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COURT OF APPEALS
DIVISION II

NO. 42506-8-II

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY C
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KING COUNTY, Appellant,

v.

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

OPENING BRIEF OF RESPONDENT
AMALGAMATED TRANSIT UNION, LOCAL 587

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I. INTRODUCTION

In the throes of economic difficulties in 2008, Appellant King County (the “County”) set about ways to save significant amounts of money and balance its budget. With respect to the parties here, it determined that the best way to do that would be to reduce labor costs. In order to meet that savings, the County unilaterally implemented, without bargaining, a scheme whereby affected employees would be involuntarily furloughed 10 days in 2009. In so doing, and as the County candidly acknowledged at the time, the annual income of these employees was slashed across-the-board by 3.85%. As the County further acknowledged, 100% of the savings in the transit division resulted directly from the labor costs associated with the furloughs. The 66 affected members of Respondent Amalgamated Transit Union, Local 587 (the “Union” or “Local 587”) work within the transit division.

In this appeal, the County ignores the sequence above, and rather attempts to turn the facts upside down by characterizing its action as a decision to close certain buildings and associated operations, with the furloughs only a mere afterthought: collateral damage associated with this alleged operational decision. It does so because it must do so if it wants to be able to argue the only legal theory that could potentially legitimize its unfair labor practice – that its economic decision relates to its

entrepreneurial control, and is therefore a permissive, and not a mandatory, subject of bargaining. If a mandatory subject of bargaining, the County had an obligation to bargain its decision with the Union. As will be demonstrated below, the Public Employment Relations Commission (“PERC”) and the Superior Court got it right when they refused to be hoodwinked by the County’s attempts at re-characterizing the facts.

The record is replete with substantial evidence that the impetus of the County’s decision was to save on labor costs, and that it implemented the furlough plan (and not a “building closure” plan) precisely for that purpose. There is also substantial evidence in the record that operational impacts of the furlough on the County’s business were either non-existent or marginal and not sufficient to factor into the City’s ability to maintain control of its “entrepreneurial core.” While the County struggles mightily to characterize PERC’s decision as wresting from it the ability to conduct its business for the people, it will be clear that fulfilling its statutory obligation to bargain in good faith presents no such impediment.

Both the PERC and the Superior Court recognized the County’s actions for what they were, and they applied the appropriate law (with which PERC has significant expertise and should be granted substantial

deference by this Court) in a manner consistent with the holdings of the agency and the courts.

The record will show that PERC looked at all the evidence presented at the hearing, and appropriately balanced the factors necessary in arriving at a conclusion that the furlough plan was a mandatory subject of bargaining. The County failed to bargain even the effects of its furlough decision, insisting that the Union conform to a scheme that had been negotiated with other unions without the knowledge of or participation by Local 587. The Union respectfully requests that this Court defer to PERC's findings, and affirm its holding that the County committed an unfair labor practice when it implemented its furlough plan after refusing to bargain both the decision and effects of that plan.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

PERC correctly interpreted and applied the law in issuing its May 19, 2010 Decision and Order. Its findings are supported by substantial evidence in light of the whole record before the Court. Therefore, ATU assigns no error.

B. Issues Upon Review

1. Whether King County's implementation of furloughs, with

the exclusive purpose and result of reducing employee wages, was a mandatory subject of bargaining.

2. Whether King County was therefore obligated to bargain its decision to implement the furlough, and its effects, with ATU.

3. Whether, considering the totality of its conduct, King County failed to meet its obligation to negotiate in good faith the decision and its effects, and therefore committed an unfair labor practice.

4. Whether King County was obligated to compel its decision and the effects to interest arbitration prior to implementing the furloughs.

III. STATEMENT OF THE CASE

A. Factual Background

The County began its annual budget planning process in March of 2008. ATU CR 124-34 (Tr.), 702, 711.¹ While ATU and the other unions representing County employees were invited to a presentation on the 2009 budget on March 10, 2008, the County gave no “distress signals” about the budget at that time. ATU CR 112, 117-18 (Tr.), 702, 1076 (PERC Dec.). During the summer of 2008, Kevin Desmond, General Manager of the Metro Transit Division, communicated to transit employees that the sales

¹ Throughout this brief, references to Clerk’s Papers will be designated as “CP,” and references to documents contained in the Certified Record from PERC will be designated as “ATU CR.” References to transcripts of ATU’s Hearing will be designated “Tr.” and paginated in accordance with PERC’s Certified Record.

tax revenues on which Metro depends were declining, but indicated to Union President Lance Norton that reductions in service would be avoided “at all costs.” ATU CR 79 (Tr.), 787, 1076 (PERC Dec.). These conversations caused Norton to follow the status of transit funding more carefully, but he had no reason to believe the County was taking action on mandatory subjects of bargaining that would affect ATU members. ATU CR 80 (Tr.).

On October 3, 2008, County Executive Ron Sims sent a letter to the King County Union Coalition, an informal group of labor unions representing King County. Local 587 is *not* a member of the Coalition. In his letter, Sims stated he had directed the County budget office to “find ... \$15 million in reductions from the wages of both represented and non-represented employees.” ATU CR 685. Sims stated he was “prepared to take the extraordinary step of requiring staggered mandatory unpaid . . . furloughs” and invited the Coalition to “bargain alternative ways to generate these savings” at an October 6, 2008 meeting. ATU CR 686, 1076 (PERC Dec.). Sims indicated, however, that “[f]urloughs in Transit provide little savings,” and he would thus “be seeking alternative reduction strategies with Transit employees.” *Id.* The County did not send Sims’ letter to ATU. ATU CR 56 (Tr.), 1076-77 (PERC Dec.).

