an appropriate function for administrative agencies to 'fill in the gaps' where necessary to the effectuation of a general statutory scheme. It is likewise appropriate for an administrative agency to 'fill in the gaps' via statutory construction—as long as the agency does not 'amend' the statute." *Mall, Inc.*, 108 Wn.2d at 378 (internal quotation omitted). A court should uphold an agency's interpretation of a statute it administers if the construction is plausible and not contrary to legislative intent. *Pitts v. DSHS*, 129 Wn. App. 513, 523, 119 P.3d 896 (2005).

This case involves a statutory gap. RCW 41.56 does not explicitly address whether a grievance-arbitration clause in a CBA for uniformed employees remains in effect following expiration of that agreement. Indeed, with respect to uniformed employees, RCW 41.56 does not speak to whether *any* of the terms of an expired CBA continue to be viable until the parties reach a new agreement. Nevertheless, the general rule under both federal and state labor law is that the terms and conditions of an expired CBA *do* remain in force until the parties reach a new agreement. As set forth *infra*, that general "rule" resulted from federal and state agency adjudications, not some formal agency rulemaking process.

Again through the agency adjudication process, the federal National Labor Relations Board ("NLRB") carved out an exception to this

general rule under the NLRA for private-sector employees with respect to grievance-arbitration clauses. Under federal law, grievance-arbitration clauses do not survive the expiration of the CBA like other contract terms do. The question before PERC in this case was whether the statutory provisions and policies underlying Washington collective bargaining law for uniformed public sector employees would be better served if grievance-arbitration clauses were enforceable following the expiration of the CBA, just like *every other* existing term and condition of employment. This is precisely the type of policy decision the Legislature has committed to the Commission and to which a court should defer.

D. PERC REASONABLY INTERPETED THE PECBA AS PROVIDING FOR THE POST-EXPIRATION ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENT GRIEVANCE-ARBITRATION CLAUSES.

1. Enforceable Grievance-Arbitration Clauses Go Hand-In-Hand with Limitations on a Union's Ability to Strike over Workplace Grievances.

Washington public sector labor law has many similarities to private-sector NLRA jurisprudence. Federal and state labor law both promote collective bargaining. Furthermore, "the grievance machinery under a collective bargaining agreement is at the very heart of" the employer-union relationship. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

In the collective bargaining context, grievance arbitration is the substitute for workplace strife. *Id.* at 578. The very purpose of grievance-arbitration procedures is to provide for the expeditious settlement of workplace disputes without resort to strikes, lockouts or other self-help measures. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249, 90 S. Ct. 1583, 26 L. Ed. 199 (1970). NLRA-covered employees have a federally protected right to strike. 29 U.S.C. §§ 158(d)(4), 163. The union's ability to resolve grievances through arbitration is the *quid pro quo* for its surrender of the ability to exercise its right to strike over workplace grievances. *Boys Markets*, 398 U.S. at 248.

The past half-century of labor law leaves no doubt that restrictions on a union's right to strike are inextricably linked to the maintenance of a grievance-arbitration system for the resolution of workplace disputes. In *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962), the U.S. Supreme Court held that a collectively bargained arbitration procedure necessarily implies a no-strike obligation on the part of the union, even where the CBA lacks a no-strike clause. The Court reasoned that arbitration is the substitute for economic warfare and allowing the union to exercise its statutory right to strike was antithetical to the duty to arbitrate. *Id.* at 105. "[T]he agreement to arbitrate and the duty not to

strike should be construed as having coterminous application." *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 382, 94 S. Ct. 629, 38 L. Ed. 2d 583 (1974).

For this very reason, under the NLRA, the union's duty not to strike survives the expiration of the CBA only to the extent that its correlative grievance-arbitration clause survives. *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB,* 501 U.S. 190, 200, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). If the union loses the ability to redress workplace grievances under an arbitration clause, the union regains the previously surrendered right to strike. Thus, a union's no-strike obligation and an arbitral mechanism for resolving workplace disputes go hand-in-hand.

2. Under Federal Law, Grievance-Arbitration Clauses are Excluded from the General Prohibition on Unilateral Changes after the Expiration of the Collective Bargaining Agreement Because Unions Regain Their Right to Strike upon the Expiration of those Clauses.

Under both federal and state labor law, an employer is prohibited during contract negotiations from making unilateral changes to the existing wages, hours, and other conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); *Asotin County Corrections Guild v. Asotin County*, Decision 9549 at *1-2 (PECB

2007). An employer who makes such unilateral changes violates the duty to bargain in good faith and commits a ULP. *Id.* Additionally, absent a waiver by the union, an employer may not make unilateral changes to the terms and conditions of employment following the expiration of an existing CBA without first bargaining to impasse. *Asotin County* at *2; *International Bhd. of Teamsters Local 763 v. City of Mukilteo*, Decision 9452-A (PECB 2008). The unilateral change prohibition doctrine does not, however, add to the substantive terms of the parties' prior contractual agreement. The terms the parties agreed to in their prior CBA simply continue as they were.

"[M]ost mandatory subjects of bargaining are within the *Katz* prohibition on unilateral changes." *Litton*, 501 U.S. at 199. Grievance-arbitration procedures are mandatory subjects of bargaining. *Litton*, 501 U.S. at 199; *Asotin County* at *1. Nevertheless, in 1970 the NLRB decided as a matter of federal labor policy that grievance-arbitration clauses should be excluded from the general prohibition on unilateral changes. *Hilton-Davis Chem. Co., Div. of Sterling Drug, Inc.,* 185 N.L.R.B. 421 (1970). The NLRB reasoned that an arbitration clause under the NLRA represents a decision by an employer and union "voluntarily and mutually to surrender the use of their respective economic weapons in favor of third party determination of unresolved issues." *Id.* at 242.

