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I. INTRODUCTION

King County imposed ten unpaid furlough days upon members of the Technical Employees Association (TEA). The imposition resulted in a nearly four percent pay cut for TEA members for the 2009 calendar year. Under the Public Employees Collective Bargaining Act (PECBA), TEA was entitled to negotiate any change in its members “wages, hours and working conditions.” But the County did not “collectively bargain” this pay reduction before it imposed it. Consequently, TEA filed an Unfair Labor Practice (ULP) Complaint with the Public Employment Relations Commission (PERC). After an administrative hearing and full briefing, a PERC Hearing Examiner found that the County’s unilateral action violated PECBA. The Commissioner *affirmed*.

The County’s challenge to the PERC decisions is not based on any recognized interpretation of PECBA. Despite the County’s clever efforts to attempt to recast its actions simply as a change in “services,” its arguments sidestep the simple fact that no recognized exception to the collective bargaining law permits an employer to unilaterally slash wages by four percent. The Hearing Examiner, the Commission and the Thurston County Superior Court all properly sustained the TEA ULP Complaint based on unequivocal PECBA case law.

King County's argument is so riddled with inconsistencies that it implodes upon itself. The County asserts that the furlough decision was primarily based upon a County decision to simply alter the scope of services provided — but then argues at length that a shutdown is warranted, not due to any particular decrease in service, *but by economics*. The County argues that TEA “waived” its right to bargain by failing to promptly request bargaining — but then concedes the decision to furlough had already been made *before the idea was even presented to TEA*. The County asserts this was a long developing financial crisis — but admits that it demanded that TEA attend negotiation sessions *on day notice without supplying requested bargaining information*.

The County does not dispute — because it cannot dispute — that layoffs and wage reductions are mandatory subjects of bargaining. Instead, it attempts to circumvent its collective bargaining law obligation by recasting the change as a simple “reduction in service.” *Even if* this was primarily motivated by a service decision — which it was not — PECBA does not give the County a free hand to do what it did here — reduce these employees' wages by nearly four percent. No matter how many times the County attempts to invoke its “service reduction” mantra, *it cannot avoid the reality that this was an economically motivated change in employee wages, hours and working conditions*. PERC so found, its

analysis is unassailable and its findings on this record are not susceptible to judicial reversal.

II. COUNTERSTATEMENT OF FACTS¹

TEA represents three distinct bargaining units of engineering and technical employees in two separate divisions of King County Government: The Wastewater Treatment Division and the Transit Division.² One of the contracts, the TEA Transit contract, was involved in interest arbitration with King County before arbitrator Michael H. Beck.³ The two TEA Wastewater contracts expired at the end of June 2008, and the parties began to bargain the successor Wastewater contracts in February 2008.

The parties met to negotiate the Wastewater contract regularly between February and September.⁴ TEA submitted a wage proposal in August. King County did not reciprocate. At the September 16, 2008 session, County Negotiator, Amy Bann, communicated that she would not be able to offer any “COLA” — an annual adjustment in wages to reflect interim inflation. Determining that the parties were at impasse on the

¹ The Respondent’s record references are all to the PERC Administrative Record on the hearing between TEA and the County which has been transmitted to this Court.

² Exhibit 1 [CR 1758-1828], Exhibit 2 [CR 1829-1899], and Exhibit 3 [CR 1900-1946].

³ Exhibit 3 [CR 1900-1946], and Exhibit 4 [CR 1947-1991].

⁴ Eric Davison Testimony; Tr. at 401, 406, 411, 415, and 419 [CR 1032, 1037, 1042, 1046, and 1050].

wage issue, TEA requested mediation.⁵ The parties did not meet or speak again until a conference call on October 30, 2008.⁶

In the meantime, King County had become aware that it would likely face significant budget deficits in its *General Fund* in fiscal year 2009.⁷ *The County's Wastewater and Transit Divisions at issue in this case were funded through separate, dedicated Executive Funds not subject to the same fiscal limit as the General Fund.*⁸ While Amy Bann was meeting regularly with TEA, she simultaneously met monthly with a "labor roundtable group" of which TEA was not a part.⁹ As early as August 20, 2008, Amy Bann began to discuss with the labor roundtable the possibility that the County would want union cooperation to obtain salary savings for fiscal year 2009.¹⁰ By October 27, 13 unions covered by the General Fund

⁵ Roger Browne Testimony; Tr. at 77 [CR 708].

⁶ Amy Bann Testimony; Tr. at 1007: 6-9 [CR 1638: 6-9].

⁷ Exhibit 9 [CR 2005-2025].

⁸ Roger Browne Testimony; Tr. At 37, 79 [CR 668, 710]. While Bann invited TEA to attend this presentation, at no point during the nine months of regular negotiations did she discuss troubles in the Wastewater fund, or the need for TEA to participate in any form of salary savings actions to address these economic woes. Eric Davison Testimony; Tr. at 410, 411, 412, 414 [CR 1041, 1042, 1043, 1045].

⁹ Amy Bann Testimony; Tr. at 966-967 [CR 1597-1598]; Exhibit 73 [CR 2934].