The County asked the Coalition if they would engage in “effects” bargaining about the budget decision on October 13, 2008,² and began negotiations leading to the Agreement the very next morning, but took no affirmative steps to ensure that *all* the affected unions were aware of the negotiations. ATU CR 230-31 (Tr.), 1077 (PERC Dec.). The Agreement eventually reached between the Coalition and the County contained provisions amounting to significant wage losses for affected employees. ATU CR 68 (Tr.), 673-80. The Agreement requires "mandated leave by all eligible County employees" for ten specified days during the 2009 calendar year. ATU CR 677.

The County made no contact with ATU regarding the Coalition Agreement until County Labor Negotiator David Levin notified Norton by phone a day or two prior to Ron Sims' October 28, 2008 letter to all employees announcing both the Coalition Agreement and the furloughs. ATU CR 44-48 (Tr.), 1077 (PERC Dec.). This conversation was the first indication to ATU that its members could be affected by the furloughs. ATU CR 44, 47 (Tr.). Despite ATU's representation of the largest number

² The “effects” bargaining in which the County and Coalition engaged consisted of between four and five bargaining sessions between the Coalition and the County, culminating in a tentative agreement on October 27, 2008. At no point did the parties bargain whether or not the furloughs would occur. However, the parties were able to bargain mitigations to the effects of the furloughs, so that the final Agreement preserved the “cumulative effect of COLA increases,” but lowered the net 2009 COLA increase to one percent. ATU CR 994-95 (HE Dec.).

of County employees and ATU's long-standing collegial negotiating relationship with the County, ATU was never asked by the County to bargain individually or as a part of the Coalition. ATU CR 42-44, 45 (Tr.), 1077 (PERC Dec.).

Once ATU received notification of the Agreement between the County and the Coalition, the furloughs were all but confirmed. ATU CR 46-47, 49, 51, 83, 85 (Tr.). Norton testified that on October 29th and 30th, Levin informed him that "this was going to happen . . . [t]he furloughs and shutdowns of the dates listed, and the conditions that were negotiated in this agreement . . . [i]t was going to happen to everyone." ATU CR 49 (Tr.). Levin said the County would be willing to meet to discuss "the effects on the furlough, [and the] tentative agreement," but that the decision to implement the furloughs was a "done deal." ATU CR 51-52 (Tr.).

Nevertheless, Norton demanded that the County bargain both the decision and effects of the furlough, and attempted to offer up cost-saving proposals that could have avoided them. ATU CR 54, 58-59 (Tr.), 1077-78 (PERC Dec.). Those proposals were dismissed out of hand. ATU CR 60-61 (Tr.). Norton recalls that in conversations with Levin "he'd say, Lance, this is going to happen. . . . [O]n January 2nd it's happening." ATU CR 65 (Tr.). An experienced negotiator with more than 15 years of

Union leadership, Norton "pretty well can read and get a good sense if there's any opportunity to continue, and [he] knew all the other unions had agreed to this, and it was just a done deal. And there was nothing [he] could say or to do that would provide anything different from what the coalition had agreed to." ATU CR 114 (Tr.).

When it became clear to ATU that the County was unwilling to bargain the decision to furlough transit employees, Norton attempted to commence negotiating the effects of the Coalition Agreement on ATU members by proposing several alternatives, including an AC leave (compensatory time under the collective bargaining agreement) bank, wherein transit employees could donate time to employees that were going to be furloughed. ATU CR 59-60, 83 (Tr.), 996 (HE Dec.), 1077-78 (PERC Dec.). However, the County did not show "any willingness to bargain the coalition agreement." ATU CR 60, 61, 63 (Tr.). Levin expressed some interest in the AC leave proposal, but clearly specified that the County was only open to negotiating "in the context of ATU signing the furlough agreement." ATU CR 95 (Tr.), 687, 996 (HE Dec.). However, in follow-up discussions, the County made clear that it was unwilling to administer the donation of the AC hours, expressing that it would be difficult for the County to agree to something different with ATU than it agreed to with the Coalition. ATU CR 63 (Tr.). After that

untenable proposal, there was no subsequent discussion with the County regarding the effects of the imposed furloughs. ATU CR 66-67 (Tr.). Levin made it clear that there was no room to negotiate on the Coalition Agreement. ATU CR 67 (Tr.), 996-97 (HE Dec.).

In the course of these negotiations, the County placed a great deal of pressure on ATU to accept the Coalition Agreement. ATU CR 65, 85, 98 (Tr.). The County established a deadline for ATU to sign the "furlough effects agreement" in a November 12, 2008 email from Levin to Norton, where Levin wrote: "As we discussed, we need to get all of these signatures into a transmittal package by the end of the day Friday [November 17, 2008]." ATU CR 688. That deadline was reiterated in another email from Levin to Norton on November 13, 2008. ATU CR 690. Norton held a meeting with the affected ATU employees in mid-November, where the members unanimously voted their opposition to ATU joining the Coalition Agreement. ATU CR 70-71 (Tr.).

Throughout the process, the County noted that the furloughs were the core of the implementation. As noted above, Executive Sims described the "extraordinary step of requiring staggered mandatory unpaid week long furloughs..." ATU CR 686. On October 28th, in announcing the Coalition Agreement, the Executive stated that the "essence of the agreement" is a cost of living adjustment but with employees taking "10

days unpaid furlough in 2009.” ATU CR 673. In correspondence with the Union, the County repeatedly characterized the issue as the “King County furlough,” or “the furloughs.” *E.g.*, ATU CR 681-86, 687, 688-98, 699-701, 703. On December 3rd, 2008, County Human Resources Director Anita Whitfield issued a memo to Departmental and Deputy Directors entitled “2009 Furloughs,” the subject of which is “furlough management.” ATU CR 691. In that memo, “Facilities Closures” are only but one of the eight bulleted items which should be given attention as a result of the decision to furlough. ATU CR 692.