Under the NLRA, "[a]bsent mutual consent, the parties revert to the statutory scheme of 'free' collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to . . . forfeit its right to utilize its economic power if no agreement can be achieved." *Id.* The U.S. Supreme Court later adopted *Hilton-Davis Chem. Co.* under the principle of administrative deference, as the Board's decision was a "rational and consistent" interpretation of the NLRA. *See Litton*, 501 U.S. at 200.

3. As PERC Recognized, Washington Public Sector Collective Bargaining Law Significantly Differs from the NLRA, Particularly in that Public Sector Employees are Prohibited from Striking.

The NLRB explicitly grounded its decision to exempt arbitration clauses from the general rule prohibiting unilateral changes to mandatory subjects of bargaining following the expiration of the CBA upon the NLRA's statutory scheme of "free" collective bargaining. The statutory scheme and policy governing public sector employees in Washington are antithetical to the underpinnings of the NLRB's decision in *Hilton-Davis Chem. Co.,* and federal court precedents based on that decision. Public sector unions in Washington lack that most potent of economic weapons: the strike. *See* RCW 41.56.120 & 41.56.490. "[T]here exists a public policy in the state of Washington against strikes by uniformed personnel

as a means of settling their labor disputes." RCW 41.56.430; *accord* RCW 41.56.490. The public transit employees whom the Union represents are "uniformed employees" subject to this policy. RCW 41.56.492. Furthermore, public transit employees lack the right to strike when the parties reach an impasse in contract negotiations. The Legislature has enacted a statutory scheme that severely penalizes such strikes and provides the alternative mechanism of interest arbitration. *See Seattle Police Mgt. Ass'n v. Seattle*, Decision 1667 (PECB 1984).

In sharp contrast to the "free" collective bargaining scheme under the NLRA, collective bargaining for Washington public transit employees is highly regulated. "Collective bargaining" is specifically defined as "the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions. . . ." RCW 41.56.030(4). If no agreement is reached after 90 days, either party may invoke mediation to resolve the impasse. RCW 41.56.492(1). If, following mediation, the parties remain at impasse, either party may invoke the interest arbitration procedures of RCW 41.56.450. RCW 41.56.492(2). During the pendency of proceedings before the interest

arbitration panel, "existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other. . . ." RCW 41.56.470 (enacted in 1973). These restrictions on "free" collective bargaining under the PECBA have no analogues under the NLRA.

PERC adopted the NLRA's unilateral change prohibition in 1977. *Ridgefield Educ. Ass'n v. Ridgefield School Dist.*, Decision 102-A (PECB 1977). Ten years later, PERC incorporated into state law the NLRA exemption of grievance-arbitration clauses from the general prohibition on unilateral changes. *Teamsters Union, Local 313 v. Pierce County*, Decision 2693 (PECB 1987). In 2007 the Commission cast serious doubt on whether the NLRA rule that grievance-arbitration clauses do not survive the expiration of the CBA "represent[ed] the current and best policy of the [Commission]." *Asotin County Corrections Guild v. Asotin County*, Decision 9549 *3 (PECB 2007). The Commission correctly recognized the NLRA's exemption of grievance-arbitration clauses from the general principle that the terms of a CBA continue after its expiration "is predicated on the inherent ability of private sector employees to strike, a right that does not expressly exist for public sector employees in the State of Washington." *Id.* at * 4 (citing RCW 41.56.120). The *Asotin County* parties, however, withdrew their case before the Commission

rendered a final determination on whether PERC should continue to follow the federal exemption of grievance-arbitration clauses from the unilateral change prohibition.

Here, the Commission reached the question it left open in *Asotin County*. PERC determined that because uniformed public sector employees cannot lawfully strike, the Commission had erred in previously adopting the federal NLRA exemption of grievance-arbitration clauses from the unilateral change doctrine. The majority correctly reasoned that the reactivation of the union's statutory right to strike under the NLRA in the absence of a grievance-arbitration clause is what led the NLRB to carve out such clauses from the general prohibition on unilateral changes. Washington labor law policy regarding the right to strike in the public sector is the polar opposite of federal policy under the NLRA. Therefore, PERC determined it made no sense to apply an exception to the unilateral change rule predicated on the union's NLRA statutory right to strike to a state law collective bargaining regime that prohibits strikes.

The Commission determined that discarding the federal exemption of grievance-arbitration clauses from the unilateral change doctrine will facilitate PECBA's interest arbitration process for uniformed public sector employees. PERC decided that allowing the parties to alter previously existing conditions of employment--including a previously existing

grievance-arbitration clause--prior to the commencement of interest arbitration would be destructive of the interest arbitration process. The Commission reasoned the Legislature could not have intended uniformed public sector employees to resolve through interest arbitration differences with their employer over the future conditions of employment they are negotiating while depriving them of a previously negotiated mechanism for resolving differences over already existing conditions of employment. As PERC recognized, in the context of employees eligible for interest arbitration, the NLRA rule regarding the non-survival of grievance-arbitration clauses is nothing short of perverse.