¹⁰ Amy Bann Testimony; Tr. at 967 [CR 1598]. Those parties started to discuss a menu of options that could obtain the intended salary savings, including "reducing the COLA, freezing the COLA, shutting buildings down." *Id.* Tr. at 967: 18-20 [CR 1598: 18-20]. Bann then began to meet with the roundtable routinely with the specific purpose of discussing approaches for dealing with the County's economic crisis (meeting on September 8, October, 6, 13, 14, 20, 24, and 27th) Amy Bann Testimony; Tr. at 970, 971, 974, 976, 978, 979, 981 [CR 1601, 1602, 1605, 1607, 1609, 1610, and 1612]. County Executive Ron Sims attended the meeting on October 6th. Amy Bann Testimony, Tr. at 971 [CR 1602]. The roundtable discussions evolved to formal negotiations of a furlough agreement on October 14, 2008. *Id.* at Tr. at 971-972 [CR 1602-1603].

had tentatively agreed to the furlough.¹¹ Bann did not invite TEA to participate in these discussions with these General Fund unions, and she did not inform TEA that these discussions were taking place.¹² On October 28, 2008, TEA members received an e-mail from County Executive Ron Sims informing them that the General Fund union coalition had agreed to take 10-days of unpaid furloughs in 2009, and that the furloughs would be extended to all executive departments.¹³ The furloughs were spread through the year on identified days. On October 30, County Negotiator, Amy Bann, verbally advised TEA officers in a telephone conference that the County would be furloughing their members.

On November 3, TEA received formal written notice from another labor negotiator, David Levin, that the furlough would be imposed against the TEA Transit unit. David Levin offered to negotiate the “effects” of the furlough but not the furlough itself.¹⁴ TEA counsel notified Amy Bann and David Levin that TEA was not agreeing to the furlough, and that TEA

¹¹ *Id.* Tr. at 979: 17-25. Exhibit 71 [CR 2910-2932: 17-25].

¹² Amy Bann Testimony; Tr. at 1050: 22; Tr. 1051: 7 [CR1681: 22, CR1682: 7].

¹³ Exhibit 16 [CR 2041-2042].

¹⁴ Exhibit 17 [CR 2043-2048], Exhibit 18 [CR 2049], Exhibit 19 [CR 2050-2052]. The first time that an official representative of King County told TEA that its members would be furloughed was on October 30 in a telephone conference on October 30 between Amy Bann, Roger Brown and Eric Davison. Roger Browne Testimony; Tr. at 90 [CR 721]. When Roger Browne reminded Bann that the Wastewater fund was healthy, she informed them that they had to “share the pain.” *Id.*

demanded to bargain the decision itself.¹⁵ In response, Amy Bann and David Levin, made it clear that *the decision had already been made and that they would only be willing to bargain the effects.*¹⁶

Despite, the County's unequivocal announcement, TEA agreed to meet with the County after it acquired further information on the budget situation. On December 10, 2008, TEA representatives met with King County Negotiator Kim Ramsey. TEA suggested an alternative means to facilitate an "operational shutdown" while avoiding a salary reduction.¹⁷ Specifically, TEA presented a compromise idea to go along with the building shutdowns, but adopt a 4, 10-hour day work schedule during the "furlough weeks." The idea was summarily rejected. Ramsey replied that the furlough decision was *already made* and that *she would not agree to any terms that would negate the salary savings intended by the furlough.*¹⁸

On January 2, 2009, King County imposed the first of ten unpaid furlough days against TEA members.¹⁹ TEA filed a ULP Complaint. Its Complaint was upheld by Hearing Examiner Terry Wilson and then affirmed, with some modifications, by the Commission. The County filed Petition for Review a Petition for Review in Thurston County Superior

¹⁵ Exhibit 20, page 11 [CR 2053-2064, page 11].

¹⁶ Exhibit 20, at 8 [CR 2053-2064, at 8].

¹⁷ John Phillips Testimony; Tr. at 525 [CR 1156].

¹⁸ Kim Ramsey Testimony; Tr. at 882-883 [CR 1513-1514].

¹⁹ Exhibit 59 [CR 2255-2260].

Court. The Honorable Thomas McPhee dismissed that petition and this appeal followed.

III. ARGUMENT

A. The Standard of Review arises from the Administrative Procedures Act.

This is a judicial review action under the APA. In *Pasco Police Officers' Association v. City of Pasco*, 938 P.2d 827, 132 Wn.2d 450 (1997) the Supreme Court described the appropriate standard of review of such a PERC ruling:

Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. *City of Pasco v. PERC*, 119 Wn.2d 504, 506, 833 P.2d 381 (1992). RCW 34.05.570(3) permits relief from an agency order if the agency erroneously interpreted or applied the law. *Pasco*, 119 Wn.2d at 507. Under the error of law standard, the court may substitute its interpretation of the law for that of PERC. *Public School Employees v. PERC*, 77 Wn. App. 741, 745, 893 P.2d 1132, *review denied*, 127 Wn.2d 1019, 904 P.2d 300 (1995). *See also Pasco*, 119 Wn.2d at 507 ("an agency is charged with the administration and enforcement of a statute, the agency's interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous.") (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992)). The court may also grant relief from an agency order if it finds that the order "is not supported by evidence that is substantial when viewed in light of the whole record before the court" RCW 34.05.570(3)(e).²⁰

²⁰ *Teamsters Local 763 v. PERC*, 132 Wn.2d 450, 458, 938 P.2d 450 (1997)

B. King County Committed an Unfair Labor Practice by Refusing to Engage in Collective Bargaining.

1. King County Refused to Engage in Collective Bargaining When it Unilaterally Changed Mandatory Subjects of Bargaining.

a) King County has a Duty to Bargain all Mandatory Subjects of Bargaining with TEA including Salaries, Hours of Work, and Layoffs.

