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

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TEAMSTERS LOCAL UNION NO. 117 and PHYLLIS CHERRY,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF THE ISSUE.....	2
III.	RESTATEMENT OF THE CASE.....	2
	A. Statement Of Facts.....	2
	1. Prison Rape Elimination Act Victim Advocate.....	2
	2. Just Cause Investigation Regarding The PREA Victim Advocate Email.....	3
	3. Gender Responsiveness Training.....	4
	4. The “If Project”.....	4
	5. Ms. Cherry Is Investigated And Issued A Letter Of Reprimand For Sending Unauthorized, Personal, And Unprofessional Emails To All WCCW Custody Staff.....	5
	6. Restoration Of Ms. Cherry’s IT Privileges.....	8
	B. Procedural History.....	9
IV.	STANDARD OF REVIEW.....	11
	A. An Administrative Agency’s Final Action Is Reviewed De Novo Using The Error Of Law Standard.....	11
	B. Deference Should Not Be Given To The Examiner Who Drafted The Initial ULP Decision, Because He Was Not Present At The PERC Hearing.....	14
V.	ARGUMENT.....	15

A.	The Commission Properly Upheld PERC’s Decision, Because The Appellant Did Not Establish A Prima Facie Case That Ms. Cherry Engaged In Protected Union Activity .....	15
1.	The Two Email Messages Broadcast To The WCCW Custody Staff Are Not The Type Of Action That Constitutes Protected Union Activity Under RCW 41.80.050 .....	16
2.	All Communications Between A Shop Steward And Fellow Represented Employees Regarding Their Employer Are Not Automatically Protected Union Activity .....	19
3.	Discrimination And/Or Interference Cannot Occur In The Absence Of Protected Union Activity .....	24
4.	The Appellant’s Communications Were Not Protected Union Activity, But Even If They Were, The Employer Did Not Discriminatorily Retaliate When It Temporarily Suspended Her IT Access And Issued Her A Letter Of Reprimand .....	27
B.	The Appellant Is Asking The Court To Legislate By Expanding Washington’s Collective Bargaining Law To Mirror The NLRA .....	30
1.	Concerted Activity Is Not A Protected Employee Right In Washington State And Should Not Be Imputed To Be .....	32
2.	The NLRA Was Enacted To Protect The Rights Of Private Sector Employees, Not Those Of Public Employees .....	34
VI.	CONCLUSION .....	36

## TABLE OF AUTHORITIES

### Cases

<i>Allison v. Seattle Hous. Auth.</i> , 118 Wn.2d 79, 821 P.2d 34 (1991).....	25, 26
<i>Apostolis v. City of Seattle</i> , 101 Wn. App. 300, 3 P.2d 198 (2000).....	14
<i>Asotin Cy. Hous. Auth.</i> , Decision 2471-A (PECB, 1987).....	17
<i>Brinnon Sch. Dist.</i> , Decision 7210-A and 7211-A (PECB, 2001) .....	14, 25
<i>Callecod v. Wash. State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510 (1997).....	13
<i>Cent. Wash. Univ.</i> , Decision 10118-A (PSRA, 2010) .....	24
<i>Chevron, U.S.A., Inc. v. NRDC</i> , 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984).....	12
<i>City of Bellevue v. Int’l Ass’n of Fire Fighters, Local 1604</i> , 119 Wn.2d 373, 831 P.2d 738 (1992).....	13
<i>City of Bellevue</i> , Decision 4242 (PECB, 1992).....	31
<i>City of Fed. Way v. Pub. Empl. Relations Comm’n</i> , 93 Wn. App. 509, 970 P.2d 752 (1998).....	12, 25
<i>City of Lynnwood</i> , Decision 6986 (PECB, 2000).....	31
<i>City of Pasco v. Pub. Empl. Relations Comm’n</i> , 119 Wn.2d 504, 833 P.2d 381 (1992).....	11
<i>City of Seattle</i> , Decision 9439-A (PECB, 2007) .....	26

<i>City of Tacoma,</i> Decision 4444 (PECB 1993).....	31
<i>Clallam Cy,</i> Decision 4011 (PECB, 1996).....	21, 22
<i>Clark Cy,</i> Decision 9127-A (PECB, 2007) .....	25
<i>Cnty. Coll. Dist. 13,</i> Decision 9171 (PSRA, 2005).....	25, 26
<i>Cnty. Coll. Dist. 5,</i> Decision 8850-A (PSRA, 2006) .....	17, 19, 26, 31
<i>Cowlitz Cy,</i> Decision 7007-A (PECB, 2000) .....	14
<i>C-TRAN,</i> Decision 7087-B and 7088-B (PECB, 2002).....	14
<i>Delagrave v. Empl. Sec. Dep't,</i> 127 Wn. App. 596, 111 P.3d 879 (2005).....	12
<i>Dieringer Sch. Dist.,</i> Decision 8956-A (PECB, 2007) .....	18, 19, 22, 23
<i>Dot Foods, Inc. v. Wash. Dep't of Rev.,</i> 166 Wn.2d 912, 215 P.3d 185 (2009).....	32
<i>Faghih v. Dental Quality Assur. Comm'n,</i> 148 Wn. App. 836, 202 P.3d 962 (2009).....	31
<i>Franklin Cy. Sheriff's Office v. Sellers,</i> 97 Wn.2d 317, 646 P.2d 113 (1982).....	11
<i>Hitchcock v. Wash. State Dep't of Ret. Sys.,</i> 39 Wn. App. 67, 692 P.2d 834 (1984).....	11