4. Other Provisions of the PECBA Show The Legislature Intended That Grievance-Arbitration Clauses Would Survive The Expiration of The Collective Bargaining Agreements of Public-Sector Employees.

PERC's determination in this case is far more consistent with the language and overall structure of Washington public sector labor law than the precedents the Commission overruled. Several provisions of the PECBA demonstrate the Legislature intended for arbitration clauses to survive the expiration of the CBA. RCW 41.56.100 provides that where "a public employer implements its last and best offer where there is no contract settlement, allegations that either party is violating the terms of the implemented offer shall be subject to grievance arbitration procedures

if and as such procedures are set forth in the implemented offer, or, if not in the implemented offer, if and as such procedures are set forth in the parties' last contract." This provision shows that, in contrast to the NLRA, the Legislature intended the grievance-arbitration procedures in an expired public sector CBA to continue to apply unless the employer's implemented last and best offer provided for an alternative procedure. Moreover, with respect to *non-uniformed* employees, RCW 41.56.123 preserves the operation of the grievance-arbitration clause in an expired CBA for one year. *See Maple Valley Fire Fighters*, 135 Wn. App. at 759.

RCW 41.56.123 does not apply to public sector employees who are eligible for interest arbitration, but RCW 41.56.470 does. As noted above, section 470 provides that, during the pendency of proceedings before the interest arbitration panel, "existing wages, hours, and *other conditions of employment* shall not be changed by action of either party without the consent of the other. . . ." (emphasis supplied). Although, as discussed in section E.3 *infra*, PERC's decision in this case is not based on RCW 41.56.470 (which does not speak in any way to collective bargaining procedures *following the expiration of* a CBA), the Commission's decision is consistent with the language and policy of that provision.

The United States Supreme Court has expressly held that grievance-arbitration clauses are "conditions of employment." *Litton Fin.*

Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB, 501 U.S. 190, 199, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). CT has offered no persuasive justification why grievance-arbitration clauses should be "conditions of employment" under federal labor law but not "conditions of employment" under Washington labor law. CT incorrectly claims the definition of "collective bargaining" under RCW 41.56.030(4) proves that grievance-arbitration clauses are not "conditions of employment" CT Br. at 32. That definition treats "grievance procedures" as distinct from "personnel matters, including wages, hours and *working conditions*." *Id.* (emphasis supplied). RCW 41.56.030(4) cannot bear the weight CT seeks to place on it. "Working conditions" in the context of RCW 41.56.030(4) is a term of limited reach. It refers only to those conditions "which may be peculiar to an appropriate bargaining unit of [a] public employer." *City of Pasco v. PERC*, 119 Wn.2d 504, 509-10, 833 P.2d 381 (1992). By contrast, "conditions of employment" is a term of broad application with a well-understood meaning which, as the Commission properly recognized in this case, includes grievance-arbitration clauses.

CT asserts the Legislature did not intend that contractual arbitration clauses remain enforceable by and against uniformed employees following CBA expiration because the Legislature used the phrase "existing wages, hours and other conditions of employment" in

RCW 41.56.470 rather than "all of the terms and conditions of specified in the collective bargaining agreement," which appears in RCW 41.56.123. CT Br. at 31-32. While courts may presume that differences in statutory language imply differences in statutory meaning, *see Densley v. Dep't of Retirement Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007), this is only a presumption, not an invariable rule. Here, the two different statutory phrases have the similar meanings. The existing "conditions of employment" in a workplace by definition include "all of the terms and conditions specified" in an existing CBA. *See International Bhd. of Teamsters Local 763 v. City of Mukilteo*, Decision 9452-A at n.4 (PECB 2008) (noting the similarity between RCW 41.56.470 and RCW 41.56.123). If anything, the language the Legislature used in in 1973 when it enacted RCW 41.56.470 is *broader* than the language it used in 1989 when it enacted RCW 41.56.123. The difference in terminology between RCW 41.56.123 and RCW 41.56.470 does not suggest the Legislature intended grievance-arbitration clauses to survive CBA expiration for non-uniformed public sector employees but not for uniformed ones.

CT has failed to articulate a plausible reason why the Legislature would have preserved the enforceability of grievance-arbitration clauses for non-uniformed public employees following CBA expiration, but not

for ones who are eligible for interest arbitration. As PERC recognized, if anything, the statutory language and policy governing uniformed public sector employees even more strongly supports the continuation of grievance-arbitration clauses in expired CBA governing those employees. Relying on its expertise, PERC determined the Legislature's purposes in enacting PECBA will be better served by continuing the grievance-arbitration clause following contract expiration for all public sector employees. This Court should not disturb that conclusion.

E. PERC DID NOT ACT IN EXCESS OF ITS MANDATE, VIOLATE ANY STATUTORY PROVISIONS, OR "OVERRULE" ANY JUDICIAL PREECEDENTS.

1. PERC's Decision in this Case Relies on the Exact Same Statutory Authority as it used in 1977 to adopt the "Unilateral Change Prohibition."

CT asserts that PERC exceeded its statutory authority by establishing a decisional rule that the grievance-arbitration clause in an expired CBA continues to remain in effect unless the parties have specifically provided otherwise. CT Br. at 22. This is simply not so. PERC relied here on the exact same statutory authority it used to decide that the substantive terms of CBA remain in effect following its expiration. The Commission's decision in this case is simply a corollary or a supplement to the unilateral change prohibition doctrine that has existed under PERC law for almost 35 years.