The County implemented its first furlough day on January 2, 2009. However, the County did not fully shut down operations as provided in the Coalition Agreement. Rather, the County exempted select employees deemed to be delivering essential services, including the pass sales office located in the King Street building, where many of the affected ATU employees worked. Since that time, the furlough days as set out in the Coalition Agreement have been implemented. ATU CR 72-73, 276-77 (Tr.). Due to the County’s insistence that the furloughs would move forward according to the Coalition Agreement regardless of any further proposals made by ATU, Norton informed Levin that ATU would pursue remedies through the grievance and unfair labor process instead. ATU CR 307 (Tr.). *See also* ATU CR 51-52, 58-61, 65-68, 114, 296 (Tr.), 996-97,

1005-07 (HE Dec.). It did so, and a hearing was held before a PERC Hearing Examiner, after which the parties submitted post-hearing briefs as well as supplemental briefing of *Griffin School Dist.*, Decision 10489 (PECB, 2009). ATU CR 968-88 (Briefs on Supp. Auth.). On September 29, 2009, the Hearing Examiner issued Decision 10547, ruling that the County had refused to bargain a mandatory subject and interfered with employee rights when it decided to furlough bargaining unit employees without offering to bargain the decision or its effects with ATU. ATU CR 990 (HE Dec.).

Applying the balancing test employed by PERC in determining whether a subject of bargaining is mandatory or permissive, the Hearing Examiner concluded that “the fundamental nature of the employer’s action is a reduction in labor costs achieved by cutting employee work days,” ATU CR 1006 (HE Dec.), and that the extent to which the employer’s action impacted employee wages, hours and working conditions predominated over the extent to which the decision is an essential management prerogative. ATU CR 997-98, 1006 (HE Dec.). The Hearing Examiner also rejected the affirmative defense of business necessity raised by the County, finding that the County failed to provide sufficient evidence that it had no other option but to impose furloughs, and

that the 24 days which passed before the County provided notice to ATU of the furloughs was “not timely.” ATU CR 1003 (HE Dec.).

With respect to the County’s obligation to engage in bargaining over the effects of the furlough, the Hearing Examiner held that where an employer and union are unable to reach agreement on proposed changes to wages, hours, or working conditions, the employer may not unilaterally implement the change and might instead have exercised the option of interest arbitration through the process provided by RCW 41.56.492. ATU CR 1003 (HE Dec.), citing *City of Tukwila*, Decision 9691-A. By unilaterally implementing the furloughs without having reached agreement with the union or pursuing interest arbitration, the County committed an unfair labor practice. ATU CR 1004, 1007 (HE Dec.). The County appealed the Decision to PERC, and on May 19, 2010, PERC affirmed and adopted the Hearing Examiner’s decision in its entirety. ATU CR 1086 (PERC Dec.).

The County appealed PERC’s findings to Thurston County Superior Court on June 18, 2010, on the grounds that PERC erroneously interpreted and applied the law and that its ruling was not supported by substantial evidence in light of the entire record. Oral arguments were held April 22, 2011. The Honorable Judge Thomas McPhee rendered his opinion upholding PERC’s Decision and Order in its entirety on July 27,

2011, finding that “the required balancing of both sides was considered and was the foundation of PERC’s final decisions,” CP 96, and that its findings as a result were supported by substantial evidence in the record. CP 99. The County has again appealed its holdings before this Court.

IV. ARGUMENT

A. *Standard of Review*

The Washington Legislature has charged PERC with the administration and enforcement of the Public Employees’ Collective Bargaining Act (“PECBA”), RCW 41.56. *City of Pasco v. Pub. Employment Relations Comm’n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). The Legislature has delegated to PERC the “delicate task of accommodating the diverse public, employer and union interests at stake in public employment relations.” *Int’l Ass’n of Fire Fighters, Local Union 1052 v. Pub. Employment Relations Comm’n*, 113 Wn.2d 197, 202-03 (1989) (the *City of Richland* decision). As a result, “[g]reat deference is usually given to PERC’s interpretation of the law it administers.” *Int’l Ass’n of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235, 239, 967 P.2d 1267 (1998), citing *Local 2916, IAFF v. Pub. Employment Relations Comm’n*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995). In short, the Legislature has tasked PERC with expertise in Washington public

sector labor relations, not the courts. *Maple Valley Professional Fire Fighter Local 3062 v. King County Fire Protection Dist. No. 43*, 135 Wn. App. 749, 759, 145 P.3d 1247 (2006).

The Washington Administrative Procedure Act (WAPA), RCW 34.05, dictates that a court shall overturn PERC action *only* if it determines that PERC erroneously interpreted or applied the law, or the order is not supported by substantial evidence when viewed in light of the whole record before the court. RCW 34.05.570; *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 552, 222 P.3d 1217 (2009), citing *City of Federal Way v. Pub. Employment Relations Comm'n*, 93 Wn. App. 509, 512, 970 P.2d 752 (1998). These standards are applied to PERC's decision, as opposed to that of the Examiner or the superior court. *Pub. Employment Relations Comm'n v. City of Vancouver*, 107 Wn. App. 694, 703, 33 P.3d 74 (2001). The court must also weigh the findings of the Hearing Examiner as part of the record. *Id.* at 704, citing *Pasco Police Ass'n v. City of Pasco*, 132 Wn.2d 450, 459, 938 P.2d 827 (1997).

When reviewing questions of law, an appellate court may substitute its determination for that of PERC, although PERC's interpretation of the collective bargaining statutes is entitled to "great weight and substantial deference." *Id.* at 703. In adjudicating scope-of-

bargaining questions, it is well-settled that PERC applies a balancing test, measuring the subject's relationship to "wages, hours and working conditions" against the extent to which the subject is a management prerogative, and determine which of these characteristics predominates. *City of Richland* at 203, citing *Spokane Educ. Ass'n v. Barnes*, 83 Wn.2d at 376, 517 P.2d 1362. In *City of Richland*, the Supreme Court held that PERC assumed, rather than decided, that the union's proposal concerned a mandatory subject of bargaining and thus did not apply the required balancing test. *Id.* at 202. Here, however, it is clear that PERC correctly identified the predominant characteristics test and applied it to the analysis of the facts presented. ATU CR 990-91, 997 (HE Dec.) ("Applying the balancing test in this case, I find that the extent to which the employer's action impacts employee wages, hours, and working conditions predominates over the extent to which the action is an essential management prerogative."); ATU CR 1080 (PERC Dec.); CP 96 ("The decisions of the hearing examiners and the Commission demonstrate that the required balancing of both sides was considered and was the foundation of PERC's final decisions.").