<i>In re Acron</i> , 122 Wn. App. 886, 95 P.3d 1272 (2004).....	33
<i>Inland Empire Distrib. Sys., Inc. v. Utils. &amp; Transp. Comm'n</i> , 112 Wn.2d 278, 770 P.2d 624 (1989).....	13
<i>King Cy</i> , Decision 7139 (PECB, 2000).....	31
<i>King Cy. v. Boundary Review Bd.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	31
<i>King Cy. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 142 Wn.2d 543, 14 P.3d 133 (2000).....	12, 13
<i>Mukilteo Sch. Dist.</i> , Decision 5899-A (PECB, 1997) .....	17
<i>Nw. Steelhead &amp; Salmon Coun. of Trout Unlimited v. Dep't of Fisheries</i> , 78 Wn. App. 778, 896 P.2d 1292 (1995).....	12
<i>Oroville Sch. Dist.</i> , Decision 6209-A (PECB, 1998).....	17
<i>Pasco Hous. Auth. v. PERC</i> , 98 Wn. App. 809, 991 P.2d 177 (2000).....	13
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	13
<i>Port of Seattle</i> , Decision 6854-A (PECB, 2001) .....	19, 23
<i>Pub. Util. Dist. 1 v. Dep't of Ecology</i> , 146 Wn.2d 778, 51 P.3d 744 (2002).....	12
<i>Reardan-Edwall Sch. Dist.</i> , Decision 6205 (PECB, 1998).....	26
<i>Regan v. State Dep't of Licensing</i> , 130 Wn. App. 39, 121 P.3d 731 (2005).....	12
<i>Renton Tech. Coll.</i> , Decision 7441-A (CCOL, 2002).....	14, 21

<i>Seattle Sch. Dist.</i> , Decision 5237-B (EDUC, 1996) .....	33
<i>State v. Avery</i> , 103 Wn. App. 527, 13 P.3d 226 (2000) .....	36
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003) .....	36
<i>State v. Eaton</i> , 168 Wn.2d 476, 229 P.3d 704 (2010) .....	33
<i>State v. McGee</i> , 122 Wn.2d 783, 864 P.2d 912 (1993) .....	36
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005) .....	36
<i>Tapper v. Empl. Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993) .....	12, 13
<i>Terry v. Empl. Sec. Dep't</i> , 82 Wn. App. 745, 919 P.2d 111 (1996) .....	13
<i>Univ. of Wash.</i> , Decision 11199 (PSRA, 2011) .....	20, 21
<i>Univ. of Wash.</i> , Decision 9550 (PSRA, 2007) .....	31
<i>Wilmot v. Kaiser Aluminum</i> , 118 Wn.2d 46, 821 P.2d 18 (1991) .....	25, 26
<i>Yakima Sch. Dist.</i> , Decision 8612 (EDUC, 2004) .....	26

**Statutes**

29 U.S.C. § 157 .....	32, 34
29 U.S.C. §§ 151-69 .....	34
RCW 34.05.030(5) .....	11
RCW 34.05.554 .....	31

RCW 34.05.570 .....	11
RCW 34.05.570(1).....	14
RCW 34.05.570(3).....	11, 12, 13
RCW 41.56 .....	23, 31, 34
RCW 41.56.040 .....	30, 33
RCW 41.56.140 .....	32
RCW 41.59 .....	33
RCW 41.80 .....	passim
RCW 41.80.040 .....	36
RCW 41.80.050 .....	passim
RCW 41.80.060 .....	36
RCW 41.80.110 .....	15
RCW 41.80.110(1).....	26
RCW 41.80.120 .....	13, 15
RCW 41.80.907 .....	16

## I. INTRODUCTION

This case originated as an unfair labor practice (ULP) before the Public Employment Relations Commission (PERC or the Commission). The employee (Ms. Cherry) is a corrections officer and union shop steward at the Washington Corrections Center for Women (WCCW). The Department of Corrections (DOC) temporarily suspended her email and internet access while it investigated her misuse of her state-issued email account, and thereafter issued a letter of reprimand for the misuse. The employee claimed employer interference and discrimination in reprisal for protected union activities. A PERC hearing was held; however, the hearing Examiner resigned before issuing a decision and PERC assigned a replacement Examiner to review the record and issue a decision. The substitute Examiner found for the employee and DOC successfully appealed the Examiner's ruling to the PERC Commission.

The Appellant sought judicial review of the Commission's finding that the employee failed to make a prima facie case of discrimination and interference, because her use of DOC's email was not protected union activity. The Appellant is challenging both the decision of the PERC Commission and Pierce County Superior Court's Order Denying their Petition for Review of the PERC decision. This is a case of first impression, as the Appellant seeks to impute "concerted activity" into

Washington's collective bargaining laws and have RCW 41.80.050 mirror Section 7 of the National Labor Relations Act (NLRA).

## **II. RESTATEMENT OF THE ISSUE**

Whether the Superior Court properly denied the Union's petition for review of the PERC decision dismissing the ULP complaint, when neither of the Appellant's email communications warranted protection under RCW 41.80.050, because (1) the communications were not related to union activity; and (2) were merely general information as evidenced by the Appellant's own admission.

