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JENNIFER L. HARRIS
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NO. 42506-8-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KING COUNTY,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,
AMALGAMATED TRANSIT UNION, LOCAL 587, and TECHNICAL
EMPLOYEES ASSOCIATION,

Respondents.

APPELLANT KING COUNTY'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

 A. Assignments of Error 3

 B. Issues Pertaining to Assignments of Error 3

III. STATEMENT OF THE CASE 4

 A. The Parties 4

 B. Factual Background Pertaining to the Closure
 Decision 5

 C. Factual Background Concerning Bargaining 7

 D. Procedural History 9

IV. ARGUMENT 12

 A. Standard of Review 13

 B. The Commission Erroneously Interpreted and
 Applied the Law 14

 C. The Commission’s Determination Is Not Supported
 by Substantial Evidence 26

 D. The Commission’s Holding Regarding Satisfaction
 of the Bargaining Obligation Is Erroneous 29

 E. The Commission’s Holding Regarding an
 Impermissible Change to the Status Quo is
 Erroneous 35

V. CONCLUSION 36

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>City of Pasco v. PERC</i> , 119 Wn.2d 504, 833 P.2d 381 (1992).....	15
<i>Int’l Ass’n of Fire Fighters, Local Union 1052 v. PERC</i> , 113 Wn.2d 197, 778 P.2d 32 (1989).....	15, 16, 17, 19
<i>International Ass’n of Fire Fighters, Local 27 v. City of Seattle</i> , 93 Wn. App. 235, 967 P.2d 1267 (1998).....	13
<i>PERC v. City of Vancouver</i> , 107 Wn. App. 694, 33 P.3d 74 (2001).....	13
<i>Spokane Education Ass’n v. Barnes</i> , 83 Wn.2d 366, 517 P.2d 1362 (1974).....	17, 18
STATUTES	
RCW 34.05.570(3)(d)	13
RCW 34.05.570(3)(e)	13
RCW 41.56	24, 26, 33
RCW 41.56.010	13
RCW 41.56.020	14
RCW 41.56.030	14
RCW 41.56.140	14
RCW 41.56.140(1).....	1
RCW 41.56.140(4).....	1, 14
RCW 41.56.150(4).....	14

RCW 41.56.430	32
RCW 41.56.492	10, 32, 33
REGULATIONS	
Wash. Admin. Code 391-25-140(2).....	35
OTHER AUTHORITIES	
<i>City of Bellevue</i> , Decision 3343-A (PECB, 1990).....	29
<i>City of Tacoma</i> , Decision 5049-B (PECB, 1997).....	26
<i>Community Transit</i> , Decision 10647-A (PECB, 2011)	14, 15
<i>Federal Way School Dist. No. 210</i> , Decision 232-A (PECB, 1977)	17
<i>King County</i> , Decision 10940 (PECB, 2010)	33, 34
<i>Skagit County</i> , Decision 8746-A (PECB, 2006).....	17, 18
<i>Tacoma-Pierce County Health Dep't</i> , Decision 6929-A (PECB, 2001)	25
<i>Tacoma-Pierce County Health Department</i> , Decision 6929-A (PECB, 2001).....	17
<i>Val Vue Sewer Dist.</i> , Decision 8963 (PECB, 2005)	29
<i>Wenatchee School District</i> , Decision 3240 (PECB, 1989).....	20
<i>Wenatchee School District</i> , Decision 3240-A	30
<i>Wenatchee School District</i> , Decision 3240-A (PECB, 1990).....	19, 20, 32

I. INTRODUCTION

On ten days in 2009, King County closed certain buildings and associated operations in order to address a budget crisis. These closures caused the furlough of employees in affected operations. King County (“County”) offered to, and did, bargain with Respondents about the effects of the closures, including mitigating the financial impact of the furloughs. However, in two rulings, the Public Employment Relations Commission (“Commission” or “PERC”) held that the County’s decision to close the buildings and operations was a mandatory subject of bargaining. Accordingly, it concluded that the County’s closure without bargaining the decision violated the Revised Code of Washington (“RCW”) 41.56.140(1) and (4). PERC’s conclusion meant that King County could not close its operations unless Respondents agreed, either directly or through an agreement imposed by a third party arbitrator.

The key question in this appeal is whether the County’s decision to close operations was either a mandatory subject of bargaining or a permissive subject of bargaining. The basic principles are not in dispute. If the closure decision was a management prerogative and therefore a permissive subject, the County was permitted to implement the decision and was required to bargain about only the effects of the decision. If the closure decision was a mandatory subject, the County was not permitted to implement that decision without the agreement of the Respondents.

The Commission erred in concluding that the County's closure of operations in response to a fiscal emergency was a mandatory subject of bargaining. The Commission did not consider the fundamental management prerogative of allowing governmental entities to determine the choice and quantity of services they provide to the public. By doing so, the Commission confused the decision (closure) with the effects (furloughs).

The Commission also failed to consider substantial evidence in the record. The Commission's neglect of this critical evidence led it to improperly apply the balancing test used to determine whether an issue is a mandatory or permissive subject of bargaining. Each of PERC's subsequent errors can be traced to this faulty finding. If not overturned, this decision will unduly restrict the County, and all governmental employers, from determining how to effectively serve the public with limited resources.

A PERC Hearing Examiner, *sua sponte*, reached an additional conclusion. The Hearing Examiner found, and PERC subsequently affirmed, that if the decisional bargaining reached an impasse, the County was required to let an arbitrator determine whether it could close its operations and furlough the employees.

King County respectfully asks this Court to vacate the Commission's decisions and find that (a) the closures were an exercise of a public employer's managerial prerogative and therefore could be

implemented without bargaining the decision, (b) the proper bargaining obligation was effects, rather than decisional, bargaining, (c) imposition of an interest arbitration requirement is inappropriate here, and (d) the County did not impermissibly alter the status quo for TEA-represented employees during the pendency of a representation petition.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

No. 1. The Public Employment Relations Commission erred in its interpretation and application of the law.