The County complains that in finding that the furloughs' direct relationship to employee wages outweighed their impact on the County's managerial prerogative, PERC incorrectly interpreted and applied the

balancing test. Appellant's ("App.") Opening Brief, 12-13. In so claiming, however, the County finally concedes that PERC in fact applied the balancing test, but objects to its finding that the County's prerogative to control services did not predominate. App. Opening Brief, 16-17. Therefore, the County has only raised a question of substantial evidence, not error of law – "[i]f it was merely the outcome of balancing the two sides (which one predominated) that was challenged, that would be a finding of fact reviewable under the substantial evidence standard." CP 96 fn.3. "It is the process that PERC undertook in deciding these cases that determines the correct application of law, not their consistency with outcomes from prior cases with different facts." CP 95. Thus, as the Superior Court correctly analyzed, the County's challenge to the outcome of PERC's balancing test is a challenge to fact, not law. Therefore, this Court should appropriately uphold the Superior Court's finding that PERC committed no error of law in applying the predominant factor test to its finding that the County's implementation of furloughs was a mandatory subject of bargaining, and instead evaluate PERC's decision using the substantial evidence standard.

Next, this Court must determine whether PERC considered evidence that was substantial in light of the whole record before it. The substantial evidence standard of review is deferential; it does not permit a

reviewing court to substitute its view of the facts for that of the agency if substantial evidence supports the agency's finding. *Yakima Police Patrolmen's Ass'n*, 153 Wn. App. at 553, citing Washington Administrative Law Practice Manual § 10.05(c) at 10-29 (2008). Evidence that is substantial is that which is "sufficient to persuade a fair-minded person of their truth." *Pub. Employment Relations Comm'n v. City of Vancouver*, 107 Wn. App. 694, 703, 33 P.3d 74 (2001), citing *City of Federal Way v. Pub. Employment Relations Comm'n*, 38 Wn. App. 572, 512, 970 P.2d 752 (1998) (further citations omitted). Only PERC is entitled to substitute its findings of fact for those of the Examiner; therefore, as with errors of law, PERC's findings are the relevant findings for appellate review. *City of Vancouver* at 703-704, citing *City of Federal Way*, 93 Wn. App. at 512, 970 P.2d 752 (further citations omitted). The Hearing Examiner's findings are considered as part of the record. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 459, 938 P.2d 827 (1997). Here, PERC affirmed and fully adopted the Hearing Examiner's findings of fact, a strong endorsement of her evaluation of the record. The substantial evidence standard demands that this Court defer to PERC's evaluation and expertise.

B. *The Decision to Furlough Employees is a Mandatory Subject of Bargaining.*

The Public Employee Collective Bargaining Act obligates unions and employers to "confer and negotiate in good faith . . . on personnel matters, including wages, hours and working conditions." RCW 41.56.030. Matters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered a prerogative of employers or of unions have been categorized as "non-mandatory" or "permissive." ATU CR 1078 (PERC Dec.); RCW 41.56.030(4); *Yakima County*, Decision 6595-C (PECB, 1999). An employer is obligated to bargain both its decision and the effects of any changes to mandatory subjects of bargaining it wishes to implement. ATU CR 1078-79 (PERC Dec.), citing *Skagit County*, Decision 6348 (PECB, 1998). An employer failing or refusing to bargain in good faith on a mandatory subject commits an unfair labor practice. ATU CR 1078 (PERC Dec.), citing RCW 41.56.140(4) and (1); *Griffin School Dist.*, Decision 10489-A (PECB, 2010).

Where the bargaining obligation is not apparent, the Commission applies a balancing test to determine whether "the matter at issue is one which is at the core of entrepreneurial control ... or [whether it] directly affects terms and conditions of employment with a limited impact upon the ability of the employer to meet its managerial objectives." *Yakima County*, Decision 6595-C (PECB, 1999). The application of the balancing

test focuses on which characteristic predominates, based on the “nature of the impact on the bargaining unit.” ATU CR 1079 (PERC Dec.), citing *Int’l Ass’n of Fire Fighters, Local 1052 v. Pub. Employment Relations Comm’n*, 113 Wn.2d 197, 200 (1989); *Spokane County Fire Dist. 9*, Decision 3661-A (PERC 1991).

1. PERC correctly applied the law in finding that the County’s decision to furlough was a mandatory subject of bargaining.

In this case, PERC examined the Hearing Examiner’s application of the predominant characteristic test and found that it had been applied without error. ATU CR 1080 (PERC Dec.). The Thurston County Superior Court agreed. CP 97 (“There was no error of law or erroneous application of the law.”). In adopting the Hearing Examiner’s findings, PERC noted the Examiner’s consideration of the County’s prerogative to provide services and manage its budget. “The Examiner found that the employer’s desired action, implementing ten days of furloughs, impacted wages, hours and working conditions in such a manner as to predominate over the employer’s managerial prerogative ... The Examiner noted that the employer had the right to determine and manage its own budget, and considered the impact of the looming financial crisis. These facts did not make the decision to furlough employees a permissive one. We agree.” ATU CR 1080 (PERC Dec.).