## **III. RESTATEMENT OF THE CASE**

### **A. Statement Of Facts**

#### **1. Prison Rape Elimination Act Victim Advocate**

On August 7, 2009, an article was posted on *Inside DOC*, the agency's intranet site, regarding DOC's appointment of Jeralita Costa as the agency's Prison Rape Elimination Act (PREA) Victim Advocate for offenders who are victims of staff sexual misconduct. Clerk's Papers (CP) at 272. This position was created as part of a settlement agreement reached in the *Jane Doe v. DOC* class action lawsuit, alleging sexual misconduct against female offenders by agency staff. CP at 272, 709.

On August 10, 2009, Phyllis Cherry, a Corrections & Custody Officer at WCCW and shop steward for the Teamsters Local Union No. 117, used her state-issued email account to send an email communication to all (approximately 220) WCCW custody staff regarding the hiring of Ms. Costa. CP at 274, 624, 708. The subject line was, "Thought everyone should see this." The body of the email stated:

WCCW will be getting a new staff by the name of Jeralita Costa former state Senator to be the inmate advocate for victims of staff sexual misconduct. And of course, look at her salary to be an advocate for inmates.

CP at 274.

The email contained a link to an external news blog, which included Ms. Costa's salary and numerous antagonistic statements about the appointment. CP at 274, 390-93, 707.

## **2. Just Cause Investigation Regarding The PREA Victim Advocate Email**

Subsequent to Ms. Cherry's email, WCCW Superintendent Doug Cole ordered a just cause investigation to examine whether Ms. Cherry's alleged unprofessional email about a coworker was a misuse of state resources. CP at 709-10. During her investigatory interview, Ms. Cherry asserted that the email "wasn't union business," was "not union related," and that she was just "being informative." CP at 253-55, 379-82, 678. Furthermore, Ms. Cherry stated that she was familiar with DOC's

Acceptable Use of Technology and Ethics policies; Article 6 of the Teamsters' collective bargaining agreement (CBA), which governs union activities; and the DOC Employee Handbook, which requires "treating fellow staff with dignity and respect." CP at 253-54, 379-82. After reviewing the investigation, Superintendent Cole determined that Ms. Cherry had misused state resources and violated DOC policy. CP at 704-09, 718.

### **3. Gender Responsiveness Training**

After *Jane Doe*, DOC also implemented mandatory gender responsiveness training for all staff. CP at 715-16. This was referred to as "sensitivity class" by some of the WCCW staff. CP at 714-15.

The intent of the training is to improve WCCW staff interactions with female offenders by educating the staff about the experiences that many offenders have lived through – such as domestic violence, sexual assault, and sexual abuse – and how that history may trigger certain responses and behaviors from the offenders. CP at 715. Sixty-five to seventy percent of the offenders at WCCW have a significant history of domestic violence, sexual assault, and/or sexual abuse. CP at 715.

### **4. The "If Project"**

The "If Project" involves inmates at WCCW answering the question, "If there was something someone could have said or done that

would have changed the path that led you here, what would it have been?” CP at 350. The hope is that sharing this information will trigger youth to avoid following the same destructive paths. CP at 350.

On October 12, 2009, just two weeks after being investigated for the unprofessional PREA Victim Advocate email, Ms. Cherry sent another email to all WCCW custody staff. This time the subject was, “The If Project.” CP at 246. The body of the email stated:

Check this out!!!

Now tell me why we are being sensitive when they have projects like this going on. Inmates telling their stories as to how they made bad choices and ways to change their lives. Inmates are trying to help others by telling that if they had whatever....things could've been different.

However, we are to be sensitive to their needs...with that sensitivity class!!!!

This was filmed inside WCCW with several of the current inmates...even a person sentenced to life!!!!

Phyllis Cherry

<http://theifproject.com/>

CP at 246.

**5. Ms. Cherry Is Investigated And Issued A Letter Of Reprimand For Sending Unauthorized, Personal, And Unprofessional Emails To All WCCW Custody Staff**

At the time that Ms. Cherry sent out these emails, WCCW was experiencing significant changes due to the *Jane Doe* case. CP at 708.

These included changes to offender programming policies and job assignments, and certain custody officer positions being designated as female-only under the bona fide occupational qualification (BFOQ) defense to employment discrimination claims. CP at 708-09. As is common when changes of this nature occur, this was a challenging time for some of the staff and administration. CP at 708-09.

Superintendent Cole felt that Ms. Cherry's emails were unprofessional and undermined the steps DOC was taking to meet the requirements of the *Jane Doe* settlement agreement and to eliminate the very serious problem of sexual assault of offenders, particularly during this already challenging time. CP at 708-09, 714, 716, 729. Superintendent Cole considered the first email to be disrespectful and antagonistic to the new PREA Victim Advocate. CP at 706-07, 709. Moreover, when Ms. Cherry broadcast her second email about the "If Project," all staff had not yet had the opportunity to participate in the gender responsiveness training. CP at 716. Superintendent Cole believed the antagonistic tone of the email created animosity towards the training and undermined its intended goals. CP at 705-06, 714, 716, 720-21. After Ms. Cherry sent out her email, some staff tried to refuse to attend the training. CP at 716.