CT claims that PERC "created a right that is not guaranteed by the statute." *Id.* at 25-26. As noted above, an agency charged with administering a statute may fill any gaps in the legislative scheme through statutory construction in the adjudicative process *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987). The Legislature granted PERC the authority to determine that conduct affecting rights guaranteed by the PECBA are unfair labor practices. *Local 2916 IAAF v.* PERC, 128 Wn.2d 375, 383, 907 P.2d 1204 (1995). No provision of the PECBA addresses whether any of the terms of an expired CBA continue to remain in effect with respect to uniformed employees. Despite this in 1977, PERC ruled through the adjudicative process that employers may not unilaterally change the substantive terms and conditions of an expired CBA without bargaining to impasse. *Ridgefield Educ. Ass'n v. Ridgefield School Dist.*, Decision 102-A (PECB 1977).

PERC created "a brand-new unfair labor practice" in 1977 when it adopted the unilateral change prohibition. In this case, PERC extended the decisional rule it adopted almost 35 years ago by abrogating the exception it had created in 1987 with respect to the continuation of previously negotiated grievance-arbitration clauses. If, as CT does not dispute, PERC had the authority under the PECBA to require employers to abide by the substantive terms of a CBA following its expiration, then

surely PERC has the authority under the PECBA to require employers to continue to abide by a grievance-arbitration clause within that same contract. This Court should reject CT's illogical argument to the contrary.

2. PERC Provided a "Reasoned Justification" for Departing from Its Own Precedents.

CT wrongly asserts that PERC's decision to depart from agency precedent violates RCW 34.05.570(3)(h). CT Br. at 11, 35. That WAPA provision applies only when there is a conflict between an agency adjudicative "order" and an agency "rule." As noted earlier, PERC's adjudicative precedents that adopted the NLRA grievance-arbitration clause exception to the unilateral change prohibition were not agency "rules" within the meaning of WAPA. Therefore, RCW 34.05.570(3)(h) has no application to this case.

An administrative agency may reconsider and overrule its own prior interpretation of a statute if it provides "a reasoned justification" for doing so. *W & M Properties of CT, Inc. v. NLRB*, 514 F.3d 1341, 1347 (D.C. Cir. 2008). As long as the agency changing course supplies a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored, the agency's departure from precedent is not arbitrary or capricious. *Id.* at 1347-48. PERC's decision here easily meets this test.

In *Asotin County*, the Commission correctly noted that the genesis for the assumption that the NLRA rule regarding the survival of arbitration clauses also applies under the PECBA was the un-appealed hearing examiner's decision in *Teamsters Union, Local 313 v. Pierce County*, Decision 2693 (PECB 1987). *Asotin County*, at *3. The hearing examiner's decision relied solely on federal precedent to exclude arbitration clauses from the operation of the unilateral change rule. *Id.* Subsequent PERC decisions (*OPEIU Local 11 v. Clark County,* Decision 3451 (PECB 1990) and *International Ass'n of Fire Fighters, Local 469 v. City of Yakima*, Decision 3880 (PECB 1991)) rotely followed *Pierce County* and federal precedent without "explor[ing] any of the policy arguments for or against the premise that arbitration agreements do not survive the expiration of the collective bargaining agreement." *Asotin County*, at *3. *Enumclaw Police Officers Ass'n v. City of Enumclaw*, Decision 4897 (PECB 1994), simply relies on *City of Yakima*, without further analysis.

Asotin County put employers and unions on notice in 2007 that the Commission was disposed to reconsidering these precedents. There and in the instant case PERC comprehensively considered for the first time whether the significant statutory differences between the NLRA and the PECBA militated against incorporating the NLRB's exemption of

grievance-arbitration clauses from the general prohibition on unilateral changes. A majority of the Commission has now held that the absence of a right to strike under the PECBA renders the NLRA exclusion inapplicable to uniformed public sector employees in Washington. CT baselessly asserts that this is not "a rational basis" for PERC to reconsider agency precedent. CT Br. at 35. While the interplay between the PECBA's prohibition on strikes and the enforceability of previously negotiated grievance-arbitration clause following contract expiration is a significant policy question over which reasonable minds might disagree, the Commission has supplied a reasoned justification for overturning its prior adjudicative precedents. Agency law requires nothing more.

CT erroneously argues the existence of the statutory interest arbitration process for uniformed public sector employees eliminates any justification for continuing the contractual grievance-arbitration mechanism following contract expiration. CT Br. at 35. While related, the interest arbitration process set forth in RCW 41.56 and the grievance-arbitration process established by a CBA are not one in the same. Interest arbitration is a method for resolving impasses *during* collective bargaining *negotiations*. Grievance arbitration is a method for resolving disputes under a *previously negotiated* contract. The fact that the Legislature gave uniformed employees an interest arbitration process for resolving impasses

in the course of negotiations over a *new* contract does not suggest the Legislature intended those employees to be without an arbitral remedy for disputes under a *prior* CBA whose substantive terms remain in effect.

Pasco Police Officers Ass'n v. City of Pasco, 132 Wn.2d 450, 467, 938 P.2d 827 (1997), shows the fundamental difference between administering the terms of a prior contract and bargaining over the terms of a future one. There the Supreme Court held that employer prerogatives during contract negotiations do not limit the union's right to challenge the "employer's unilateral action *under an existing contract*." *Id.* at 464 (emphasis in original). Here, the Commission in this case correctly recognized that interest arbitration cannot provide uniformed employees with a remedy for their employer's breach of its continuing obligations under an existing but expired CBA. PERC determined the most effective means of implementing the purposes of the PECBA is to allow for continued enforcement of the expired CBA's grievance-arbitration clause. PERC reasonably found that the potential alternatives available to a union are inadequate to protect the collective bargaining process.