No. 2. The Public Employment Relations Commission erred in issuing decisions and orders that are not supported by evidence that is substantial when viewed in light of the whole record before the Court.

B. Issues Pertaining to Assignments of Error

1. Whether King County's use of closures, with employee furloughs as a consequence, is a mandatory or permissive subject of bargaining where the decision is made for purposes of maintaining other public services and balancing its budgets.

2. Whether King County had a duty to bargain both the decision and the effects of the closures, or only a duty to bargain the effects of the closures.

3. Whether it was improper for the Commission to require the parties to use a third-party arbitrator to create an agreement if the parties reached impasse during bargaining.

4. Whether King County violated the status quo by bargaining with TEA during the pendency of a representation petition.

III. STATEMENT OF THE CASE

A. The Parties

Appellant King County provides a variety of public services to the residents of King County, including public health clinics, courts, criminal corrections programs, sheriff services, wastewater treatment, and public transportation. The County employs approximately 13,000 individuals to provide these and other services to its residents. *See*, ATU CR 992 (Hearing Examiner (“HE”) Decision).¹ Most of the County’s employees are represented by labor unions, including the Respondents.

King County’s Transit Division operates a public passenger transportation system. The County and Respondent Amalgamated Transit Union, Local 587 (“ATU”) are parties to a collective bargaining agreement. ATU represents approximately 3,600 County employees employed by the Transit Division, 65 of which are affected by the Commission decision at issue here. The affected employees were primarily engaged in customer assistance, rider information and pass sales. ATU CR 992, 996 (HE Decision).

¹ Throughout this brief, references to Clerk’s Papers will be designated as “CP,” references to documents contained in the Certified Record from PERC in the Amalgamated Transit Union matter below will be designated as “ATU CR,” documents contained in the Certified Record from PERC in the Technical Employees Association matter below will be designated as “TEA CR.” References to transcript excerpts will be designated “Tr.”

Respondent Technical Employees Association (“TEA”) represents three bargaining units of King County employees. The first unit consists of approximately 65 non-supervisory employees in King County’s Transit Division, working in the Transit Division’s Design and Construction section. The second unit contains approximately 12 supervisory employees in King County’s Wastewater Division, primarily engaged in the Asset Management, Major Capital Improvement, and Planning and Compliance sections. The third unit consists of approximately 260 non-supervisory, “staff” employees in the same sections of the Wastewater Division. TEA CR 3536 (PERC Decision).

B. Factual Background Pertaining to the Closure Decision

In 2008, the County and its citizens experienced an economic crisis. TEA CR 1196 (Tr). The County faced critical deficits in each of its budgets, including the General Fund, the Transit Fund, and the Wastewater Fund. By early September 2008, the projected General Fund deficit for 2009 was \$93.4 million and the projected Transit fund deficit had reached \$83 million. ATU CR 136 (Tr). Similar budget shortfalls were experienced throughout the County due to falling sales tax revenues, increases in operating costs, climbing wages due to contractually obligated cost of living adjustments, markedly reduced housing and new business starts, and the failure of banks, sureties and insurance companies that resulted in the essential shut-down of the bond market and caused interest rates to soar while interest earnings tumbled. ATU CR 3537 (PERC

Decision); *see also*, TEA CR 1256-58, 1276-77 (Tr. Christie True, Director Wastewater Treatment Division); TEA CR 1547-48 (Tr. Kevin Desmond, General Manager, King County Metro Transit); TEA CR 1196, 1199-1201, 1203 (Tr. Beth Goldberg, King County Deputy Director, Office of Management and Budget).

The County considered options in response to the budget crisis, including program reductions, program eliminations and layoffs. ATU CR 136-39 (Tr). As the County weighed the available choices to balance its budgets, it determined that its priorities were to sustain services to the community and to preserve jobs. ATU CR 138, 255 (Tr); *see also, e.g.*, ATU CR 673-74 (letter dated 10/28/08); ATU CR 736-37 (letter dated 10/13/08); ATU CR 677-80 (Coalition Agreement); TEA CR 1206 (Tr). The County solicited its employees and many of its labor unions for ideas on how to address the economic crisis and budget deficits. ATU CR 1077 (PERC Decision); TEA CR 3536-39 (PERC Decision).

Ultimately, each division was required to develop its own proposal to address its budget deficit. For example, the Transit division formulated a budget including an unprecedented two-step fare increase (two separate 25-cent increments), \$80 million in capital budget reductions, provisions to spend down reserves, and \$32 million in operating expense reductions. TEA CR 1550 (Tr). The operating expense reductions required layoffs, a partial hiring freeze, and the elimination of vacant positions. TEA CR 1550-51 (Tr).

When the County approved its overall budget, it decided to reduce service levels by closing certain buildings and operations on ten days throughout 2009. On those ten days, the affected operations did not provide service to the public. TEA CR 1637 (Tr). For example, residents of King County could not enter County buildings to address property tax issues, purchase pet licenses, schedule building inspections, or lodge code enforcement complaints.

On the ten closure dates, employees assigned to closed buildings were not permitted to perform work. The closures resulted in the furlough equivalent of 80 hours for each full-time employee over the course of 2009, saving \$8.5 million in general fund operations, \$14.3 million in non-general fund operations, and additional operating expenses from the reduced need to heat, cool and service the closed County facilities. ATU CR 164 (Tr); ATU CR 673-74 (letter dated 10/28/08).

Because the County made drastic cuts in expenses and programs prior to implementing the closures, the remaining alternatives to the closures were deeper reductions in critical services and additional layoffs. TEA CR 1210 (Tr).