On October 19, 2009, Superintendent Cole initiated another just cause investigation into whether Ms. Cherry's October 12, 2009 email constituted a misuse of state resources. CP at 717-18. That same day, Superintendent Cole requested that Ms. Cherry's information technology (IT) access be temporarily suspended to prevent recurring behavior or destruction of potential evidence during the investigation. CP at 357-58, 718-19; 734. It is common practice at DOC to suspend IT access when a staff member is suspected of abusing IT resources. CP at 698, 721-22, 733-34. Between March 11, 2009, and April 13, 2010, DOC suspended the access of 105 staff members agency-wide. CP at 375, 698.

On November 9, 2009, during her investigatory interview regarding the "If Project" email, Ms. Cherry stated that she sent it in her role as a "correctional officer" and that she was once again being "informative." CP at 256-58. Again, she affirmed her familiarity with DOC's Acceptable Use of Technology policy. CP at 257.

On December 2, 2009, Superintendent Cole issued Ms. Cherry a letter of reprimand for improperly broadcasting her personal opinions via the August 10 and October 12 emails to all WCCW custody staff in

violation of DOC policy.<sup>1</sup> CP at 259-61, 725-26. Superintendent Cole also sent an email to the Chief Information Security Officer, Peter Jekel, requesting that all of Ms. Cherry's IT privileges be reinstated that same day. CP at 261, 446, 731-32, 734.

#### **6. Restoration Of Ms. Cherry's IT Privileges**

On January 2, 2010, Superintendent Cole was informed by Teamsters' Business Representative, Analtha Moroffko, that while most of Ms. Cherry's IT privileges were functioning, she was unable to access the "Department of Personnel" or the "DOC intranet." CP at 362. When Superintendent Cole contacted the IT group about the problem, he was told that Ms. Cherry would need to "call or put in an IT ticket" to get it corrected, because "local IT folks don't handle it." CP at 363. Superintendent Cole then conveyed this information to Ms. Moroffko. CP at 363. However, when Ms. Cherry was informed that she would have to call or submit an IT ticket to correct the access problem, she refused to do so. CP at 654-55. Her rationale was that she didn't create the problem, so she shouldn't have to mitigate it. CP at 654-55. Ms. Cherry's IT privileges were fully restored on February 2, 2012. CP at 364.

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<sup>1</sup> Ms. Cherry's letter of reprimand was subject to the just cause standard under the discipline article of the CBA. She challenged the reprimand through the last step of the CBA's grievance procedure, and it was not resolved. Letters of reprimand are not subject to grievance arbitration.

## **B. Procedural History**

On November 10, 2009, Ms. Cherry filed a ULP with PERC.<sup>2</sup> CP at 5-6. Ms. Cherry alleged employer discrimination and interference with protected employee rights under RCW 41.80 because her IT access was temporarily suspended during an investigation of her misuse of state-issued email and she was subsequently issued a letter of reprimand for the misuse. CP at 5-6, 145-46. An evidentiary hearing was conducted before PERC Examiner Terry Wilson on April 20, 2010. CP at 583-760. Teamsters' counsel appeared at the hearing and represented Ms. Cherry. CP at 583. The parties submitted post-hearing briefs. CP at 450-93. However, Examiner Wilson resigned from PERC prior to issuing a decision. CP at 448. PERC reassigned Examiner Philip Huang to review Examiner Wilson's record, exhibits, and to issue a written decision. CP at 447-48.

Examiner Huang issued a decision (10998 – PSRA) on February 8, 2011. CP at 494-516. He held that DOC discriminated against Ms. Cherry and interfered with her employee rights. *Id.* He concluded that Ms. Cherry's actions were protected because she was an active Union shop steward who had previously engaged in Union activities, and because the emails commented on issues affecting her

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<sup>2</sup> The Teamsters did not file the ULP and did not appear on Ms. Cherry's behalf until the PERC hearing on April 20, 2010. CP at 481 n. 1.

fellow bargaining unit members. *Id.* Additionally, he concluded that it could be inferred that suspending her IT access and issuing her a letter of reprimand were discriminatory. *Id.*

DOC appealed Examiner Huang's decision to the full PERC Commission. CP at 517-26. After a de novo review of the record, PERC vacated Examiner Huang's Findings of Fact, Conclusions of Law, and Order on June 15, 2011. CP at 569-82. The Commission concluded that the two emails sent by Ms. Cherry were not actions protected by RCW 41.80; *Id.*

On July 13, 2011, the Appellant petitioned the Pierce County Superior Court for Review of the PERC Order. CP at 792-99. A hearing was held before the Honorable Judge Linda C.J. Lee on March 23, 2012. CP at 908, 921. On May 25, 2012, Judge Lee concluded that the Commission's order finding that Ms. Cherry was not engaged in protected activity as outlined in RCW 41.80.050 was supported by the record and denied the Petition for Review. CP at 908-17, 921-22.

Appellant's Notice of Appeal was filed on June 15, 2012. CP at 919-20.

#### IV. STANDARD OF REVIEW

##### A. An Administrative Agency's Final Action Is Reviewed De Novo Using The Error Of Law Standard

PERC decisions are subject to judicial review under the Washington Administrative Procedure Act (APA). RCW 34.05.030(5); *City of Pasco v. Pub. Empl. Relations Comm'n*, 119 Wn.2d 504, 506, 833 P.2d 381 (1992). RCW 34.05.570 sets forth the standards a court applies when reviewing agency action. A court shall grant relief from an agency order *only if* it determines the agency has erroneously applied the law, when an order is outside the agency's statutory authority, is inconsistent with a rule of the agency, is arbitrary and capricious, or is not supported by substantial evidence. RCW 34.05.570(3)(b),(d)-(e),(h)-(i).