3. PERC's Decision is Not Inconsistent with RCW 41.56.470 because they Address Two Different Time Points in the Collective Bargaining Process.

CT incorrectly contends that PERC's decision in this case conflicts with the clear language of RCW 41.56.470. CT Br. at 29-30. Contrary to

what CT suggests, PERC did not base its decision in this case upon its interpretation of the language of RCW 41.56.470. The reason that PERC did not base its decision on that statutory provision is that the Commission's decision in this case involves a different issue than RCW 41.56.470 addresses.

The unilateral change doctrine and PERC's decision in this case pertain to what terms and conditions of employment remain in effect upon the expiration of the CBA. RCW 41.56.470 concerns what terms and conditions of employment continue to remain in effect once interest arbitration proceedings have commenced. CT acknowledges that RCW 41.56.470 only applies "[d]uring the pendency of proceedings before the interest arbitration panel." As CT admits, there may be a gap of several years between the expiration of a prior CBA and the initiation of interest arbitration proceedings. CT Br. at 30. In this very case, the collective bargaining agreement between the parties expired four years before proceedings eventually commenced before the interest arbitration panel. The dispute at hand occurred well *before* those proceedings began.

There is no conflict between the Commission's decision here and RCW 41.56.470. The unilateral change prohibition and the agency's decision in this case concern one time-point in the collective bargaining process. RCW 41.56.470 comes into play only at a much later point in the

process. PERC's decision in this case no more conflicts with the text of RCW 41.56.470 than the unilateral change prohibition itself does.

4. There is No Impermissible Conflict between PERC's Decision in this Case and *Maple Valley Fire Fighters*.

CT also erroneously contends that PERC's decision conflicts with *Maple Valley Fire Fighters*. CT Br. 26-27. That appellate decision relied largely on existing PERC precedent. The court's opinion concludes thus: "In sum, we are unwilling to overrule established PERC precedent based on the Union's policy arguments. . . ." 135 Wn. App. at 760; *see also id.* at 759 ("the Union has not presented us with sufficient cause to overrule established PERC precedent on this issue."). *Maple Valley Fire Fighters* was at bottom a decision grounded in administrative deference to the expertise of PERC in formulating the procedures governing public sector employee collective bargaining in Washington.

As noted above, an administrative agency may reconsider and overrule its own prior interpretation of a statute if it provides "a reasoned justification" for doing so. The same standard applies even where an appellate court has upheld the initial interpretation. *W & M Properties*, 514 F.3d at 1347 (upholding the NLRB's repudiation of *FES (Div. of Thermo Power)*, 331 N.L.R.B. 9 (2000), *enforced,* 301 F.3d 83 (3d Cir. 2002)). Here, the Commission reexamined the precedents that *Maple*

Valley Fire Fighters had deferred to and decided they were analytically flawed. That is a sufficient basis for the agency's decision to change its course in this case. PERC's decision therefore does not impermissibly conflict with *Maple Valley Fire Fighters.*

Moreover, *Maple Valley Fire Fighters* involved the text of RCW 41.56.470 and not the scope of the unilateral change prohibition that is at issue in this case. *See* 135 Wn. App. at 754. The appellate tribunal framed the issue thus: "[T]he issue squarely before the court is whether *under RCW 41.56.470* a grievance arbitration procedure contained in an expired collective bargaining agreement remains in effect *during the pendency of interest arbitration proceedings* involving uniformed public employees." *Id.* at 753 (emphasis supplied). As discussed *supra*, RCW 41.56.470 and the unilateral change prohibition that PERC has adopted through the adjudicatory process pertain to different stages of the collective bargaining process.

If, however, the Court finds there is any tension between *Maple Valley Fire Fighters* and PERC's decision in this case, the Court should resolve it in favor of the agency. *Maple Valley Fire Fighters* appears to suggest that grievance-arbitration clauses are not "conditions of employment" within the meaning of the PECBA. 135 Wn. App. at 755, 759. *Maple Valley Fire Fighters* recognized that grievance-arbitration

clauses are "conditions of employment" under federal law. *Id.* at 755 n.13 (citing *Litton,* 501 U.S. at 199 and *United Elec. Radio & Mach. Workers of Am. v. NLRB,* 409 F.2d 150, 156 (D.C. Cir. 1969)). The *Maple Valley Fire Fighters* court did not provide any reason why grievance-arbitration clauses would be conditions of employment under federal labor law but not under RCW 41.56.470. Neither the text of the PECBA nor state labor law policy justifies such an inconsistency. Therefore, to the extent PERC's decision in this case holds that grievance-arbitration clauses are "conditions of employment" under the PECBA, in conformity with federal labor law, this Court should uphold the Commission's determination as a matter of administrative deference despite anything in *Maple Valley Fire Fighters* that may indicate to the contrary.

5. PERC's Decision Does Not Require the Parties to Continue with any Method to Settle Grievances They Did Not Previously Agree to.