In its Opening Brief, the County relies heavily on *Wenatchee School Dist.*, Decision 3240 (PECB, 1989), and calls the question of bargaining public employee furloughs one of “first impression.” App. Opening Brief at 12. In fact, prior to deciding the matter currently before the Court, PERC decided *Teamsters Local Union 252 v. Griffin School Dist.*, Decision 10489 (PECB, 2009), where the employer sought to reduce its budget by reducing its employee work year by 20 days, resulting in a seven to eight percent reduction in wages, “due to the financial difficulties that the district was experiencing.” *Griffin School District*, Decision 10489 (PECB, 2009), *aff’d* Decision 10489-A (PECB 2010). There, PERC specifically distinguished the holding in *Wenatchee School District* with respect to an employer’s decision to furlough: while employers “generally have the entrepreneurial right to control the level of services they provide,” an employer must provide evidence that “its decision to close its facilities on certain days was due to a lack of work, or that the public was no longer utilizing a service it had offered.” *Griffin School Dist.*, Decision 10489-A (PECB, 2010). The County failed to do so here.

Similarly, it is well-settled before PERC that reductions in service made exclusively for the purpose of effecting labor cost savings are mandatory subjects of bargaining. “Despite the employer’s legitimate need to achieve budgetary savings, the decision to close facilities for 20

days impacted wages and hours so substantially that the decision must be bargained.” *Id.* at 7. *See also City of Kelso*, Decision 2633-A (PECB, 1988) (“the decision to lay off employees is a mandatory bargaining subject”); *North Franklin School Dist.*, Decision 5945 (PECB, 1997) (“an employer has an obligation to bargain when a desire to reduce employee work hours is motivated solely for the purpose of reducing its labor costs.”); *City of Centralia*, Decision 5282-A (PECB, 1996) (“The employer’s interest in reducing its staff was to reduce labor costs.... The reduction of shift staffing and the effects of that reduction are thus mandatory subjects of bargaining.”) This is consistent with federal precedent, particularly the NLRB’s holding in *First National Maintenance Corporation v. NLRB*, that an employer’s desire to reduce labor costs is a matter “peculiarly suitable for resolution within the bargaining framework.” 452 U.S. 666, 679-80 (1981). Here, PERC similarly found that, upon balance of the evidence, “[t]his record supports a finding that the employer’s chief motivation for imposing furloughs was to reduce labor costs.” ATU CR 1080 (PERC Dec.).³

³ In its Opening Brief, the County complains that PERC failed to consider substantial evidence in the record, supporting this conclusion by citing only Sims’ October 3 letter. App. Opening Brief at 26. However, in so finding, PERC specifically adopted the findings of the Hearing Examiner, whose findings of fact reflect her examination of several documents in the record supporting her conclusion that the County acted exclusively to reduce labor costs. ATU CR 1006 (HE Dec.) (“The fundamental nature of the employer’s action was a reduction in labor costs achieved by cutting employee work days.”)

Throughout its argument, the County seeks to frame the furloughs as a reduction in services to the public. This argument is disingenuous. The County failed to provide any evidence whatsoever that its decision resulted from a lack of work or the public's failure to make use of the affected services on furlough days. In fact, every single one of the services which the County claims it reduced were provided and used by the public at several other sites during furlough days: customer assistance, rider information, and pass sales are available at any time on King County's website, <http://transit.metrokc.gov>, and pass sales were transacted at over 100 locations throughout King County, including several retail locations which remained open throughout furlough days. The County failed to provide evidence on this point, but presumably the public's use of the pass sales service that would have occurred at the King Street Center was absorbed by those other locations on the furlough days. The fact that the County continued to provide identical services at other venues demonstrates that King County's decision was not a reduction in service at all, but was in fact solely intended to reduce labor costs.

But the County itself made no initial attempt at masquerading its efforts – in Executive Sims' October 3rd letter to the Coalition, he plainly stated: "I have directed the budget office to find the final 15 million in reductions from the wages of both represented and non-represented

employees.” ATU CR 685. Then, on October 27th, he emailed the Coalition that “[t]he essence of the [Coalition] agreement is a cost-of-living adjustment.” ATU CR 673. The County knew and clearly expressed that its decision had nothing to do with services and nothing to do with programs; it was, at its core, an adjustment of employee wages. PERC relied upon that and other evidence in rendering its balance, and correctly found that the predominant characteristic of the County’s decision was a reduction in employee wages – a mandatory subject of bargaining.

In asserting that PERC failed to correctly apply the law, the County specifically takes issue with PERC’s distinguishing *Wenatchee* on the grounds that the school district’s decision in that case was a “wholesale” or “programmatic” change. App. Opening Brief at 22-23. However, PERC found the school district’s decision in *Wenatchee* to be a “policy decision concerning the employer’s basic educational program,” *Wenatchee School Dist.*, Decision 3240 at 7, which came from the district’s curriculum department. *Id.* at 6. It entirely eliminated the half-day kindergarten provided by the school district, dramatically impacting the core educational program provided by the employer. The program change in the kindergarten program, as it turned out, residually affected another group of employees – school bus drivers, which in turn had a

concomitant and desirable reduction in cost to the school district. Here, on the other hand, there was no such significant reduction or change in service – for example, the County did not entirely eliminate the purchase of pass sales at its King Street building, but “simply preclude[d] certain services from being available on ten days a year.” ATU CR 1081 (PERC Dec.). And the purpose behind the change in working conditions here was to directly reduce the amount of money paid to the furloughed employees. The fact that some services may not have been provided on 10 days in the year is not attributable to a program change, but rather because the County told the affected employees not to show up to work those 10 days because they were not going to get paid.

PERC has specifically held that “[w]here an employer seeks to reduce its operating costs without making a programmatic change to its operation, *any decision* that reduces employee wages or hours is a mandatory subject of bargaining.” *Griffin School Dist.*, Decision 10489-A (PECB, 2010) (emphasis added). Thus, “furlough days are a mandatory subject of bargaining.” *Griffin School Dist.*, Decision 10489 (PECB, 2009), *aff’d Griffin School Dist.*, Decision 10489-A (PECB, 2010). *See also Skagit County*, Decision 8746-A (PECB, 2006) (where PERC held that the employer had the right to determine the level of ferry service it

would offer but did not have the right to change the employees' shift schedule without bargaining).