Review of an administrative decision "is on the record of the administrative tribunal itself, not the superior court." *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 324, 646 P.2d 113 (1982). *See also Hitchcock v. Wash. State Dep't of Ret. Sys.*, 39 Wn. App. 67, 71, 692 P.2d 834 (1984).

The Appellant incorrectly asserts that "this Court should review the entire record in light of the presumption that the Examiner's findings are correct." Brief of Appellant (Brief of Appellant) at 18-19. Under the APA, the court reviews the findings and conclusions of the final decision-

maker, not the initial decision-maker. *Delagrave v. Empl. Sec. Dep't*, 127 Wn. App. 596, 603, 111 P.3d 879 (2005) (citing *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 404, 858 P.2d 494 (1993) (court reviews commissioner's decision, not the administrative law judge's (ALJ) decision)); *Regan v. State Dep't of Licensing*, 130 Wn. App. 39, 49, 121 P.3d 731 (2005) (court reviews Director's findings, not the ALJ's); *City of Fed. Way v. Pub. Empl. Relations Comm'n*, 93 Wn. App. 509, 511-12, 970 P.2d 752 (1998) (court reviews Commission's findings, not the Examiner's); *Nw. Steelhead & Salmon Coun. of Trout Unlimited v. Dep't of Fisheries*, 78 Wn. App. 778, 785-86, 896 P.2d 1292 (1995) (court reviews agency head's findings, not the ALJ's).

Under RCW 34.05.570(3)(a)-(d) "error of law" standards, the court engages in de novo review of the agency's final legal conclusions. *Franklin Cy. Sheriff's Office*, 97 Wn.2d at 325. Notwithstanding the de novo review, courts give great weight to an agency's reasonable interpretation of an ambiguous statute that the agency administers. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984); *Regan*, 130 Wn. App at 50; *Pub. Util. Dist. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002); *King Cy. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). This is particularly true when the agency has expertise in a

specific subject area. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-95, 90 P.3d 659 (2004); *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm'n*, 112 Wn.2d 278, 282, 770 P.2d 624 (1989).

The Commission is empowered to adjudicate ULPs and to issue appropriate remedial orders. RCW 41.80.120. Thus, PERC's decisions are accorded extraordinary judicial deference. *Pasco Hous. Auth. v. PERC*, 98 Wn. App. 809, 813, 991 P.2d 177 (2000); *see also City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382, 831 P.2d 738 (1992).

The court applies the "substantial evidence" standard to the agency's findings of facts. RCW 34.05.570(3)(e); *Terry v. Empl. Sec. Dep't*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). The factual findings are given "the same level of deference which would be accorded under any other circumstance." *Tapper*, 122 Wn.2d at 403 (citation omitted). The test of substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d at 553 (citing *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)).

The burden of proof is on the party asserting the invalidity of the agency action. RCW 34.05.570(1)(a); *Apostolis v. City of Seattle*, 101 Wn. App. 300, 304, 3 P.2d 198 (2000). As the following argument demonstrates, the Appellant has not met this burden and the Superior Court and PERC decisions should be upheld.

**B. Deference Should Not Be Given To The Examiner Who Drafted The Initial ULP Decision, Because He Was Not Present At The PERC Hearing**

The Appellant argues that the Commission failed to give substantial weight to the Examiner and “ignored those findings which were based on an overwhelming weight of evidence.” Brief of Appellant at 33. The Appellant further states that deferral to the Examiner’s findings was especially appropriate in this case because of the importance of the actions, words, and response of the parties at the hearing. *Id.*

The Commission typically does attach “considerable weight to the factual findings and inferences” of its examiners. *Renton Tech. Coll.*, Decision 7441-A (CCOL, 2002); *C-TRAN*, Decision 7087-B and 7088-B (PECB, 2002); *Brinnon Sch. Dist.*, Decision 7210-A and 7211-A (PECB, 2001); *Cowlitz Cy*, Decision 7007-A (PECB, 2000). “This deference, while not slavishly observed on every appeal,” is particularly appropriate in fact-oriented appeals. *Id.*

However, the Examiner who wrote the initial decision in this case was not in a position to assess witness credibility, because he was not present at the PERC hearing. CP at 447-48. The evidentiary hearing was conducted before Examiner Terry Wilson, who resigned from PERC before issuing a decision. PERC reassigned Examiner Philip Huang to review Examiner Wilson's record and to issue a written decision. CP at 447-48. Consequently, the Examiner was in no better position to evaluate credibility than the Commission and should not be afforded deference. The Commission did not err in reversing the Examiner; the Commission's decision is entitled to judicial deference, as discussed above.

## V. ARGUMENT

### A. **The Commission Properly Upheld PERC's Decision, Because The Appellant Did Not Establish A Prima Facie Case That Ms. Cherry Engaged In Protected Union Activity**

PERC is the agency charged with enforcing state collective bargaining laws and adjudicating ULP complaints. *See, e.g.*, RCW 41.80.120. A ULP occurs when the union or employer refuses to bargain, interferes with another's collective bargaining rights, or discriminates against an employee who has filed a ULP charge. RCW 41.80.110. In the instant case, the Appellant alleges employer discrimination and interference with protected employee rights under

RCW 41.80 when DOC temporarily suspended her email and internet access while it investigated the misuse of her state-issued email account, and thereafter issued a letter of reprimand for the misuse. The record supports the Commission's finding that Ms. Cherry was not engaged in protected activity as outlined in RCW 41.80.050 when she sent the emails.