King County and TEA are governed by RCW Chapter 41.56, the Public Employees Collective Bargaining Act (PECBA). PECBA makes it an “unfair labor practice for an employer “to refuse to engage in collective bargaining.”²¹ “Collective bargaining” is defined in RCW 41.46.030(4):

“Collective bargaining” means 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 public 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.

Thus, the duty to bargain extends to “wages, hours and working conditions.” In its decision here, PERC properly described the general duty to “collectively bargain:”

A public employer covered by the Public Employees’ Collective Bargaining Act, Chapter 41.56 RCW, has a duty to bargain with the exclusive bargaining representative of

²¹ RCW 41.45.140

determine if a subject is or is not a “mandatory subject of bargaining.”²⁵ PERC has said: “The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of the impact on the bargaining unit.”²⁶ PERC has been consistent and clear: What it looks to in determining whether a change is within the scope of bargaining is the essential nature of the change, *not the creative label that a party might attach to the change.*²⁷

The duty to bargain is broad and a subject is not automatically exempt from bargaining simply because it *somehow involves* management rights. For example, in *King County v. PERC*,²⁸ the Court of Appeals rejected King County’s claim that its right to regulate jail security

²⁵ See *IAFF, Local 1052 v. PERC*, 113 Wn.2d 197, 778 P.2d 32 (1989).

²⁶ *Spokane County Fire District 9*, Decision 3661-A (PECB 1991).

²⁷ As the Commission explained in *City of Yakima*, Decision 6595-C (1999):

In determining whether an issue is a mandatory subject of bargaining, the Commission weighs the extent to which the issue affects personnel matters. Where a subject relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. *International Association of Fire Fighters, Local 1051 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197 (1989). *The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of the impact on the bargaining unit. Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

In *City of Richland*, Decision 6120 (1997), the Examiner rejected an employer’s attempt to cast as management right to determine “staffing” what essentially was skimming of bargaining unit work. He noted: “The Commission and its Examiners thus go beyond characterizations and labels to analyze the facts demonstrated by a full evidentiary record.” See also *City of Wenatchee*, Decision 8802 (2004)(“Whether a staffing proposal is a mandatory or permissive subject of bargaining depends on the nature of the proposal.”).

²⁸ 94 Wn.App. 431, 438-39, 979 P.2d 130 (1999).

exempted it from a duty to negotiate with the nurses union as to whether nurses had to wear a badge identifying their names. The nurse's union argued — and PERC had agreed — that this touched on employee's safety concerns, a working condition, and was therefore subject to the duty to bargain. In upholding PERC, the Court of Appeals demonstrated an application of the balancing test:

King County asserts that the jail's name badge policy is a fundamental management prerogative which directly affects the "operational integrity of the jail." It claims that if decisions such as this one "were required to be made through the Jail's negotiations with its eleven different bargaining units, the result would be chaos and possible loss of control over a facility which necessarily requires strict and careful control over matters affecting security." King County cites numerous sources which support its argument that decisions affecting the safety and security of correctional facilities must remain in the hands of the correctional administrator. To tailor those sources to the facts of this case, King County cites two cases which held that employers were not required to bargain with employees over uniform changes which were implemented to further the facilities' missions. Those cases are not helpful here, however, because the employees in those cases were not relying on personal safety concerns. When union members' reasons for objecting to a proposed policy are not compelling, their interests are clearly outweighed by those of an employer who relies on internal order and discipline as a reason for the policy. But here, the nurses object to the jail's policy because they believe it will jeopardize their safety, a much more significant concern that those raised in the cases King County relies on.²⁹

²⁹ *Id.*

In upholding PERC, the Court also cited the standard used by the National Labor Relations Board (which PERC often cites as persuasive authority),³⁰ that the “scope of bargaining” test involved whether the issue touched on a “legitimate concern” to the union.³¹

Here King County claims that it can exempt it itself from the duty to bargain simply by labeling this action as a “service” decision. PERC has consistently rejected this approach in the past.³²

PERC’s position has been upheld by the courts. In *Metro v. PERC*,³³ the employer argued that its decision over whether reorganize of a “commuter pool program” was one strictly of management rights. The Court rejected that claim, noting that the employee had been transferred to a different work group where they would be subject to new working conditions:

We agree that Metro is not required to bargain over changes in the scope and direction of the commuter pool program which do not primarily concern conditions of employment. Metro may reorganize a significant facet of its operation without bargaining, so long as the wages, hours and working conditions of represented employees are not affected. It is clearly implicit in PERC's order, however, that restoration of the commuter pool program to

³⁰ See *Nucleonics Alliance, Local 1-369 v. WPPSS*, 101 Wn.2d 24, 677 P.2d 108 (1984).

³¹ *Id.* at 440.

³² See e.g., *City of Kalama*, Decision 6739, 6740 and 6741 (PECB 1999).