C. Factual Background Concerning Bargaining

Following the decision to implement closures as one part of the County-wide budget deficit reduction plan, the County communicated the closure decision to each of the labor unions representing County employees. TEA CR 3538 (PERC Decision); ATU CR 1077 (PERC

Decision). Initially, the County focused on bargaining the effects of the closures with the King County Coalition of Unions, a group comprised of a majority of the collective bargaining units at the County, where it could achieve results with a large number of units through one consolidated bargaining process. King County and the Coalition identified concerns regarding the effects of the closures on members. The County and Coalition negotiated until they reached agreement on the effects. TEA CR 3538; ATU 1077 (PERC Decisions). This agreement is referred to as the “Coalition Agreement.”

Immediately upon conclusion of effects bargaining with the Coalition unions, King County advised Respondents ATU and TEA (and all other unions not participating in the Coalition process) of the closure decision. The County invited bargaining regarding the effects of the closures. TEA CR 3538 (PERC Decision), TEA CR 2044-45 (letter dated 11/3/08); ATU CR 1077 (PERC Decision), ATU CR 682-83 (letter dated 11/3/08). The County began bargaining with TEA and ATU by presenting the terms of the Coalition Agreement as its opening proposal to address the closure impacts. ATU CR 1077 (PERC Decision); TEA CR 1358 (Tr). The terms of the County’s proposal would have mitigated the financial impact of the furloughs on TEA and ATU members. TEA CR 1568-69 (Tr).

Following the County’s initial offer, the course of bargaining with each union took its own path. After discussion, ATU took the County’s

offer to its membership for a ratification vote. The members voted down the offer. Following rejection of the offer, ATU withdrew from the collective bargaining process and explicitly informed the County that it would pursue remedies through an unfair labor practice (“ULP”) charge and grievance procedure rather than continuing to bargain. ATU CR 307 (Tr). TEA did not take the County’s offer to its membership and also chose to file an unfair labor practice rather than continue bargaining. *See*, TEA CR 1-277 (TEA ULP Charge).

D. Procedural History

On January 5, 2009, TEA filed three unfair labor practice charges with PERC, one for each bargaining unit, claiming that the County interfered with employee rights by unilaterally implementing employee furloughs on ten days during 2009 without first bargaining the decision or the effects of the decision to impasse. The charge also alleged that the County unlawfully failed to maintain the status quo during the pendency of a representation petition for the Transit group. TEA CR 1-277 (TEA ULP Charge). TEA alleged a variety of other claims that were dismissed by the Commission and are unrelated to this appeal.

On February 5, 2009, ATU filed a similar unfair labor practice charge with the Commission claiming that the County interfered with employee rights by unilaterally implementing employee furloughs during 2009. The charge also alleged that the County unlawfully refused to bargain concerning the furlough decision. ATU CR 1-3 (ATU ULP

Charge). The charge contained several other allegations that were dismissed by the Commission and are not relevant to this appeal.

Neither ATU nor TEA alleged that the County unlawfully failed or refused to invoke the interest arbitration process, and neither ATU nor TEA requested arbitration. *See*, ATU CR 1-3; TEA CR 1-277.

On May 20 and 28, 2009, a hearing was conducted by PERC Hearing Examiner Jamie Siegel into ATU's unfair labor practice allegations. Examiner Siegel issued Decision 10547 on September 29, 2009, finding the County's decision to close certain operations on ten days, resulting in employee furloughs, was a mandatory subject of bargaining. ATU CR 989-1011 (HE Decision). The Examiner's Decision also found that the County failed to satisfy its bargaining obligations with respect to the decision to close operations and the effects of that decision on ATU members. *Sua sponte*, Examiner Siegel found the County had not met its bargaining obligation because it did not invoke the statutory mediation and interest arbitration provisions of RCW 41.56.492 available to Transit employees.²

PERC Hearing Examiner Terry Wilson presided over a separate hearing addressing TEA's allegations of unfair labor practices and issued his consolidated Decision 10576, -77, and -78 on October 22, 2009. TEA CR 3421-52 (HE Decision).

² RCW 41.56.492 provides Transit employees with the right to invoke interest arbitration proceedings after unsuccessful mediation of a labor dispute.

Examiner Wilson mirrored the decision in the ATU case on the threshold issue, finding the County's decision to close operations and furlough employees was a mandatory subject of bargaining. The Examiner's Decision also followed the ATU decision in finding that the County failed to satisfy its bargaining obligations, though the TEA decision did not include any discussion of the statutory interest arbitration provision relating to the TEA Transit unit. Specific to the TEA case, Examiner Wilson found that the County failed to maintain the status quo during the pendency of a representation petition in the TEA Transit unit.

The County appealed both Hearing Examiner Decisions to the full Commission. ATU CR 1012-17; TEA CR 3453-60 (Notices of Appeal). On May 19, 2010, the Commission issued a decision upholding the conclusions of the Hearing Examiner in the ATU matter and affirmed and adopted the associated Findings of Fact, Conclusions of Law, and Order. ATU CR 1075-87 (PERC Decision).

On June 22, 2010, the Commission issued a decision in the TEA matter, echoing its findings in the ATU case holding that the County's closure decision was a mandatory subject of bargaining, the County failed to bargain with TEA about its decision, and *sua sponte*, the Commission found that the County did not fulfill its bargaining obligation because it did not invoke the statutory interest arbitration procedure for the TEA Transit unit. The Commission affirmed and adopted the Findings of Fact, Conclusions of Law, and Order issued by the Hearing Examiner, except

that Conclusion of Law 6 and Order paragraph 1.b. were each amended to incorporate the Commission's decision that the County was required to obtain an award through interest arbitration for the Transit unit. TEA CR 3535-3558 (PERC Decision).

On June 18, 2010 and July 21, 2010, King County timely petitioned for review of the Commission's decisions in the ATU and TEA cases, respectively. CP 11-34. On September 10, 2010, the Thurston County Superior Court granted the parties' joint motion to consolidate the pending cases. CP 35-36. On April 22, 2011, the Honorable Judge Thomas McPhee heard oral argument on the matter and issued an Opinion on July 27, 2011, affirming the Commission's Decisions. CP 94-99. On August 25, 2011, King County filed its Notice of Appeal to the Court of Appeals. CP 100-145. On October 6, 2011, Judge McPhee filed his Judgment Affirming PERC's Decisions. CP 146-147.