**1. The Two Email Messages Broadcast To The WCCW Custody Staff Are Not The Type Of Action That Constitutes Protected Union Activity Under RCW 41.80.050**

The Personnel System Reform Act (PSRA) contains the law governing Washington state employees' collective bargaining rights. RCW 41.80. When enacted in 2002, it granted full scope collective bargaining to certain state employees and gave them the ability to collectively bargain over terms and conditions of employment. RCW 41.80.907; Laws of 2002, ch. 354, p. 1800 (PSRA).

RCW 41.80.050 specifically guarantees that represented employees have the right to:

**self-organization, to form, join, or assist employee organizations, and to bargain collectively** through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right **to refrain from any or all such activities** except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

RCW 41.80.050 (emphasis added).

For an activity to be protected, the employee must give the employer notice that she is raising an issue she considers to pertain to collective bargaining rights. *Cnty. Coll. Dist. 5*, Decision 8850-A (PSRA, 2006). PERC has held that protected activity includes: an employee invoking collective bargaining rights, *Cnty. Coll. Dist. 5*, Decision 8850-A (PSRA, 2006); the filing of a grievance or ULP complaint, *Mukilteo Sch. Dist.*, Decision 5899-A (PECB, 1997); union organizing activity, *Asotin Cy. Hous. Auth.*, Decision 2471-A (PECB, 1987); and acting as the union president and participating in collective bargaining with the employer, *Oroville Sch. Dist.*, Decision 6209-A (PECB, 1998).

The Appellant has failed to establish that the two emails at issue constitute protected union activity. No evidence was presented that Ms. Cherry ever made any reference to the union or to union activities during the actual communications or when she was later questioned about the emails. Additionally, no evidence was presented that the emails were sent to further the collective bargaining process.<sup>3</sup>

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<sup>3</sup> Simply raising a workplace issue without notice to the employer of intent to invoke collective bargaining rights is not engaging in protected union activity. *Cnty. Coll. Dist. 5*, Decision 8850-A (PSRA, 2006). Ms. Cherry did not put DOC on notice that she was raising an issue that pertained to collective bargaining rights; however, because Ms. Cherry admitted that the emails “were not union business” and were not sent in her capacity as a shop steward, notice is not relevant to the analysis in this case. CP at 253-58, 379-82, 678.

The Appellant states that its position is simply that Ms. “Cherry acted in her capacity as a Union shop steward when she sent out two emails”; *ipso facto*, the communications constitute protected union activity. Brief of Appellant at 19. However, Ms. Cherry explicitly stated that the emails were not sent in her capacity as a shop steward, were “not union business,” and were “not union related.” CP at 253-58, 379-82, 678. Given these circumstances, it is difficult to understand how her activity could be considered to be protected under collective bargaining laws. The language of the statute makes clear that to be protected an activity must be “for the purpose of collective bargaining.” RCW 41.80.050.

Having expressed dissatisfaction that Ms. Cherry was issued a letter of reprimand for misuse of her state email account and that her IT access was temporarily suspended during the investigation, the Appellant offers only generalized, and often contradictory, allegations to support her claim that the emails were union activity. PERC has held that evidence that is too generalized and unspecific does not rise to the level of union activity. *Dieringer Sch. Dist.*, Decision 8956-A (PECB, 2007). DOC, on the other hand, has specifically explained why it took these actions and the process and policies for doing so. As explained in more detail in part A.4 (beginning below at page 27), Superintendent Cole disciplined Ms. Cherry

because DOC policy prohibits using email for non-business purposes or to express personal opinions; it is standard practice to suspend IT access during an investigation into abuse; and Ms. Cherry had repeated instances of misuse.

One matter that both parties agree upon is that whether a specific action is related to union activity “is a question of fact for PERC to decide.” Brief of Appellant at 22. PERC has decided – the Appellant is just dissatisfied with the decision. The Commission followed its long-standing precedent and concluded that Ms. Cherry’s email communications were not protected union activity. *See Dieringer Sch. Dist.*, Decision 8956-A (PECB, 2007); *Port of Seattle*, Decision 6854-A (PECB, 2001).

**2. All Communications Between A Shop Steward And Fellow Represented Employees Regarding Their Employer Are Not Automatically Protected Union Activity**

The mere fact that someone is a shop steward does not transform every action by that person into activity that is protected under collective bargaining laws. *See Cmty. Coll. Dist. 5*, Decision 8850-A (PSRA, 2006). It is true that Ms. Cherry is a shop steward, but she was not engaged in union activity when she sent the emails at issue here. By Ms. Cherry’s

own admission, the email communications were not union activity and were not sent in her role as a shop steward. CP at 253-58, 379-82, 678.

The Appellant is attempting to make shop stewards immune from the same standards to which all other employees are held. However, being a shop steward “does not give employees *carte blanche* to engage in behavior that would ordinarily lead to discipline.” *Univ. of Wash.*, Decision 11199 (PSRA, 2011).