³³ 60 Wn. App. 232, 803 P.2d 41 (1991), affirmed in part, reversed in part: 118 Wn.2d 621, 826 P.2d 158, 1992, Wash. LEXIS 67 (1992) (Supreme Court reversed separate aspect of decision which required Metro to submit dispute to binding interest arbitration.).

its former status is limited to the wages, hours and working conditions of the five transferred employees represented by Local 17. Its order does not affect management personnel, nor does it infringe upon Metro's prerogative to change the direction of its operations. PERC's exercise of its power under RCW 41.56.160 to compel Metro to comply with its duties under RCW 35.58.265 presents no conflict with Metro's transportation function.³⁴

A core PECBA requirement is that negotiations *precede* any decision to change “wages, hours or working conditions.” An employer commits an unfair labor practice by effecting changes in wages, hours, or working conditions of union represented employees without *first*: “(a) giving notice to the Union; (b) providing an opportunity for bargaining *before* making the decision on a proposed change; and (c) bargaining in good faith to agreement or impasse *prior to* unilaterally implementing any change.”³⁵

For bargaining units subject to the statutory “interest arbitration” provisions,³⁶ a classification of a subject as negotiable carries an additional consequence — no change is permitted without either the

³⁴ *Id.* at 238.

³⁵ *Skagit County*, Decision 8886 (PECB, 2005) (emphasis supplied). *Id.* (citing *City of Vancouver*, Decision 808 (PECB, 1980)). “The notice must be given in such a manner as to allow time for the union to ‘explore all the possibilities, provide counter-arguments and offer alternative solutions or proposals regarding the issue raised by the proposed change’.” *Id.*

³⁶ RCW 41.56.430-492.

“consent” of the other party or a resolution by the interest arbitration panel.³⁷

As indicated, the scope of bargaining is broad and extends to “wages, hours and working conditions.” The obligation to bargain wages unquestionably encompasses the amount of pay.³⁸

PECBA explicitly enumerates “hours” of work as a subject of bargaining. The concept of “hours” is also broad. It encompasses the number of hours to be worked³⁹ and the time of day to be worked.⁴⁰ The concept of hours also extends to scheduling of leave⁴¹ including the extent of flexibility in scheduling time off.⁴²

As indicated, PECBA requires bargaining over “working conditions.” Job security is a paramount “working condition.” Specifically, the Commission noted that it “has repeatedly held that the decision to lay off employees is a mandatory bargaining subject.”⁴³ The

³⁷ RCW 41.56.470

³⁸ See e.g., *City of Tukwila*, Decision 2434-A (PECB 1987).

³⁹ See *Seattle School District*, Decision 5733-A (PECB 1998); *Edmonds Community College*, Decision 10010, CCOL 2008.

⁴⁰ *Chelan County*, Decision 559-A (PECB 1996).

⁴¹ *City of Seattle*, Decision 9173 (PECB 2005) (change in minimum staffing level affecting ability to take paid leave a mandatory subject of bargaining.).

⁴² *City of Pasco*, Decision 9181-A (PECB 2008) (compensatory time system which allowed liberal use of mandatory subject of bargaining); *Mason General Hospital*, Decision 9996 (PECB 2008) (allowing employees to choose whether to deduct time from paid or unpaid leave banks at their option is a mandatory subject of bargaining).

⁴³ *City Of Kelso*, Decision 2633-A (PECB, 1988). See *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280 (PECB, 2009) (noting that “because the employer's layoff decision had a significant impact on employees' wages, hours and working conditions, the decision is a mandatory subject of bargaining”). *City*

employer's obligation to bargain extends to temporary or short term layoffs.⁴⁴

An employer may not evade the duty to negotiate a layoff by characterizing it as an "operational shutdown." Where an employer decides to lay off employees for "economic reasons rather than due to a change in the scope of its operations, such a layoff decision is a mandatory subject of bargaining."⁴⁵ As the Examiner noted in *North Franklin School District*: "[T]he Commission has held, also consistent with federal precedent, that an employer has an obligation to bargain when a desire to reduce employee work hours is motivated solely for the purpose of

of *Centralia*, Decision 1534-A (PECB, 1982); *City of Mercer Island*, Decision 1026-A (PECB, 1981); *South Kitsap School District*, Decision 472 (PECB, 1978)). N.L.R.B. cases are similar: *Pan American Grain Co.*, 2007 N.L.R.B. LEXIS 530, (2007) (affirming the ALJ's finding that the Respondent's decision to lay off employees was a mandatory subject of bargaining); *Tri Tech Services*, 340 N.L.R.B. 894, 895 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain.") (citing *Taino Paper Co.* 290 N.L.R.B. 975, 977-978 (1988); *Peat Mfg. Co.*, 261 N.L.R.B. 240 (1982)); *Davis Electric Wallingford Corporation, et al*, 318 N.L.R.B. 375 (1995) (finding that employer committed unfair labor practice when it unilaterally gave employees 3 working days notice of layoffs and refused to bargain). See also *See Quality Packaging Inc.*, 265 N.L.R.B. 1141, *2 (1982) (ordering the employer to cease and desist from "unilaterally altering its method of recalling employees from layoff without notice to or bargaining with the Union as the exclusive bargaining representative of its employees").