IV. ARGUMENT

In each of the ATU and TEA companion cases, the Commission was asked to decide a threshold question – may a public employer balance its budgets by closing its doors on certain days in order to shift money to other programs without bargaining that decision with the unions who represent the affected employees? In other words, in these circumstances, is the closure decision a mandatory or permissive subject of bargaining? In deciding this issue of first impression, the Commission issued identical findings and conclusions, each disregarding substantial evidence in the

record and improperly interpreting and applying the required balancing test. As a result, the Commission erroneously arrived at the conclusion that the closures were a mandatory subject of bargaining. The effect of the Commission's ruling is that the County would be unable to close its facilities during a rapidly emerging financial crisis without first securing the agreement of the labor unions that represents its employees working in those facilities.

A. Standard of Review

The Court of Appeals will “review an appeal from a PERC decision of a ULP in accordance with the Administrative Procedure Act (APA), which provides for relief when an agency has erroneously interpreted and applied the law or from an agency order that is unsupported by substantial evidence. RCW 34.05.570(3)(d), (e).” *PERC v. City of Vancouver*, 107 Wn. App. 694, 702, 33 P.3d 74 (2001). “We apply these standards to PERC’s decision, as opposed to that of the Examiner or the superior court.” *Id.* at 703.

“Findings of fact are reviewed for substantial evidence. Conclusions of law are reviewed by the error of law standard where ‘the court may substitute its interpretation of the law for that of PERC.’” *International Ass’n of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235, 239, 967 P.2d 1267 (1998) (internal citations omitted).

B. The Commission Erroneously Interpreted and Applied the Law

RCW Chapter 41.56, *Public employees' collective bargaining*, sets out the bargaining obligation that exists between the County and the designated representatives of public employees. *See*, RCW 41.56.010, *Declaration of purpose*, and RCW 41.56.020, *Application of chapter*. RCW 41.56.140, *Unfair labor practices for public employer enumerated*, establishes that “It shall be an unfair labor practice for a public employer: (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;” and “(4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.” RCW 41.56.030, *Definitions*, defines Collective Bargaining as follows:

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*, which may be peculiar to an appropriate bargaining unit of such employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

(Emphasis added.) As defined by statute, it is an unfair labor practice to fail or refuse to bargain over the wages, hours and working conditions of

represented public employees. *See*, RCW 41.56.140(4); RCW 41.56.150(4); *see also*, *Community Transit*, Decision 10647-A (PECB, 2011).

PERC and the courts have distinguished between mandatory subjects of bargaining (wages, hours, and working conditions) and nonmandatory or permissive subjects of bargaining. *See, e.g. Community Transit*, Decision 10647-A (PECB, 2011); *City of Pasco v. PERC*, 119 Wn.2d 504, 833 P.2d 381 (1992); *Int'l Ass'n of Fire Fighters, Local Union 1052 v. PERC*, 113 Wn.2d 197, 200-202, 778 P.2d 32 (1989). When changing a mandatory subject, the employer must bargain its decision and attempt in good faith to reach agreement. *Id.* For a permissive subject, the parties may choose to bargain about the decision, but there is no duty to bargain or reach agreement. The parties need only bargain the effects of the decision on wages, hours and working conditions. *Id.*

“In some cases, an employer’s decisions on nonmandatory subjects may have effects on mandatory subjects. If the union so requests, such effects must be submitted to negotiation. Thus, for example, while an employer need not bargain with its employees concerning an economically motivated decision to terminate a services contract (a nonmandatory subject), it must bargain over how the layoffs necessitated by the contract’s termination will occur.” *Int'l Ass'n of Fire Fighters, Local*

Union 1052 v. PERC, 113 Wn.2d 197, 201, 778 P.2d 32 (1989)(internal citation omitted).

- 1. King County’s Managerial Prerogative to Reduce Some Services to Save Others Predominates Over the Relationship to Wages, Hours and Working Conditions**

Of course, a public employer’s managerial decisions about services offered to the public will often impact the wages, hours and working conditions of its employees. For example, if a public employer decides that it will shut down a public health clinic, the employees working in that clinic may be laid off or reassigned to a new position with corresponding changes in pay, benefits and other working conditions. Accordingly, while the employer may make the decision to close the clinic without bargaining, it must bargain about the effects of the decision on employees.

The parties agree that the Washington Supreme Court has established a balancing test for the purpose of determining whether a topic that involves both a managerial prerogative and wages, hours or working conditions is a mandatory subject. “On one side of the balance is the relationship the subject bears to ‘wages, hours and working conditions’. On the other side is the extent to which the subject lies ‘at the core of entrepreneurial control’ or is a management prerogative. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of the inquiry is to determine which of these characteristics predominates.” *Int’l Ass’n of Fire Fighters, Local 1052 vs. PERC*, 113 Wn.2d 197, 203, 778 P.2d 32 (1989) (internal citations omitted).

Under this balancing test, it is well established that a public employer's interest predominates when the employer is determining the quantity and scope of services it offers to the public or when it is establishing its budgets. See e.g., *Federal Way School Dist. No. 210*, Decision 232-A (PECB, 1977)(no duty to bargain regarding budget); *Skagit County*, Decision 8746-A (PECB, 2006)(type and level of services offered are management prerogatives and permissive subjects of bargaining); *Spokane Education Ass'n v. Barnes*, 83 Wn.2d 366, 517 P.2d 1362 (1974)(no duty to bargain decision to reduce budget); *Tacoma-Pierce County Health Department*, Decision 6929-A (PECB, 2001)(no duty to bargain change in services provided by substance abuse/methadone program). Accordingly, decisions to change the level, quantity, or type of services to be provided to the public have been held to be "managerial decisions which lie at the core of entrepreneurial control" and "are not subject to the duty to bargain collectively." *Federal Way School Dist. No. 210*, Decision 232-A (PECB, 1977).