In the *Wenatchee* case, PERC found that cost savings were a factor in the school district's decision, but they were not the only factor, and as mentioned above, the programmatic changes in the classroom there had a residual effect on a bargaining unit outside the classroom. In the instant case, cost savings were the *only* factor, and had a direct effect on every employee who was furloughed.

In this case, after applying the facts of the record to the appropriate balancing test, the Hearing Examiner held the predominant characteristic of the furloughs was their "[direct effect on] bargaining unit employees' wages, hours and working conditions. . . . [which reduced] the employee work year by 80 hours and reduces employee compensation for 2009 by 3.85 percent." ATU CR 997-98 (HE Dec.). PERC affirmed and adopted that holding. ATU CR 1080 (PERC Dec.). As discussed, the County made no real programmatic or service change, other than to decide to absent its work force 10 days a year. To the extent there was any programmatic change, it was inconsequential and a result of the furlough decision.

2. PERC engaged in a full and accurate balancing test and reached its finding based on substantial evidence in the record.

In its Opening Brief, the County accuses the Commission of reaching its conclusion based on a single document and failing to consider the remaining record. App. Opening Brief, 26-27. Not true. When holding that the County’s “chief motivation for imposing furloughs was to reduce labor costs,” PERC relied not only on King County Executive Ronald Sims’ October 3 letter stating that the County sought to balance its budget by reducing employee wages and Sims’ October 13 budget submissions, but also on the findings of the Hearing Examiner, who heard the entire case, including the testimony of a number of witnesses. ATU CR 1080-81 (PERC Dec.). Notably, the Hearing Examiner commented on the complete absence of *any* evidence provided by the County to demonstrate that it had even calculated or considered non-labor costs in deciding to implement furloughs. ATU CR 1081 (PERC Dec.).

Similarly, the Superior Court found that the findings made by the Hearing Examiner and adopted by the Commission “were all supported by substantial evidence.” CP 98-99. Moreover, the Superior Court noted the erroneous nature of the County’s argument that “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,”

CP 98, citing the County's Brief (CP 54), correctly clarifying that the correct standard is "whether the PERC's decision is supported by substantial evidence, not whether there was substantial evidence supporting a contrary position." CP 98. The County made an identical argument in its brief before this Court, Appellant's Opening Brief at 26, but its argument here is no less flawed.

Nevertheless, PERC correctly upheld the Hearing Examiner's findings, and both engaged in a complete analysis of the record to apply the balancing test. The Examiner cited hearing testimony from Beth Goldberg, King County's deputy director of its Office of Management and Budget, ATU CR 992-93 (HE Dec.); the transit division's mid-biennial supplemental budget request, which proposed nine specific options for closing the division's budget gap, most of which the County Council chose not to pursue, ATU CR 993 (HE Dec.) referencing 789-90; and Sims' October 13 proposed budget identifying targeted savings from represented employees. ATU CR 993-94 (HE Dec.). However, the Examiner's consideration was far from unbalanced: she also considered evidence describing the County's budgeting challenges, including declining sales tax revenues and increasing diesel fuel costs, ATU CR 993-94 (HE Dec.), and explicitly cited Sim's October 27 email noting the

savings on heating and cooling costs that would result from the furloughs (with respect to divisions other than transit). ATU CR 999 (HE Dec.).

The Hearing Examiner and Commission correctly found that at its heart, the County acted solely out of a desire to balance its budget by reducing labor costs. The County candidly admitted, and does not dispute, that one hundred percent (100%) of the projected \$22.8 million savings from the furlough were derived from labor costs, of which \$1.7 million came from Transit.⁴ ATU CR 165 (Tr.). *See also* ATU CR 673-74, 768. Moreover, the record demonstrates that the County considered and dismissed other cost-saving options which would almost certainly have covered the \$1.6 million transit deficit, including elimination of services, reducing worker compensation costs, and adjusting a planned 4.88 percent COLA increase to more than 2,000 unrepresented County employees.⁵ ATU CR 136-37, 154, 159-60 (Tr.), 993-94 (HE Dec.). Instead, the County chose to achieve the projected savings through furloughs. ATU CR 138-39, 143 (Tr.).⁶

⁴ At the hearing before Examiner Seigel, Beth Goldberg, deputy director of the King County Office of Management and Budget, testified:

Q: Okay. So in fact the entire \$22.8 million in savings that are furlough related is 100 percent related to salary savings?

A: It is.

ATU CR 165 (Tr.).

⁵ Even assuming only a \$20,000 average annual salary, a 4.88 percent increase for 2,000 employees cost the County \$1.95 million.

⁶ During the hearing, ATU presented testimony by an economist who provided substantial evidence that historical budgeting practices by the County and Metro in particular left the

The County argues that PERC’s decision mandating bargaining of that decision “unreasonably limits government’s capacity to respond to prevailing economic realities.” App. Opening Brief at 19. However, PERC has already provided guidance to employers on this issue, holding that “Chapter 41.56 RCW does not handcuff employers from taking action in the wake of a financial crisis” but rather simply requires them to fulfill their bargaining obligations before they do. *Griffin School Dist.*, Decision 10489-A (2010); see also ATU CR 999 (HE Dec.) (“My decision in this case does not prevent the employer from taking responsible actions reflective of its financial circumstances. . . . [it] simply requires that the employer fulfill its bargaining obligation.”). Moreover, “if limitations on management flexibility were the criteria for determining whether union proposals on work hours were a mandatory subject of bargaining, most proposals, as such, would be subject to challenge, and RCW 41.56.030(4) would be rendered meaningless.” *Skagit County*, Decision 8746-A (PECB, 2006). This is a case about statutory bargaining obligations, not about a union’s ability to direct the County’s discretionary decisions. Upon balancing the evidence, PERC found that the 100% of savings