⁴⁴ See *East Coast Steel, Inc. and Shopmen's Local Union No. 807, of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 317 N.L.R.B. 842, 846 (1995) (finding that employer violated its duty to bargain when it failed to properly bargain temporary layoff of employees on three days due to predictable supply shortfalls).

⁴⁵ *Pan American Grain Co.*, 2007 N.L.R.B. LEXIS 530, *12 (2007). (Citing *Adair Standish Corp.*, 290 N.L.R.B. 317, 319 (1988) (finding unlawful failure to bargain over economically motivated layoffs), *enfd.* in relevant part 912 F.2d 854 (6th Cir. 1990); See also *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 213-214, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964).

reducing its labor costs.”⁴⁶ As a result, characterizing a short-term layoff as a “furlough” also does not excuse the obligation to bargain.⁴⁷

b) The County Made Unilateral Changes in Salaries, Hours of Work, and Layoff Procedures.

This ten day furlough significantly impacted employees. Most concretely, it reduced their pay by nearly four percent, *which was entirely its purpose*. By achieving its economic gain at the expense of its employees, King County made unilateral changes in “wages, hours and working conditions” in a number of ways.

The changes were never to be negotiated and were always presented as a *fait accompli*.⁴⁸ When King County communicated with

⁴⁶ Decision 5945 (PECB 1997).

⁴⁷ See *East Coast Steel, Inc.* 317 N.L.R.B. 842, 846 (1995) (finding that employer violated its duty to bargain when it failed to properly bargain temporary layoff of employees on three days due to predictable supply shortfalls).

⁴⁸ TEA learned that the County would impose a furlough on them through a series of communications that it received in October of 2008. The first was an October 13, 2008 e-mail from the head of the King County Wastewater division, Christie True, to all Wastewater employees, which communicated that the proposed 2009 Wastewater budget submitted to the County council includes furloughs. Exhibit 14 [CR 2038-2039]; Roger Brown testimony, Tr. at 89: 15-21 [CR 720: 15-21]. TEA received another notice of the furlough on October 28, 2008, through a King County Global Announcement sent via e-mail to all King County employees from the then County Executive, Ron Sims. Exhibit 16 [CR 2041-2042]. Eric Davison testimony; Tr. at 425: 21- 25; 426: 18–20 [CR 1056-1057]. (Wastewater is in the executive department) (Davison testimony). The e-mail communicated that an agreement had been reached between a “Union Coalition” and the County in which: “[a]ll employees except those deemed to be providing essential services, would take 10 days unpaid furlough in 2009.” Exhibit 16 [CR 2041-2042].

Id. On November 3, the King County Labor Negotiator formally communicated to TEA members in the Transit and Wastewater Divisions that it intended to furlough them in 2009. Exhibit 17 [CR 2043-2048], Exhibit 18 [CR 2049], and Exhibit 19 [CR 2050-2052]. The County then moved forward and implemented the intended furloughs against TEA employees. See Exhibit 31 [CR 2094], (November 26 e-mail from Christie True, stating: “I can say with absolute certainty that WTD will be implementing the furloughs throughout the division”); Exhibit 34 [CR 2111-2121] (December 3, 2008 letter from

TEA about the furlough, as PERC found, it did so solely for the purpose of announcing *a decision already made*, and offering to bargain only what *it deemed* to be the “effects.”⁴⁹

Anita Whitefield, Director of Human Resources providing information regarding the implementation of the 80 hour furlough); Exhibit 39 [CR 2188-2189]; Exhibit 40 [CR 2190-2192]; Exhibit 41 [CR 2193-2194] (December 8, 2008, letters from Elizabeth Ford, Manager of Labor Relations specifying the furlough closure dates); Exhibit 48 [CR 2228-2230] (Letter to FLSA exempt employees regarding the 2009 Furlough Days); Exhibit 50 [CR 2232] (letter from Kevin Desmond, General Manager of Metro Transit Division re: 2009 Furlough Information).

⁴⁹ As David Levin admitted, King County had no intention of bargaining with TEA until the decision to implement the furlough had already been finalized:

1 Q. And you weren't going to bargain with TEA until those
2 decisions were finalized?

3 A. That's correct.

4 Q. And so when you sent the letter to TEA in early
5 November, the decision to close had already been finalized?

6 A. Yes.

David Levin Testimony, Tr. at 730: 1-6 [CR 1361: 1-6]. See also David Levin Testimony, Tr. at 727: 3-A [CR 1358: 3-A]: (“We were not proposing an 80-hour reduction of salary. We were telling TEA that the county was closing operations for 10 days in 2009, and we were willing to negotiate the effects of that with TEA.”)

Bann likewise admitted that by the time she communicated with TEA about the furloughs, King County had already made the decision to implement the furloughs, and she was only offering to negotiate “effects” with TEA: as Bann testified:

23 Q. I believe you indicated that the instructions that
24 went out to the negotiators (On October 30, 2008 regarding the
25 tentative furlough agreement) were to immediately contact the
1 unions, that had not been party to the Coalition Agreement, to
1 begin the discussions with them?