In *Int'l Ass'n of Fire Fighters, Local 1052*, the Supreme Court recognized that the staffing level of firefighters for the city of Richland was not a mandatory subject of bargaining. The court held that a city-wide staffing level was a determination regarding the quantity of services this public employer would offer to the community and need not be negotiated with the firefighters' labor union. *Int'l Ass'n of Fire Fighters, Local 1052 vs. PERC*, 113 Wn.2d 197, 778 P.2d 32 (1989). "The law is

clear that general staffing levels are fundamental prerogatives of management.” *Id.* at 205.

Consistent with this Supreme Court guidance, the Commission found that the sailing schedule of ferries is not a mandatory subject of bargaining in *Skagit County*. Again, the sailing schedule involves the volume or quantity of services to be provided to the public, which lies at the core of entrepreneurial control for the public employer. *Skagit County*, Decision 8746-A (PECB, 2006). “We conclude the employer was not obligated to bargain an increase of the level of service in order to accommodate employee interests.” *Id.*

Similarly, in *Spokane Education Association*, the Court recognized that the school district’s decision to reduce the head count of its teachers in response to a failed levy and the corresponding lack of money to maintain its current level of staffing was not a mandatory subject of bargaining. *Spokane Education Association v. Barnes*, 83 Wn.2d 366, 374-375, 517 P.2d 1362 (1974).

Based on this authority, it is beyond doubt that it lies within King County’s authority to determine the budget and staffing of its Transit services (or any particular service). These are well-established managerial prerogatives, subject only to effects bargaining. The County would be required to bargain only about the effects of the decision.

Here, King County made a decision to reduce the amount of service provided to the public on 10 days in 2009 in order to maintain

other public services and to balance its budgets. However, in this case, the Commission departed from the Washington Supreme Court's statement of the law and its own precedent when it determined that King County did not have the right to make the decision to reduce the services offered to the public without first bargaining with the Respondents.

In reaching this decision, the Commission unreasonably limited the government's capacity to respond to prevailing economic realities. In contrast to private enterprise, public employers are accountable to their entire voting constituency for the political and administrative decisions they make. To require bargaining over a decision to reduce the level of services "represent[s] an intrusion into that type of governmental decision which should be reserved for the sole discretion of the elected representatives of all the citizens...rather than one which must be subjected to the bargaining process with the representatives of the employees hired to deliver the services." *Int'l Ass'n of Fire Fighters, Local Union 1052 v. PERC*, 113 Wn.2d 197, 206 (1989). Sometimes public employers must make difficult decisions about which services to sacrifice in order to preserve other services. King County officials, not the designated bargaining representatives of employees, are elected to make these decisions.

Indeed, the Commission misapplied its own decision in *Wenatchee School District* in reaching its conclusion. *Wenatchee School District*, Decision 3240-A (PECB, 1990). In *Wenatchee School District*, the

employer submitted two special levies for voter approval. On each occasion, the levy failed requiring the employer to reduce its budget. Analogous to the County's objective to reduce costs in order to maintain programs and services with the least impact on residents, "[the school district's] administrative team adopted a goal of making cuts that would least impact the educational program provided its students." *Id.* Like King County, the school district solicited help from employees and unions to formulate cost-saving ideas. The school district adopted a recommendation to convert from half-day to full-day kindergarten to eliminate bus runs and reduce wages and benefits for bus drivers while providing exactly the same number of instructional hours. There was no change in the curriculum or amount of education offered to students, only a change in the class schedule allowing the school district to eliminate mid-day bus runs. *Id.*; *see also*, Hearing Examiner's decision below, *Wenatchee School District*, Decision 3240 (PECB, 1989).

The union representing the bus drivers filed an unfair labor practice charge alleging that the school district unlawfully refused to bargain regarding alteration of the kindergarten program schedule, thereby eliminating mid-day bus service. The Hearing Examiner concluded that the employer failed to bargain the effects of the schedule change, but did not commit an unfair labor practice by making the change itself. Decision 3240 (PECB, 1989).

Upon review, the Commission affirmed and clarified the Hearing Examiner's finding that the school district's decision to change the kindergarten schedule was a permissive, non-mandatory subject of bargaining. The Commission explained, "This is a case in which it is easy, at first glance, to conclude there was a refusal to bargain. We can understand why the Examiner did so. The critical issue, however, is the one that the Examiner did not clearly resolve, *i.e.*, whether the employer was under a duty to bargain the decision to convert from half-day to full-day kindergarten...we conclude, as in *Federal Way, supra*, that the kindergarten change is the kind of program decision properly classified as a nonmandatory subject for bargaining." Decision 3240-A (PECB, 1990).

Here, the County's decision to close operations on 10 days was a decision regarding the services to be offered to its residents. Indeed, just as Wenatchee School District students could no longer enroll in morning or afternoon kindergarten, King County residents who appeared at one of the closed buildings on a closure date were unable to access County services. This schedule and service availability decision is not a mandatory subject of bargaining.

2. The Commission's Justification for Finding the Decision to Be a Mandatory Subject of Bargaining Is Flawed

The Commission attempted to distinguish the County's decision to close for ten days from other decisions about services in two ways. First, it believed that the County's decision was not a "programmatic" one,

unlike its earlier cases. Second, it concluded that the decision was distinguishable because it was based on labor cost savings. Both of these conclusions are flawed, both factually and legally.

a. The Commission’s “programmatic change” distinction is erroneous.