County with reserve funds of approximately \$250 million, of which only \$1.6 million would have been needed to obviate the furloughs, had the County voted to release them. ATU CR 147, 176, 203-04, 213, 215, 260, 262, 264, 269, 270, 327, 338, 340, 350 (Tr.), 836, 839, 993-94 (HE Dec.). Because the information was not available to the County when it made the decision to furlough, the Hearing Examiner opted not to consider it. ATU CR 1001, n.6 (HE Dec.).

realized by the furloughs predominated over any contention that the decision was one about the level of service. The furloughs were, therefore, a mandatory subject of bargaining. The County “had the right to determine and manage its own budget, and considered the impacts of the looming financial crisis.” ATU CR 1080 (PERC Dec.). It merely needed to bargain the decision.

3. The County committed an unfair labor practice when it failed to negotiate in good faith both the decision to furlough and its effects.

ATU does not dispute the County’s difficulty in balancing its budget following 2008’s tumultuous economic climate. No amount of difficulty, however, frees the County of its responsibility to bargain its decision and effects.⁷ It is well settled that an employer’s bargaining obligation applies to both a decision affecting employee wages, hours and working conditions, and the effects of that decision. *Skagit County*, Decision 8886-A (PECB, 2007)(citing *Skagit County*, Decision 6348 (PECB, 1998). Even where a subject is not mandatory, however, the employer is still obligated to bargain the effects of its decision. *Wenatchee School District*, Decision 3240-A (PECB, 1990). To demonstrate whether the County failed to meet its bargaining obligation, PERC must evaluate the totality of the County’s conduct, *Griffin School*

⁷ While the County initially raised business necessity as an affirmative defense, it has not done so before this Court.

District, Decision 10489-A at 6, citing *City of Mercer Island*, Decision 1457 (PECB, 1982), and ascertain whether the County met its duty to “engage in full and frank discussion on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees.” *Griffin School Dist.*, Decision 10489-A (PECB, 2010); *Snohomish County*, Decision 9834-B (PECB, 2008). The obligation to bargain does not compel parties to make concessions, but a party “is not entitled to reduce collective bargaining to an exercise in futility.” *Id.*, (citing *Mason County*, Decision 3706-A (PECB, 1991) (where totality of the evidence demonstrated that employer entered negotiations with a predetermined outcome and only declared impasse because the discussion could not be completed before the planned passage of a city ordinance governing the disputed issue). Here, substantial evidence supports the conclusion that “the respondent’s total bargaining conduct demonstrates a failure or refusal to bargain in good faith” and an “intention to frustrate ... reaching an agreement.” *Griffin School District*, Decision 10489-A (PECB, 2010) at 6, citing *City of Clarkston*, Decision 3246 (PECB, 1989). The Commission’s finding that the County committed an unfair labor practice by failing to satisfy its bargaining obligation with respect to a mandatory subject of bargaining, ATU CR 1082 (PERC Dec.), should be affirmed.

- a. The totality of the County's actions demonstrate its refusal to engage in good faith bargaining.

When the County finally notified ATU of its decision to furlough Metro employees, it had not only reached its final decision on the matter, but it had bargained the effects of that decision with other unions representing the other affected employees. It is well settled that it is an unfair labor practice to present a change to a mandatory subject of bargaining as a *fait accompli*. *Griffin School Dist.*, Decision 10489-A (PECB, 2010) (internal citations omitted). In determining whether an employer has presented a decision to change a mandatory subject as a *fait accompli*, the focus is on whether an opportunity for meaningful bargaining existed under the circumstances as a whole. *Id.* Notice of a proposed change 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 issue raised by the proposed change." *Clover Park School District*, Decision 326 (PECB, 1989). Moreover, deadlines may not be imposed which render continuing attempts to bargain an exercise in futility. *Shelton School Dist.*, Decision 579-B (PECB, 1984). While parties may be expected to respect one another's convenience, neither party may "impose on the other the obligation of agreeing to a particular item by a certain date." *Id.*

Furthermore, employers may not paralyze bargaining by limiting unions to agreements previously negotiated with a different union. *Western Washington University*, Decision 9309-A (PSRA, 2008). *See also Sperry Rand Corp. v. NLRB*, 492 F.2d 63 (1974) (where the court found a contract clause controlling the terms of employment for other bargaining units to be unlawful).

Inexplicably, the County failed to include ATU, its largest bargaining unit, in negotiations until after the Coalition Agreement had been reached. ATU CR 239-41 (Tr.), 673-74. In fact, the County failed to even provide ATU with a complete list of the furloughed employees until nearly two weeks after bargaining with ATU began, leaving ATU very little time to research the complex economic impact of the Agreement, educate its members, make a decision about ratification, and begin ratification procedures. ATU CR 54, 57, 58-61, 234, 281 (Tr.), 688-89, 690, 703.

When the parties finally met on November 5, 2008, the County presented the Coalition Agreement as its opening proposal, having “already made up its mind that certain offices were going to be closed on certain dates.” ATU CR 1077, 1082 (PERC Dec.). The Coalition Agreement contains a clause which explicitly prohibits the County from providing non-signatory employees more favorable terms than those

granted to members of signatory unions, and the County candidly acknowledged it could not bargain any effects more favorable than those already negotiated in the Coalition Agreement. ATU CR 60, 63, 64, 67 (Tr.), 679. Nevertheless, ATU presented several proposals over the following weeks which mitigated the effects of the furloughs, but the County failed to engage in a full and frank discussion of any of them. County Labor Negotiator David Levin could not even say whether anyone at the County had calculated the savings that might have been realized by any of the several other ATU proposals mitigating the effects of the furloughs, and was unable to provide any evidence that the County "took under advisement ATU's ideas" as he claimed, or proposed any alternatives that might have been acceptable. ATU CR 60, 315 (Tr.). Then, the County communicated that ATU needed to sign on to the Coalition Agreement by Friday, November 14, 2008 and complete negotiation of all "issues associated with" the furlough by Thanksgiving, even sending Norton a signature page for an effects bargaining "agreement" which had not, in fact, been reached. ATU CR 299, 301 (Tr.), 688-89, 690.