2 A. To seek to begin effects bargaining with them, yes.

3 Q. And it was only going to be effects bargaining?

4 A. Yes.

5 Q. The decision to furlough the employees for 10 days had
6 already been made?

7 A. The decision to shut down county operations for 10
8 days in 2009 had already been made.

9 Q. And did that decision to shut down operations include
10 furloughing employees for 10 days?

11 A. It did.

Amy Bann Testimony; Tr. 1029-1030 [CR 1660-1661].

There is no question that the furlough changed employee “wages,” decreasing the compensation of all members of TEA. The time paid was reduced by 80 hours for the year, a decrease from 2080 to 2000 hours of compensated time.⁵⁰ This change dramatically affected employees take home pay during the ten weeks that the furloughs occurred. Salaried employees were converted to hourly employees during these pay periods to facilitate this reduction in their pay. The County admitted the sweeping scope of the wage reductions: TEA members in the Wastewater division lost a combined total of \$936,000 in salary for 2009 and TEA members in the Transit division lost a combined total of \$269,000 in salary for 2009.⁵¹

The economically motivated furlough was particularly susceptible to collective bargaining. Had the County engaged in bargaining, TEA would have offered suggestions for how the County could have saved money, for example, by recalling contracted out work.

The County does not dispute — because it cannot dispute — that layoffs or wage reductions are mandatory subjects of bargaining. Instead, it attempts to circumvent its collective bargaining obligation by recasting the change as simply a “reduction in service.” The County’s efforts to redefine reality cannot withstand even the most superficial scrutiny. No matter how many times the County attempts to invoke its “service

⁵⁰ David Levin Testimony, Tr. 714: 19-21 [CR 1345: 19-21].

⁵¹ Beth Goldberg Testimony, Tr. 588: 4-11 [CR 1219: 4-11].

reduction” mantra, *it cannot avoid the reality that this was an economically motivated change in employee wages, hours and working conditions.*

Simply calling the change an “operational shutdown” or labeling it as a mere “reduction in service” does *not* alter its fundamental nature. As indicated, what matters is the essential nature of the change, *not the label that a party might attach to the change.*⁵²

Any careful analysis of the nature of the change at issue and its underlying motivation demonstrates that the furlough is a mandatory subject of bargaining. Absent *anywhere* in the County’s brief (or anywhere else in the record) is *a single* identification of *any* change in actual “services” offered through these employees. The reason for that evidentiary vacuum is simple: *There was no change in services delivered.*

⁵² As the Commission explained in *City of Yakima*, Decision 6595-C (1999):
In determining whether an issue is a mandatory subject of bargaining, the Commission weighs the extent to which the issue affects personnel matters. Where a subject relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. *International Association of Fire Fighters, Local 1051 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197 (1989). *The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of the impact on the bargaining unit. Spokane County Fire District 9.* Decision 3661-A (PECB, 1991).

In *City of Richland* Decision 6120 (1997), the Examiner rejected an employer’s attempt to cast as management right to determine “staffing” what essentially was skimming of bargaining unit work. He noted: “The Commission and its Examiners thus go beyond characterizations and labels to analyze the facts demonstrated by a full evidentiary record.” See also *City of Wenatchee*, Decision 8802 (2004)(“Whether a staffing proposal is a mandatory or permissive subject of bargaining depends on the nature of the proposal.”).

This was *entirely* a budget driven reduction *in payroll*, which compelled a reduction in work hours. This was *not*, as the County would like to pretend, a management “policy” decision to reduce service which only incidentally affected the “wages, hours and working conditions” of employees.

The central flaw in the County’s revisionist argument is that it has entirely flipped the direction of causation. The County’s spin is that in response to a fiscal crisis, it made a decision to reduce its level and scope of services offered to the public and that decision incidentally impacted employee wages and hours. In reality, the County’s perceived budgetary situation led it to determine that it needed to reduce its budget by cutting its payroll by nearly four percent. *Any reduction in the services offered — none of which the County can even identify — was incidental to this wage cut — not the other way around.*

As indicated, the County has identified no “services” actually reduced. There is not a scintilla of evidence in this record that County policymakers decided to reduce any of the services these TEA members were offering the public. In reality, the services offered to the public, at least through the TEA bargaining units, continued and the employees were expected to absorb 10 days of leave without pay. In short, the County’s

“change in service” decision.⁵³ The Commission rejected this logic.⁵⁴ It noted that “[a]ctions causing a reduction in compensation to bargaining unit employees are generally mandatory subjects of bargaining” and concluded that because the employer’s primary motivation was to reduce labor costs, all aspects of the changes were bargainable:

We find that the employer's interest in reducing its staff was to reduce labor costs, and the change was a mandatory subject of bargaining under *First National Maintenance Corporation v. NLRB*, 452 U.S. 666 (1981). We also find that under the analysis of *Richland*, the employees' interests in safety, workload, and pay outweigh the employer's attempts to reduce its costs. The reduction of shift staffing and the effects of that reduction are thus mandatory subjects of bargaining.⁵⁵

⁵³ *City of Centralia*, Decision 5282 (PECB 1995).

⁵⁴ *City of Centralia*, Decision 5282-A (PECB 1996).