CT erroneously claims the Commission's decision in this case undermines the "consensual" nature of collective bargaining for public sector employees subject to interest arbitration. CT Br. at 27, 31. Nor does the decision conflict with RCW 41.58.020(4) and WAC 391-65-610. *Id.* PERC's decision does not require employers and unions to include grievance-arbitration clauses in their CBAs. It does not require them to change the terms of any grievance-arbitration procedure. The agency's

ruling provides only that any arbitral mechanism that the parties have *previously agreed to* will remain in force after contract expiration, unless the parties have otherwise provided. PERC's decision simply places grievance arbitration clauses on the same footing as every other contract term the parties had previously agreed to in an expired CBA. If anything RCW 41.56.080, cited by CT on page 31 of its brief, supports PERC's decision in this case. Pursuant to the unilateral change doctrine, the "terms of an existing collective bargaining agreement" remain "in effect" following expiration of that CBA. Those CBA terms include the grievance-arbitration clause.

PERC's decision does not undermine the PECBA. In fact, as the agency determined, its decision in this case will enhance collective bargaining for uniformed public employees.

6. PERC Did Not Exceed its Remedial Authority by Giving Its Decision Prospective Application Only.

CT turns PERC's decision case on its head by contending that that the agency first determined that CT did not commit a ULP and then went beyond its "delegated authority" by pronouncing a change in the law for future cases. CT Br. at 23-24. CT describes the Commission's decision exactly backwards. PERC first determined that an employer's refusal to process and arbitrate grievances arising under an expired CBA that is still

in effect because of the unilateral change prohibition constitutes a ULP under the PECBA. Only then did the Commission decide, in the exercise of its remedial discretion, not to apply its decision to the parties at bar, given CT's reasonable reliance on prior agency precedent permitting such actions by an employer.

No doubt, if PERC had applied its decision to CT, CT now would be arguing to this Court that PERC "exceeded its remedial authority" by doing so. It has hard to see how an agency *exceeds* its remedial authority by declining to give the claimant any relief at all. ATU 1576 would certainly have preferred if PERC *had* applied the principles it announced in this case retroactively to uphold ATU 1576's ULP against CT. The Commission's decision not to do so does not, however, constitute an abuse of the agency's authority.

F. PERC'S DECISION WAS NOT RULEMAKING WITHIN THE MEANING OF THE WAPA AND FORMAL RULEMAKING WAS NOT REQUIRED IN THIS CASE.

CT contends that PERC's decision in this case to overrule its prior adoption of the federal grievance-arbitration clause exception to the unilateral change prohibition is invalid because it occurred in the context of an adjudication rather than through formal rulemaking. CT Br. 13-15, 20-21. CT misunderstands basic administrative law.

1. For almost Four Decades, Federal Law Has Been Settled that the NLRB Can Adopt Decisional Rules through the Adjudicative Process.

The NLRB is subject to the federal Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq*. The NLRB promulgated the grievance-arbitration clause exception to the unilateral change prohibition though adjudication, not formal rulemaking. *See Hilton-Davis Chem. Co., Div. of Sterling Drug, Inc.,* 185 N.L.R.B. 421 (1970). PERC originally adopted this "rule of general application" through the adjudicative process rather than through rulemaking. *E.g., Teamsters Union, Local 313 v. Pierce County*, Decision No. 2693 (PECB 1987); *International Ass'n of Fire Fighters, Local 469 v. City of Yakima*, Decision 3880 (PECB 1991). CT does not explain why it was permissible for PERC to have *adopted* NLRB adjudicatory precedent through adjudication rather than formal rulemaking but it is impermissible for PERC to *repudiate* that same NLRB precedent through adjudication.

Moreover, the United States Supreme Court has definitively rejected the very argument that CT makes in this case. *See NLRB v. Bell Aerospace Co. Division of Textron, Inc.,* 416 U.S. 267, 94 S. Ct. 1757, 40 L. Ed. 2d 134 (1974). *Bell Aerospace* involved an employer's challenge to the NLRB's reversal of its prior adjudicatory precedent regarding the scope of the "managerial exception" to the definition of "employee" under

the NLRA. The Justices unanimously reaffirmed that "the Board is not precluded from announcing new principles in an adjudicative proceeding and the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." 416 U.S. at 294 (majority opinion of Powell, J.); 416 U.S. at 295 (White, J., concurring in part and dissenting in part). The Supreme Court noted that it had long ago rejected the contention an administrative agency cannot formulate in an adjudicatory proceeding "a new standard that would govern future conduct" but must instead resort to its rulemaking procedures. *Id.* at 292 (citing *SEC v. Chenery Corp.*, 416 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

Directly relevant to the present case, the Court held in *Bell Aerospace* that "the possible reliance of industry on the Board's past decisions" did not prevent the agency from reconsidering its precedents through the adjudicatory process rather than formal rulemaking. *Id.* at 295. The Court reasoned that while the notice and comment procedures of formal "rulemaking would provide the Board with a forum for soliciting the views of those affected in industry and labor before embarking on a new course," the agency had "discretion to decide that the adjudicative procedures . . . may also produce the relevant information necessary to mature and fair consideration of the issues." *Id.*

Bell Aerospace took its holding that the NLRB has the discretion to choose between using its adjudicative and rulemaking powers directly from the three-Justice concurrence of *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 769, 89 S. Ct. 1426, 22 L. Ed. 709 (1969) (concurring opinion of Black, J, joined by Brennan, J., and Marshall, J). *See* 416 U.S. at 294. There Justice Black persuasively reasoned that the line between the NLRB's quasi-legislative ruling making and quasi-judicial adjudicatory powers "is not always a clear one and in fact the two functions merge at many points." 394 U.S. at 770. For example, if an "agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power." *Id.* at 771. Therefore, as long an NLRB action meets the APA's definition of either "rulemaking" or "adjudication," the agency has the "authority to decide, within its informed discretion, whether to proceed by rule making or adjudication." *Id.* at 772; *Bell Aerospace*, 416 U.S. at 294.