In *Univ. of Wash.*, the Examiner held that the employer did not discriminate against or interfere with an employee’s protected rights when a shop steward was investigated and disciplined for sending an “insubordinate and disrespectful” email. The complainant worked in parking and security and was a very active shop steward. When he was informed that a security officer was on a list of employees who had not paid citations for parking in a restricted area, he emailed one of the sergeants accusing him of parking in the same lot and questioning his credibility. The union alleged the complainant was exercising his statutorily protected rights when he sent the email and that the subsequent investigation and disciplinary letter were reprisal for performing his shop steward duties. During his investigatory interview, he – like Ms. Cherry – indicated that he thought his email was appropriate. In his determination, the Examiner stated that he may have more easily agreed with the union’s

contentions if the complainant “had acted in a manner reasonably expected of a shop steward when presenting an issue to a supervisor on a . . . member’s behalf.” As in the instant case, the complainant in *Univ. of Wash.* exercised poor judgment and was disciplined accordingly. *Id.*

The Appellant radically misrepresents PERC’s history by stating, “The Commission has repeatedly held that employee activity is protected if there is even a slight connection to union activity,” and “the Commission has started to erode its own rule through the development of a body of cases that suggest that even a tenuous connection to assisting the union is sufficient to trigger the statutory protection.” Brief of Appellant at 29-31. In both instances, the Appellant cites to the same two cases that the Examiner’s decision relied upon, *Renton Tech. Coll.*, Decision 7441-A (CCOL, 2002) (PERC found an employee’s communications with a legislator inquiring about using a specific funding source for employee salaries to be protected union activity) and *Clallam Cy.*, Decision 4011 (PECB, 1996) (PERC found an employee’s comments regarding the workplace being run like a “feudal empire” to be protected union activity). The Appellant further alleges that, “the Commission failed to distinguish these cases from the case at issue here.” Brief of Appellant at 29. Each of these claims is without merit. In its decision, the Commission clearly explained why the Examiner’s reliance on both of these cases was

“misplaced.” CP at 576-77. In *Renton*, the Commission found the employee’s communication to be protected activity, because it was “intended to assist the union in its negotiations.” CP at 577. In *Clallam Cy.*, the employee’s comment was protected union activity, because it was made in the midst of contentious contract negotiations and was “in response to a county resolution which the union had publicly opposed.” *Id.*

The Commission explained that those cases are distinguished from the instant case, because Ms. Cherry was “simply informing employees of a new hire and the salary of the new hire, and of the ‘If Program.’” CP at 577. Moreover, Ms. Cherry’s emails did not concern the CBA or its administration and were not related to negotiations. *Id.*

PERC has also held that evidence of protected union activity “must include more than a mere allegation of engaging in protected activity, and provide specific instances of that activity.” *Dieringer Sch. Dist.*, Decision 8956-A (PECB, 2007). Evidence that is “generalized” or “unspecific,” such as “standing up for” coworkers, is insufficient to establish protected activity. *Id.*

In *Dieringer*, the employee was an active shop steward, who had previously stood up for staff against their supervisor. When she participated in a survey of employees’ negative opinions of the supervisor,

the results of which were presented to the school superintendent, the Commission held that she had not engaged in protected union activity. Accordingly, the Union's claims of discrimination and interference when she received an unsatisfactory performance evaluation failed.

The Commission determined that the employee's participation in the survey and her presence when the results were given to the superintendent did not rise to a level of union activity contemplated by RCW 41.56.140.<sup>4</sup> Furthermore, the Commission reasoned that if such activity was held to be protected it would create a slippery slope. The Commission explained:

Allowing such generalized evidence to be accepted as union activity would open up a slippery slope of how union action could be defined. Any individual at any time could speak to a supervisor on a co-worker's behalf about anything and would be found to be engaged in protected activity. Such a broad definition is not contemplated by the statute.

*Dieringer supra; See also Port of Seattle, Decision 6854-A (PECB, 2001)* (discrimination case dismissed where employee's claims of discrimination for exercise of protected activity, including the filing of multiple grievances, failed to be supported by evidence including the date, nature, and outcomes of the grievances, or any other corroborating information to support employee's claims).

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<sup>4</sup> RCW 41.56 contains the collective bargaining law for municipalities and political subdivisions, including district and superior courts.

Here, not even a “generalized” level of union activity was present. As evidenced by her own admission, Ms. Cherry was merely informing other custody staff about information she thought they should be aware of. CP at 255, 258. While the Appellant argues that the emails were intended to inform Ms. Cherry’s coworkers about working conditions, the information about both the PREA Victim Advocate and the If Project were on the DOC intranet site, which is readily available to all DOC employees with email access. CP at 254, 259, 627, 666-67.

The Appellant further alleges that Ms. Cherry’s emails are protected activity, because they “challeng[ed] the Employer on an issue relating to working conditions.” Brief of Appellant at 2-3. Yet this too is refuted by Ms. Cherry herself who testified that she was not challenging WCCW administration in her email. CP at 676-77.

### **3. Discrimination And/Or Interference Cannot Occur In The Absence Of Protected Union Activity**

Discrimination occurs when an employer takes action against an employee in reprisal for the employee’s exercise of rights protected by collective bargaining laws, such as those in RCW 41.80. *Cent. Wash. Univ.*, Decision 10118-A (PSRA, 2010).