⁵⁵ The Commission further explained:

The Commission has found a duty to bargain exists when a change results in loss of work opportunities or pay to bargaining unit employees. *See, City of Mercer Island*, Decision 1026-A (PECB, 1981), where a duty to bargain arose because the creation of promotional positions resulted in loss of unit work for the bargaining unit. In *Spokane Fire Protection District 9*, Decision 3482-A (PECB, 1991), an unfair labor practice was found regarding a change of compensation to volunteers that affected the call-back opportunities of uniformed personnel. n8 In *City of Kelso*, Decision 2120-A (PECB, 1985), the Commission specifically held that "contracting out" fire suppression services was a mandatory subject of bargaining. n9

The Examiner in this case found no duty to bargain the removal of work, in part because the employer was not compensating neighboring jurisdictions for their services, as in *City of Kelso*. That decision, however, was based on the impact to the bargaining unit and not whether the persons who would perform the work were paid or unpaid. One reason this employer could unilaterally reduce its crew size was because of its agreements with neighboring jurisdictions to provide extra staffing in emergencies. The employer solicited assistance from other sources to perform work previously performed by bargaining unit members, and decreased its total number of paid personnel. Even though the assistance solicited was unpaid, the employer's action resulted in the same effect to employees in the bargaining unit as "subcontracting" or "skimming" would, that is, loss of work for the bargaining unit, and further supports an unfair labor practice charge.

In short, contrary to King County's claim, mere recitation of "service change" mantra is not sufficient to eliminate the obligation to collectively bargain. *Where the "service changes" primarily impact wages, hours or working conditions, management's right to prioritize the nature and method of delivery of those services do not allow it to unilaterally impose changes in wages hours and working conditions.*

PERC cases are even more emphatic on this principle when it causes a layoff or loss of employee work. In *City of Kelso*,⁵⁶ PERC likewise made clear that layoffs to accommodate budget cuts are a mandatory subject of bargaining.⁵⁷ *City of Kelso* especially undermines the County's claims here in that the employer was unsuccessful in avoiding the obligation to bargain layoffs despite a "service decision" argument.

Citing with approval N.L.R.B. authority,⁵⁸ PERC held in the *South Kitsap School District*⁵⁹ that economically motivated layoffs are a mandatory subject of bargaining. PERC found that the decision to lay off

⁵⁶ Decision 2633-A (PECB, 1988).

⁵⁷ This Commission has repeatedly held that the decision to lay off employees is a mandatory bargaining subject. *E.g.*, *Stevens County*, Decision 2602 (PECB, 1987); *City of Centralia*, Decision 1534-A (PECB, 1982); *City of Mercer Island*, Decision 1026-A (PECB, 1981); *South Kitsap School District*, Decision 472 (PECB, 1978).

⁵⁸ Morris, *THE DEVELOPING LABOR LAW*, 800 (2nd ed. 1983) lists "layoffs" under the heading of "obvious and settled examples" of mandatory bargaining subjects under NLRA. The National Labor Relations Board (N.L.R.B.) has broadly defined the obligation to bargain the decision to discharge or lay off. It has held that the decision to lay off employees for economic reasons, such as efficiency innovations, is a mandatory subject of bargaining.

⁵⁹ Decision 472 (1978).

teacher aides even though a result of a programmatic decision to transfer their work to other employees was subject to mandatory bargaining.⁶⁰

Unable to distinguish any of the PERC precedent cited above, the County cites *Wenatchee School District*⁶¹ for a principle that it does not support. In *Wenatchee School District*, the employer determined that it was more cost effective to expand its half day kindergarten program to all day and eliminate mid-day bus runs. This impacted the job security and wages of bus drivers. PERC made a fact determination that the change was “clearly a decision regarding the education program to be offered.”⁶² As such, it concluded that the employer was only obligated to bargain the effects and not the decision.

Although economics may have played a role in the school district’s decision, the Wenatchee precedent has to be understood as an employer action primarily motivated by the scope of services. Here, by contrast, the County’s decision was primarily an economic one, with any (not-yet-

⁶⁰ PERC reasoned that “[t]he decision to reassign the work to other employees did not change materially the direction of the services offered by the district.” It analyzed the change of services in the same vein as contracting out cases, which PERC has consistently held to be a mandatory subject of bargaining. See *City of Vancouver*, Decision 808 (PECB, 1980); *City of Kennewick*, Decision 482-B (PECB 1978); *Port of Edmonds*, Decision 844 (PECB 1980); *Newport School District*, Decision 2153 (PECB 1985); *Clover Park School District*, Decision 3069 (PECB 1988); *City of Tacoma*, Decision 5634 (PECB 1996); *Camas School District*, Decision 6603 (PECB 1999); *City of Seattle*, Decisions 5391-B & 5391-C (PECB 1997); *North Franklin School District*, Decisions 3980 (PECB 1992) & 3980-A (PECB 1993).

⁶¹ Decision 3240-A (PECB, 1989).

⁶² *Id.*

identified) service reductions merely following the initial decision to save money by cutting employee wages. While the County would like to recharacterize the circumstances in *Wenatchee School District* to be analogous to those here, the precedent in that case can only be understood through viewing the facts as *PERC* actually determined them before it applied the balancing test.

PERC has repeatedly held that economically motivated decisions that reduce wages or affect other working conditions are subject to negotiations. The ten day furlough reduced wages, altered hours of work and scheduling practices, and circumvented contractual layoff and seniority procedures. *All these changes were the direct result of the furlough decision.* In failing to bargain the furlough decision with TEA, the County unilaterally altered mandatory subjects of bargaining in violation of RCW 41.56.140(4).