The Commission determined that the County’s closures were not based on a programmatic decision. ATU CR 1081; TEA CR 3545. The Commission did not explain, and has never defined, what it considers to be a programmatic decision. In any event, under any meaning of that phrase, the County’s closures were a programmatic decision. The County determined that its citizens would be best served by spending limited financial resources on governmental activities other than those affected on the ten closure days. Had it not closed selected County buildings on those days, the County would have had to impact other operations and programs. *See*, TEA CR 1210 (Beth Goldberg, King County Deputy Director, Office of Management and Budget, “And really the only thing left at this point, on a large scale basis, is additional program reductions and additional layoffs.”). Selecting one public program over others must be classified as a programmatic decision.

The Commission attempts to contrast a permissible programmatic decision with an impermissible non-programmatic decision presumably made for the purpose of achieving labor cost savings. However, even if this “programmatic” distinction were valid, the Commission’s analysis breaks down under scrutiny. The only allusion made by the Commission

to a programmatic decision is its reference to *Wenatchee School District*. ATU CR 1081; TEA CR 3545 (PERC Decisions). A review of PERC's decision and the Hearing Examiner's decision below shows that *Wenatchee School District* does not support this perspective. In that case, the school district converted its kindergarten program in response to two failed levies which created a budget deficit requiring budget cuts. The conversion to full-day kindergarten was a program change implemented for the purpose of saving labor costs. The savings were achieved through the elimination of mid-day bus runs, "saving the wages and related benefits for the bus drivers who had previously driven those routes." Decision 3240-A (PECB, 1990). The Hearing Examiner noted, "The kindergarten students would receive the same number of hours of instruction during the year, only on a different schedule. The savings resulting from the conversion were primarily, if not exclusively, due to the elimination of the mid-day bus runs." Decision 3240 (PECB, 1989). Thus, the decision in *Wenatchee School District* was based on labor costs, yet was still a change in services offered to its community and therefore was not a mandatory subject of bargaining.

b. Consideration of the decision's impact on employees does not convert a permissive decision into a mandatory subject of bargaining.

The Commission and Respondents rely heavily on the fact that King County achieved labor savings through the closures to tip the balancing test toward finding the closure decision to be a mandatory

subject of bargaining. King County acknowledges that a major purpose of the closures was to obtain labor savings in the face of dire economic circumstances and the requirement to achieve a balanced budget.

As shown in *Wenatchee School District*, a motivation to achieve labor cost savings does not convert a decision that falls within the employer's managerial control into one that must be bargained. The Commission explicitly acknowledged this fact in *Wenatchee School District* noting, "The decision to convert to a full-day kindergarten program was clearly motivated, at least in major part, by a desire to reduce costs, *but that fact alone does not transform the program decision into a mandatory subject of bargaining*. Decisions regarding the product or services to be offered by employers are often triggered by cost considerations, just as they often impact the wages and hours of employees. The same is true of general budget reductions. As the Supreme Court noted in *Richland, supra*, an employer need not bargain regarding an economically motivated nonmandatory subject of bargaining; it need only bargain over the effects of that decision." Decision 3240-A (internal citation omitted)(emphasis added).

The Commission in *Wenatchee School District* concluded that "The employer might be well advised to consider bargaining unit concerns, but we hold it cannot be compelled pursuant to RCW 41.56 to bargain its decision to change the kindergarten day. That was a policy decision concerning the employer's basic educational program. So long as

the school district remained willing to negotiate the impact of its change in its educational program, we find no breach of the duty to bargain.” *Id.*

Indeed, the Commission’s approach here would eliminate the line between management decisions and the effects of those decisions. An intelligent employer will evaluate and be influenced by the cost of a decision to change services. Certainly, many decisions to close services, whether permanently or temporarily, have a financial basis.

However, the Commission may not ignore or gloss over the decision/effects dichotomy. “The bargaining obligation is applicable as to both a decision on a mandatory subject of bargaining and as to the effects of that decision, *but will only be applicable to the effects of a managerial decision on a permissive subject of bargaining*...Similarly, where an employer has no duty to bargain concerning a decision to reduce its budget...the effects of such decisions could be mandatory subjects of collective bargaining.” *Tacoma-Pierce County Health Dep’t*, Decision 6929-A (PECB, 2001)(emphasis added).

The Commission’s own analysis demonstrates that it confused the effects with the actual decision. PERC agreed with the Hearing Examiner’s conclusion that the County’s “desired action, implementing ten days of furloughs, *impacted* wages, hours and working conditions as to predominate over the employer’s managerial prerogative.” ATU CR 1080 (PERC Decision) (emphasis added). However, those “impacts” on employees are the very subjects of effects bargaining – the mandatory

subjects of employee wages, hours and working conditions. Indeed, “effects” bargaining is often called “impact bargaining.” *See, City of Tacoma*, Decision 5049-B (PECB, 1997).

The County understands that its decision had serious impacts on employees. However, to bootstrap those effects into requiring bargaining about the decision undermines many years of doctrinal foundation and the entire concept of managerial prerogatives.

The Commission improperly applied the balancing test, converting the permissive management decision to close buildings into a mandatory subject of bargaining rather than requiring the appropriate effects bargaining standard that is required under RCW 41.56.

C. The Commission’s Determination Is Not Supported by Substantial Evidence

PERC’s misapplication of the relevant law is aggravated by its failure to consider substantial evidence in the record demonstrating the County’s purpose in implementing the closures – to preserve essential programs and services. The Commission’s decision relies on the Examiners’ determination that “the employer’s stated reason for deciding to implement furloughs was to achieve labor savings.” ATU CR 1080; TEA CR 3544. However, this holding is based on a single document in the record. The Commission states, “Sims’ October 3 letter clearly states that the employer wanted to find \$15 million in savings by reducing the wages of represented and non-represented employees and the employer has not presented any contrary evidence.” ATU CR 1080-81; TEA CR

3544-45. In light of the whole record, this single document does not constitute substantial evidence in support of the Commission's finding that the County's motivation in closing buildings was simply to achieve labor savings.