Upon review of the record, both PERC and the Hearing Examiner found that the County failed to meet its burden to negotiate the decision and effects of the furloughs with ATU. In her Findings of Fact, the

Hearing Examiner held that no one from the employer contacted ATU about the furloughs or the coalition bargaining until after the employer and Coalition reached the tentative agreement, for which the County failed to provide evidence or explanation. ATU CR 1003, 1005-06 (HE Dec.). The employer failed to provide ATU with timely notice of the proposed furloughs, having provided the Coalition with notice 24 days earlier. ATU CR 1007 (HE Dec.). The employer began negotiations by presenting the ATU with the Coalition Agreement and the “stated goal of reducing labor costs.” ATU CR 1077 (PERC Dec.). In finding that the County approached the ATU for bargaining after having already made up its mind as to when and where the furloughs would occur, “the employer presented its decision to implement furloughs as a *fait accompli*, and in doing so committed an unfair labor practice.” ATU CR 1082 (PERC Dec.). PERC’s decision demonstrates consideration of the record in its entirety, and its conclusion that the County failed to meet its bargaining obligations should be upheld.

4. The County was not entitled to unilaterally implement the furlough when it became apparent that agreement could not be reached.

When a transit employer and union are unable to agree concerning changes to a mandatory subject, the employer may not unilaterally implement the change. Instead, the parties may proceed to mediation, and

if, after a reasonable period of negotiation and mediation, the mediator finds that the parties are still at impasse, either party may request that the disagreement proceed to interest arbitration. ATU CR 1079 (PERC Dec.), citing *Snohomish County*, Decision 9770-A (PECB, 2008) (“for employees eligible for interest arbitration, an employer may not unilaterally implement its desired change after bargaining to a lawful impasse, but rather must seek interest arbitration”); RCW 41.56.492; *City of Yakima*, Decision 9062-A (PECB, 2008); *City of Tukwila*, Decision 9691-A (PECB, 2008).

It is undisputed in this case that neither party sought mediation or interest arbitration. Here, the Commission cited consistent precedent establishing that employers are “*precluded* from making any changes until the parties either reach a mutually satisfactory agreement, or have any outstanding issues resolved through mediation and eventually interest arbitration.” ATU CR 1083 (PERC Dec.), citing *City of Seattle*, Decision 1667-A (PECB, 1984).

The County argues that a very recent decision places the onus upon a union to engage in interest arbitration prior to filing an unfair labor practice charge. *King County*, Decision 10940 (PECB, 2010).⁸ However,

⁸ Decision 10940 was timely appealed for rehearing and review by the Commission on January 4, 2010. Briefing was submitted by the Complainant on January 18, 2010, but the Commission has not yet rendered an opinion.

this Decision, currently on appeal, and the only one cited by the County in support of its position, represents a marked departure from PERC precedent. *See* ATU CR 1083 (PERC Dec.) (“this Commission has *never* held that public employers . . . can bypass the interest arbitration provisions . . . by simply failing to invoke [them].”). Moreover, there are significant factual differences between the two cases. In Decision 10940, the parties were *not* at impasse, the prerequisite for demanding interest arbitration. *King County*, Decision 10940 (PECB, 2010) (“both parties behaved as if bargaining had been completed”). It was certainly not apparent to the County, in any event, that an agreement had not been reached. In the instant case, however, there is substantial evidence in the record to demonstrate that negotiations broke off when ATU believed further negotiation would be futile. ATU CR 49, 51-52, 60, 61, 63, 66-67, 85, 95, 98, 114 (Tr.), 996-97 (HE Dec.). Because here the parties *were* at an impasse (“[t]he employer sent the ATU a letter expressing disappointment that an agreement had not been reached,” ATU CR 1078 (PERC Dec.)) the County was not entitled to unilaterally implement its desired furloughs, but rather had the choice of seeking interest arbitration or facing an unfair labor practice charge. ATU CR 1078, 1083 (PERC Dec.).

The County also misstates the facts when it argues that interest arbitration does not apply to this situation because it is designed as a

replacement for the ability to strike and no strike could have occurred in this situation “under the parties’ agreements.” App. Opening Brief at 33. In fact, the agreement between the County and ATU *does not* contain a no-strike clause. *See* ATU CR 399-672 (Collective Bargaining Agreement). Thus, the public policy against strikes by uniformed and transit personnel and the availability of “effective and adequate alternative means of settling disputes” applies. ATU CR 1083 (PERC Dec.), citing RCW 41.56.430. The Commission’s decision correctly interprets the County’s statutory obligation to bargain to impasse, and correctly applies PERC precedent to the County’s duty to pursue interest arbitration once impasse is reached and before unilaterally changing wages, hours, and conditions of employment. The Commission’s holding should therefore be upheld.

V. SUMMARY AND CONCLUSION

The Commission’s Decision is supported on all points by substantial evidence in the record, and applies the law correctly to the facts at hand. For the foregoing reasons, ATU respectfully requests that the Decision be upheld on every allegation of unfair labor practice in ATU’s complaint and the appropriate remedies ordered by PERC should be awarded.

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COURT OF APPEALS
DIVISION II

12 JAN 12 PM 3:43

STATE OF WASHINGTON
BY Sheila Romoff
DEPUTY

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

DATED at Seattle, Washington on this 12th day of January, 2012.



Sheila Romoff