The County's additional argument that the Commission's "application of the interest arbitration statute is improper"⁶³ is also misplaced. Once the Hearing Examiners and the Commission concluded that these furlough/salary reduction actions invoked a duty to bargain, its conclusions concerning the interest arbitration statute *automatically* followed. As indicated above, the statute mandates submission to

⁶³ Appellant's Brief at 32-35

arbitration for an employer that seeks to change working conditions without having reached an agreement with the labor organization.⁶⁴

Essentially, King County's dispute is with the collective bargaining law that has been crafted by the Legislature. PERC cannot be faulted for properly applying the statute as adopted.

2. The County's Waiver Defense Lacks Merit.

a) The Waiver Defense is Inapplicable Where the Proposal is Presented as a Fait Accompli.

Where an employer requests layoffs due to economic circumstances, the union has the burden of demanding bargaining in a timely fashion, or risk "waiver" of its bargaining rights.⁶⁵ PERC has said: "The Commission does not find waivers by inaction lightly, but a 'waiver by inaction' defense asserted by an employer will likely be sustained if the union fails to request bargaining, or fails to make timely proposals for the employer to consider."⁶⁶ It has also noted that "[t]he burden of proof is with the party claiming waiver."⁶⁷ A waiver defense, by definition, *can*

⁶⁴ See RCW 41.56.470.

⁶⁵ See *East Coast Steel, supra* at 846 ("In light of the economic circumstances motivating a company's decision to lay off employees, however, we will require that negotiations concerning this decision occur in a timely and speedy fashion. Thus should a Union fail to request bargaining in a timely fashion, once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation."); *City of Anacortes, supra*, (citing *Lake Washington Technical College, supra*) (A party may waive its bargaining rights, "when given notice of a contemplated change affecting a mandatory subject of bargaining, a union which desires to influence the employer's decision must make a timely request for bargaining.")

⁶⁶ *City of Anacortes*, Decision 6863-A (PECB, 1996).

⁶⁷ *Seattle School District*, Decision 5755-A (PECB, 1989).

It is beyond argument that the County did not inform TEA of the furlough until *after it had already decided to implement*.⁶⁹ It did not give TEA notice or opportunity to bargain the decision before the decision was made.⁷⁰ And, when it finally gave TEA an opportunity to bargain only the “effects,” it refused to consider *any* alternative that would have addressed the salary loss to TEA members resulting from the furlough.⁷¹ As such, the County presented the decision as a *fait accompli*.

mpli.⁷² It cannot now claim that TEA waived an opportunity to bargain.⁷³

The County argument that it can simply implement when the union fails to request arbitration, flies in the face of the clear text of the statute. RCW 41.56.470 makes explicit the duty to maintain the status quo absent agreement: “During the pendency of the proceedings before the 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 but a party....” The County’s claim that because TEA did not demand arbitration before the furlough days were implemented, is nonsensical both

⁶⁹ Amy Bann Testimony; Tr. at 1007, 1050, 1046 [CR 1638, 1681, 1677]; David Levin Testimony; Tr. at 730 and Tr. at 727 [CR 1361 and CR 1358].

⁷⁰ Amy Bann Testimony; Tr. at 1046 [CR 1677].

⁷¹ See Kim Ramsey Testimony; Tr. at 882 [CR 1513].

⁷² See, *Fritz Companies, Inc. and Fritz Air Freight, et al.*, 330 N.L.R.B. 1296, 169 L.R.R.M. 1558 (2000).

⁷³ See *Davis, supra* at 381.

under the plain terms of PECBA of the light and in light of PERC's finding that the County presented its decision as a "*fait accompli*."

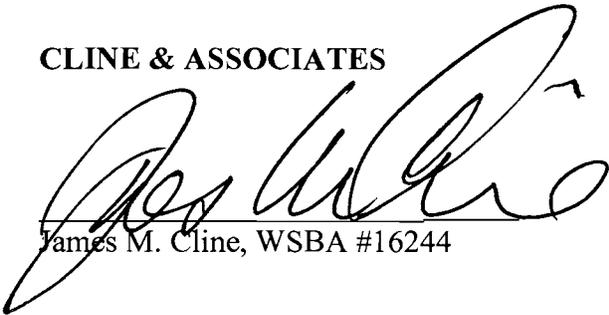
The County's narrative is interesting but takes creative license with the record. The County argument that TEA was simply "frustrated with a bargaining process that was active, alive and underway" is directly contrary to any real facts as well as those facts adopted by PERC. The County had announced the furlough before any meeting, refused to consider alternatives that confronted its faux service reduction position and implemented the first of the furlough days the same day TEA filed its complaint. No real bargaining occurred and no real bargaining was going to occur. The County simply wanted to save money by cutting take home pay and it did so unilaterally.

IV. CONCLUSION

For the foregoing reasons, PERC's decision should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of January, 2012,
at Seattle, Washington.

CLINE & ASSOCIATES



James M. Cline, WSBA #16244

CERTIFICATE OF SERVICE

I, Kelly Turner, Attorney at James M. Cline, declare that I served the Motion for Extension of Time to File Brief to which this Certificate of Service is attached and in the following manner to each of the entities below listed:

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