Rather, substantial evidence in the record demonstrates the County's considerations and objectives in making budget cuts, including the closures and resulting furloughs, to be the preservation of jobs and services. For example, on October 13, 2008, then-King County Executive Ron Sims sent King County's 2009 proposed budget to the residents of King County and to the King County Council for consideration and approval. Executive Sims' cover letter explained, "For 2009, the King County General Fund faces a \$93.4 million deficit. To close this gap, the 2009 Executive Proposed Budget *identifies and prioritizes reductions in services that will have minimal impact on services provided to citizens...* the County is left with little choice but to recommend for reduction or elimination [of] programs that directly impact health, safety and well-being of King County residents...I remain committed to providing essential services to the citizens of King County and call on my colleagues here in King County and in the State Legislature to work together...." ATU CR 736-37 (emphasis added).

In another letter dated October 28, 2008, Executive Sims sent an email to all King County employees explaining, "These are difficult times for local and state governments across the nation and the result here in

King County is program cuts and layoffs. *In order to prevent further layoffs and service cuts beyond those already announced*, I am pleased to share the news of an historic tentative agreement with the King County Union Coalition that includes sacrifice from all of us.” ATU CR 673-74 (emphasis added). In this correspondence, Executive Sims introduced his decision to implement employee furloughs associated with building closures. Executive Sims referred to the Coalition Agreement addressing the effects of the closures and furloughs. Notably, the Coalition unions agreed on the characterization of the furloughs, incorporating the following statement into the Coalition Agreement: “WHEREAS the parties will through this agreement *help to preserve essential services and reduce the layoffs necessary during 2009...*” ATU CR 677 (emphasis added).

Kevin Desmond, General Manager of King County Metro Transit Division, affirmed the County’s primary objective to maintain essential services to the public in his testimony regarding preparation of the Transit Department’s budget. Mr. Desmond conferred with Executive Sims who instructed him that the political and budgeting priorities would require Transit to achieve the necessary savings without further cuts to bus service or other essential Transit services to the public. ATU CR 255. *See also*, ATU CR 138; TEA CR 1206 (Tr).

The examples outlined above demonstrate the County’s sacrifice of limited, non-vital services on 10 days for the purpose of protecting

essential public services, employee jobs, and balancing its budget, not simply to reduce labor costs. The Commission's decision neglects its duty to consider the nature of the County's action and the County's stated purpose to minimize the negative impact of cuts on the public. Rather, the Commission's decision focused singularly on the labor savings achieved through the closures, and not the purpose of the labor savings. The Commission's analysis stopped short of conducting a full assessment of the reasons behind the decision. PERC's one-sided conclusion should be replaced with the required balanced application of the law, finding that the closure decision was a permissive subject of bargaining.

D. The Commission's Holding Regarding Satisfaction of the Bargaining Obligation Is Erroneous

The Commission's erroneous finding that the closures were a mandatory subject of bargaining requiring decisional bargaining undermined its subsequent bargaining-related analyses and decisions. Where, as here, a decision is an exercise of managerial prerogative and a permissive subject of bargaining, there is no duty to bargain or reach agreement with the union prior to taking the particular course of action.

In contrast, King County has repeatedly acknowledged that the *effects* of the closures on employees' wages, hours or working conditions are mandatory subjects of bargaining. To satisfy an effects bargaining obligation, an employer must provide reasonable notice and the opportunity to bargain. *See, e.g., Val Vue Sewer Dist.*, Decision 8963 (PECB, 2005). The employer need not finalize effects bargaining prior to

implementing its decided course of action. *See, City of Bellevue*, Decision 3343-A (PECB, 1990) (holding an “employer may implement decisions within its sole prerogative...even though required bargaining has not been concluded on the effects of that decision”); *Wenatchee School District*, Decision 3240-A (finding “no unfair labor practice arising from the failure to bargain the effects contemporaneously with the program decision”).

Because the Commission wrongly concluded that the closures were a mandatory subject of bargaining, its analysis focused solely on decisional bargaining. The Commission made no attempt to determine whether the County satisfied its effects bargaining obligations.

1. King County Satisfied Its Effects Bargaining Obligations

The County provided written notice of the upcoming closures and requested effects bargaining with ATU on November 3, 2008. ATU CR 682-83. During the time frame between notice and implementation of the closures, actual bargaining occurred. King County and ATU met face-to-face in a formal bargaining session, had numerous substantive conversations before and after the formal bargaining session, exchanged information and documents, proposed and considered a formal written proposal, and explored alternatives to that proposal. ATU CR 1077-78 (PERC Decision); ATU CR 996-97 (HE Decision). That proposal would have mitigated the financial effects of the closures on employees. The fact that ATU leadership submitted an effects proposal to its membership for a

vote in November 2008 provides evidence of the parties' participation in meaningful effects bargaining. *See*, ATU CR 997 (HE Decision). When the membership rejected the proposal, King County informed ATU that it remained willing to bargain the effects of the decision. ATU CR 997 (HE Decision). Significantly, ATU never again asked to bargain and declined each of the County's offers to do so. *Id.*; *see also*, ATU CR 833-34 (letter dated 12/8/08).

Similarly, as acknowledged in PERC's TEA decisions, King County repeatedly invited TEA to bargain the effects of the closures and acknowledged that the parties met and exchanged a number of verbal and written counter-proposals that would have mitigated the effects on employees. TEA CR 3427, 3438-39 (HE Decision); 3538-40 (PERC Decision). The record establishes that the parties bargained in-person on December 10 and 29, 2008, and exchanged three written proposals prior to the first closure date in January 2009. TEA CR 1492, 1495-96, 1498, 1501-02 (Tr). The parties continued to meet and bargain on three days in early March 2009. TEA CR 1634 (Tr).