CT misleadingly cites the *Wyman-Gordon* four-Justice plurality opinion in footnote 5 of its brief at page 20 without mentioning that five years later *Bell Aerospace* repudiated the reasoning of that plurality opinion. While the *Wyman-Gordon* plurality opinion supports CT's position in this case, it reasoning hasn't been good law since 1974.

2. No Principle of Washington Law Required PERC to Engage in Formal Rulemaking in this Case.

CT has offered no justification why the principles the U.S. Supreme Court established almost 40 years ago under the APA with respect to the NLRB's discretion to act through adjudication do not apply equally with respect to PERC and the WAPA. The federal precedents permitting the NLRB to announce principles of general application through adjudication rather than rulemaking apply to PERC *a fortiori*. The definition of a "rule" under the WAPA is substantially narrower than the definition under the APA. *Compare* RCW 34.05.010(16) *with* 5 U.S.C. § 551(4); *see also State v. Straka*, 116 Wn.2d 859, 868, 810 P.2d 888 (1991) (federal definition of "rule" "markedly different" than state).

Like the NLRB, PERC performs both quasi-judicial and quasi-legislative functions. The actions of both agencies are subject to judicial review. PERC, like the NLRB, has frequently used the adjudicatory process to announce principles of general application. *See, e.g.*, *International Association of Fire Fighters Local 27 v. City of Seattle*, 93 Wn. App. 235, 967 P.2d 1267 (1998) (affirming PERC's adjudicatory precedent that LEOFF pension benefits are an illegal subject of bargaining); *Olympic Uniserv Council v. Educational Service Dist. 114*, Decision 4361-A (PECB 1994) (announcing adoption of "substantial

motivating factor" standard for evaluating complaints of discrimination under RCW 41.45.140(1)). Like any other state agency, PERC has considerable statutory discretion to choose between adjudication or rulemaking as it deems more appropriate. *See* RCW 34.05.070(1) (an agency's refusal to convert adjudication to rulemaking, or *vice versa*, is not subject to judicial review). Nothing in the WAPA required PERC to choose rulemaking over adjudication here.

It is well established in Washington that an agency may use the adjudicatory process to "fill in the gaps" of a statute that the Legislature has charged it with administering without resort to formal rulemaking. *See, e.g. Hart v. Peoples Nat'l Bank of WA*, 91 Wn.2d 197, 201, 588 P.2d 204 (1978). WAPA does not impose a straightjacket on administrative action. *Budget Rent a Car Corp. v. Department of Licensing*, 144 Wn.2d 889, 898, 31 P.3d 1164 (2001). There, our Supreme Court recognized that if the judiciary adopted the very broad definition of a WAPA "rule" for which CT advocates here, "it would all but eliminate the ability of agencies to act in any manner during the course of an adjudication. The simplest and most rudimentary interpretation of a statute or regulation would require an agency to go through formal rule-making procedures." *Id.*; *Accord Regan v. State Dep't of Licensing*, 130 Wn. App. 39, 54-55, 121 P.2d 731 (2005).

CT attempts to distinguish the *Budget Rent a Car Corp.* on the bases that there (1) the Department of Licensing ("DOL") did not overrule prior agency precedent as PERC did in this case; (2) the DOL did not add a requirement not found in the governing statute but PERC did; and (3) the DOL applied its decisional rule to the parties at bar but PERC did not. CT Br. at 19. None of these arguments carries any weight. CT does not explain how it can be the WAPA permitted PERC to use adjudication to initially interpret the PECBA such that grievance-arbitration clauses do *not* continue in effect along with other terms of an expired CBA but the WAPA prohibits PERC from modifying that statutory interpretation.

CT's assertion that PERC may not add through the adjudication process collective bargaining requirements that are not expressly set forth in the PECBA proves far too much. As noted earlier, with respect to uniformed employees, the PECBA does not provide for the continued validity of *any* of the terms of an expired CBA. If PERC does not have the authority to use adjudication to decide that the grievance-arbitration clause of an expired contract remains in force, then PERC must not have had the authority to use adjudication to decide that the terms of an expired CBA *other than* the grievance-arbitration clause remain in force. CT does not explain how PERC could have the authority to impose through adjudication additional requirements on collective bargaining not found in

the PECBA with respect to all of the terms of an expired CBA other than the grievance-arbitration clause. Acceptance of CT's position in this case would invalidate the unilateral change prohibition itself because PERC adopted that "requirement" through adjudication rather than rulemaking.

Neither *Failor's Pharmacy v. DSHS*, 125 Wn.2d 488, 886 P.2d 147 (1994), nor *Hillis v. State, Department of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), holds that an agency cannot establish through adjudication a principle of general applicability with respect to a statute the agency administers. *Failor's Pharmacy* concerned DSHS's changes to its Medicaid reimbursement payment schedules. Instead of engaging in rulemaking, DSHS notified providers of its new schedule by a policy memorandum 10 days prior to implementation. 125 Wn.2d at 492. The Supreme Court ruled that because the agency's action related to a benefit conferred by law, rulemaking was required. *Id.* at 494-97. *Hillis* involved the Department of Ecology's internal decision to change the procedures it used to prioritize public groundwater applications. As in *Failor's Pharmancy,* the Supreme Court held that the agency's actions altered the qualifications or requirements relating to a benefit conferred by law and therefore had to occur through public rulemaking. 131 Wn.2d at 399-400. Nothing in *Hillis* or *Failor's Pharmacy* limits an agency's discretion to

engage in statutory interpretation through the adjudicative process rather than formal rulemaking.