During bargaining, both ATU and TEA insisted on bargaining the closure decision, not only its effects. Upon the County's insistence to bargain only the effects, both ATU and TEA became frustrated, withdrawing from the uncompleted bargaining process, and filing unfair labor practice charges. "This Commission has previously held that it will not condone shutting down of the bargaining process merely because a

party does not like the issues raised or the positions taken by the other...we are unwilling to find an unfair labor practice based on the employer's impatience, when the union repeatedly sought to address a nonmandatory subject of bargaining...the absence of 'effects' bargaining occurred because the union kept focusing on what we have found to be a permissive, not mandatory, subject of bargaining, *i.e.*, the change to full-day kindergarten." *Wenatchee School District*, Decision 3240-A (PECB, 1990).

As described above, the record demonstrates that King County provided notice of the closures, opportunity to bargain, and actually engaged in effects bargaining with ATU and TEA – both prior to and following implementation of the closures. Even after filing the unfair labor practice charges, the County and TEA's Wastewater Staff unit reached agreement on the effects. TEA CR 3493. Upon application of the proper bargaining standard, it is evident that the County satisfied its effects bargaining obligation.

2. The Commission's Application of the Interest Arbitration Statute Is Improper

The Commission's decision provides a discussion and application of the statutory interest arbitration provision that is applicable only to Transit workers.³ The Commission relies on its finding that the County

³ RCW 41.56.492 extends the uniformed personnel collective bargaining interest arbitration requirements to employees of Washington's public passenger transportation systems. The stated intent of the interest arbitration provision is to recognize Washington's public policy against strikes as a means of settling labor disputes to ensure uninterrupted service to the public. *See*, RCW 41.56.430, *Uniformed personnel – Legislative declaration*.

failed to invoke interest arbitration for members of those Transit units and concludes that there is no need to evaluate the County's effects bargaining efforts.

The Commission's decision incorrectly applies the interest arbitration statute to the facts of these companion cases. RCW 41.56.492 applies only to mandatory subjects of bargaining that are required generally under RCW 41.56. Had the Commission properly characterized the closures as permissive subjects, it would have found the interest arbitration statute inapplicable to the closure decision as the statute does not contain a bar to changes in permissive subjects. *See*, RCW 41.56.492.

As an additional basis for reversing the Commission's application of the statutory interest arbitration provision, the Commission improperly held the County exclusively responsible to invoke interest arbitration. PERC states that the County committed an unfair labor practice because, "[t]his record unequivocally demonstrates that *the employer* did not seek interest arbitration, or even mediation services from this agency, upon reaching an impasse in its negotiations." ATU CR 1082 (emphasis added). This holding is contrary to the law. First, interest arbitration is designed as a replacement for the ability to strike, but no strike could have occurred in this situation in any event under state law and under the parties' agreements. Second, under these facts, it was incumbent upon the unions to pursue the interest arbitration procedure.

In *King County*, Decision 10940 (PECB, 2010), a decision involving King County and ATU but unrelated to the case before this Court, PERC Hearing Examiner Emily Martin considered the County's implementation of a new policy affecting interest arbitration-eligible Transit employees. ATU told King County that it would file a grievance or an unfair labor practice if it desired to challenge the new policy implementation. The County implemented the change after ATU failed to request further bargaining. *Id.*

The Examiner found that King County did not commit an unfair labor practice even though it did not invoke the interest arbitration provision. The hearing examiner faulted the union, explaining, "if [a] union representing a bargaining unit of interest eligible employees believes that an impasse has been reached, *the union* has the option of seeking mediation and ultimately interest arbitration." *Id.* (emphasis added). The hearing examiner found it persuasive that "no one from *the union* contacted the employer for further negotiations. *The union* did not request mediation from the Commission, nor did it propose that the issue be certified for interest arbitration." *Id.* (emphasis added). The record demonstrates the same fact pattern in the instant case. Both ATU and TEA filed unfair labor practice charges out of frustration with a bargaining process that was active, alive and underway. Neither ATU nor TEA elected to move the bargaining process forward by filing for mediation or interest arbitration. Instead, both unions withdrew from the bargaining

process, an act that is inconsistent with the principles of collective bargaining. Consistent with this PERC precedent, the interest arbitration provision is inapplicable here because the obligation was on the unions to invoke interest arbitration.

Finally, the interest arbitration provision is inappropriately applied in this context as a matter of public policy. The King County Council and Executive are elected by the citizenry and charged with weighing the choices and impacts of governmental decisions. These elected officials are placed into office to consider the political, social and other factors that will ultimately lead to decisions that impact the citizens who elected them. To allow a third-party arbitrator, with neither duty nor accountability to the citizenry, to decide the schedule and scope of services to be provided undermines the political process.

E. The Commission's Holding Regarding an Impermissible Change to the Status Quo is Erroneous

Finally, the Commission's determination that the County unlawfully changed the status quo during the pendency of a representation petition filed for TEA's Transit unit is contrary to law and unsupported by the evidence. The status quo doctrine applies only to mandatory subjects of bargaining and does not bar changes to permissive subjects. *See*, Wash. Admin. Code 391-25-140(2). The status quo doctrine is not applicable here and the County did not make an impermissible change to the status quo.

Further, the Commission's decision failed to consider evidence in the record demonstrating that TEA requested, even demanded bargaining on both the decision and effects of the closures during the pendency of the representation petition. The doctrine of unclean hands establishes that TEA may not seek relief or take advantage of its own misconduct based on its own solicitation of bargaining.

V. CONCLUSION

For the reasons stated herein, King County asks this Court to vacate the Public Employment Relations Commission's decisions and orders set forth in Decision No. 10547-A and consolidated Decision No. 10576-A-PECB and enter an order finding (a) the closures were an exercise of a public employer's managerial prerogative and therefore could be implemented without bargaining the decision, (b) the proper bargaining obligation was effects, rather than decisional, bargaining, (c) imposition of an interest arbitration requirement is inappropriate here, and (d) the County did not impermissibly alter the status quo for TEA-represented employees during the pendency of a representation petition.

RESPECTFULLY SUBMITTED this 12th day of December,

2011.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Declared under penalty of perjury under the laws of the state of Washington dated at Bellevue, Washington this 12th day of December, 2011.



Lynn Michel