CT is left with the self-defeating argument that PERC's decision is not an adjudication because the agency did not apply its decision to the parties at bar. CT Br. at 19. Courts have discretion to give decisions overruling previously settled precedent prospective application only. *E.g., Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271, 278-79, 208 P.3d 1292 (2009). A judicial adjudication that overrules precedent is still an adjudication even though the court declines to give its decision retroactive effect. Likewise, an agency adjudication overruling agency precedent does not become rulemaking simply because the agency decides it is inequitable for its decision to apply retroactively. If, however, this Court were to agree with CT that an agency must apply its adjudicatory decisions to the parties at bar, then the remedy for this infirmity would be application of the new principles PERC announced to CT.

3. The Commission's Opinion Creates a Decisional Rule, but not a "Rule" within the Meaning of the WAPA.

The Superior Court correctly held that PERC's action in this case does not constitute a "rule" under the WAPA. Assuming the Commission's decision is an "order of . . . general applicability," it meets none of the five enumerated "rule" criteria of RCW 34.05.010(16).

Contrary to what CT contends, CT Br. at 17, neither it nor any other public employer (or union) is subject to "a penalty or administrative sanction" as a result of the Commission's decision in this case. RCW 34.05.010(16)(a). No employer or union will be subject to a "penalty" or "sanction" unless and until some future PERC adjudication determines the party committed a ULP. For that reason, this case is not the same as the situation in *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn. 2d 640, 647, 835 P.2d 1030 (1992). In *Simpson*, the agency had adopted a specific numeric dioxin standard the violation of which, without more, subjected to parties to a monetary penalty or sanction. If the decision in this case were likewise deemed a rule under the WAPA, PERC could never decide through the adjudicative process that certain conduct constitutes a ULP. PERC's ULP decisions by their very nature function as precedents in the adjudication of penalties for similar ULP violations in future cases.

There is also no merit to CT's assertions that PERC's decision is a WAPA "rule" because it establishes, alters, or revokes either (1) any procedure, practice or requirement related to agency hearings; or (2) any qualification, or requirement relating to the enjoyment of benefits or privileges conferred by law. CT Br. at 18-19 (citing RCW 34.05.010(16)(b)-(c)). PERC's decision is not a procedural rule respecting

the conduct of agency hearings. A change in substantive law does not become an alteration of hearing procedures simply because more hearings might occur as a result of the change. Moreover, the Commission's decision in this case expressly permits employers to continue to negotiate grievance-arbitration clauses that will expire on a date certain. The fact that CT must now obtain agreement from ATU 1576 to be absolved from the continuing validity of a CBA's grievance-arbitration clause does not constitute a deprivation of a benefit or privilege conferred by law.

In sum, while PERC's decision in this case establishes a new administrative precedent that the agency will apply in future adjudications, it is not a rule within the meaning of the WAPA. Furthermore, nothing in the WAPA required the Commission to engage in formal rulemaking to make the determination it made in this case. This Court should affirm the Superior Court's decision that PERC had the discretion to proceed through adjudication rather formal rulemaking.

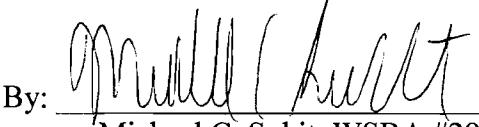
IV. CONCLUSION

CT lacks standing to challenge an administrative action decided in its favor. In any event, CT has failed to carry its burden of persuasion that PERC's decision in this case is an invalid administrative action. In accordance with the proper separation of governmental powers, this Court should defer to PERC's expertise in filing a statutory gap within the

PECBA. PERC has given a reasoned explanation for its repudiation of prior agency precedent that had adopted the federal exemption of grievance-arbitration clauses from the general prohibition on unilateral changes to an expired CBA. That exception is founded on the ability of private sector employees to strike following the abrogation of the grievance-arbitration clause. PERC acted within its discretion by reconsidering its prior adjudicatory precedent through a subsequent adjudication rather than formal rulemaking. PERC's current interpretation of the PECBA may not be the only possible construction of the statute, but it is a permissible one. Therefore, the Court should affirm the Superior Court's denial of CT's petition for review.

RESPECTFULLY SUBMITTED this 28th day of November 2011

FRANK FREED SUBIT & THOMAS, LLP

By: 

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Attorneys for ATU Local 1576

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DEPUTY

CERTIFICATE OF SERVICE

I, Susan Zimmerman, certify and state as follows:

1. I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served upon counsel of record at the address and in the manner described below on November 28, 2010, the following document: BRIEF OF RESPONDENT ATU 1576.

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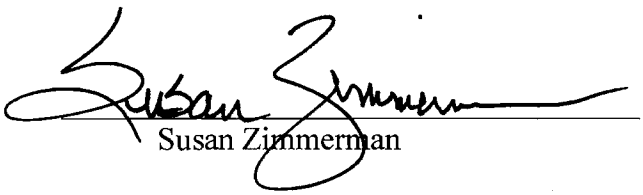
I hereby declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 28th day of November 2011.



Susan Zimmerman