In the absence of direct evidence of discrimination, a claim alleging discrimination is examined by PERC under the *Wilmot/Allison*

three-part test outlined by the Washington Supreme Court in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 821 P.2d 18 (1991) and *Allison v. Seattle Hous. Auth.*, 118 Wn.2d 79, 821 P.2d 34 (1991). To establish a prima facie case of discrimination under this analysis, an employee must demonstrate that:

- (1) the employee participated in activity protected by the collective bargaining statute, or communicated an intent to do so to the employer;
- (2) the employer deprived the employee of some ascertainable right, benefit, or status; and
- (3) a causal connection exists between the employee's exercise of a protected activity and the employer's action.

*Cnty. Coll. Dist. 13*, Decision 9171 (PSRA, 2005); *Brinnon Sch. Dist.*, Decision 7210-A (PECB, 2001); *City of Fed. Way v. Pub. Empl. Relations Comm'n*, 93 Wn. App. 509, 513, 970 P.2d 752 (1998).

If the employee can establish these three elements, the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for its action. *Brinnon Sch. Dist.*, Decision 7210-A (PECB, 2001). Once such a reason is proffered, the burden shifts back to the employee to show by a preponderance of the evidence that the employer's stated reason is pretextual. *Cnty. Coll. Dist. 13*, Decision 9171 (PSRA, 2005); *Clark Cy.*, Decision 9127-A (PECB, 2007).

If the employee prevails on his or her discrimination claim, PERC automatically finds that the employer derivatively interfered with the employee's rights under RCW 41.80.110(1)(a). *Cnty. Coll. Dist. 13*, Decision 9171 (PSRA, 2005) (citing *Yakima Sch. Dist.*, Decision 8612 (EDUC, 2004)). On the other hand, "If a discrimination claim and an interference claim are based on the same set of facts, and a discrimination claim is dismissed for failing to meet the test of protected activities, an independent interference claim will not be found." *City of Seattle*, Decision 9439-A (PECB, 2007); *Reardan-Edwall Sch. Dist.*, Decision 6205 (PECB, 1998).

Accordingly, the first threshold in proving a discrimination and/or interference claim is proof that the complainant engaged in a statutorily protected activity. *Cnty. Coll. Dist. 5*, Decision 8850-A (PSRA, 2006) (citing *Wilmot* and *Allison supra*). In the present case, the Appellant was unable to establish this first prong of the *Wilmot/Allison* test. Although the Appellant argues that Ms. Cherry's email communications were protected union activity, no evidence has been provided to support these assertions. Furthermore, when Ms. Cherry was questioned about the emails by her employer, she made it clear that the emails did not pertain to union activity or collective bargaining. Because Ms. Cherry did not engage in protected union activity, no discrimination occurred. Because

no discrimination occurred, no interference claim exists. Therefore, PERC properly dismissed the complaint.

**4. The Appellant's Communications Were Not Protected Union Activity, But Even If They Were, The Employer Did Not Discriminatorily Retaliate When It Temporarily Suspended Her IT Access And Issued Her A Letter Of Reprimand**

In the instant case, assuming *arguendo*, that Ms. Cherry has established a prima facie case of discrimination based on the temporary suspension of her IT access and subsequent letter of reprimand, DOC has articulated legitimate, nondiscriminatory reasons for these actions.

DOC's Acceptable Use of Technology policy 208.100 articulates that IT resources are to be used only "for official business purposes" and "will not be used to express personal views or opinions." CP at 300-07. It is standard practice for DOC to suspend IT access during an investigation into suspected misuse, and to issue appropriate discipline when abuse has occurred. CP at 298-99, 698, 721-22, 733-34.

The Appellant cites to only one section of the "Revocation of Network Access" memo from Kit Bail, Chief Information Officer, when alleging that there was no basis for revocation of Ms. Cherry's email

under DOC's policies.<sup>5</sup> Brief of Appellant at 10. However, when read in full, the memo explicitly states that Directives I.A and B of DOC Policy 280.100 "provide notice of when access may be terminated." CP at 298-99. Directive I.A states that all DOC IT resources are to be used only for "official business purposes." CP at 301. During her investigatory interview, Ms. Cherry acknowledged familiarity with these policies. CP at 253, 256-57. The memo, in mentioning example scenarios, did not purport to supplant the other policy. The revocation decision was consistent with agency policy.

The Appellant further erroneously asserts that, "in issuing the letter of reprimand, the Employer expressly viewed Cherry's emails as actions taken in her role 'as a shop steward.'" Brief of Appellant at 36. In addition, Appellant incorrectly states that "in the letter of reprimand, Superintendent Cole emphasized Officer Cherry's role as a shop steward." Brief of Appellant at 16. The letter made no reference to the emails being sent in her role as a shop steward. CP at 376-78. The letter merely pointed out that her conduct reflected negatively on her "as a Shop Steward and . . . as a correctional professional." *Id.*

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<sup>5</sup> Ms. Cherry's letter of reprimand addressed: (1) Secretary Eldon Vail's May 21, 2008 memorandum re: Use of DOC Internet Access; (2) DOC Policy 280.100, Acceptable Use of Technology; and (3) Articles 6.1B and 6.1C (Use of State Facilities, Resources and Equipment) of the Teamsters' Local 117 Collective Bargaining Agreement. CP at 9-139, 165-66, 168-218, 300-07, 376-78.

Other than the fact that as a shop steward Ms. Cherry was aware of DOC's policies, including the Appropriate Use of Technology policy – and thus should have known better – her union role was irrelevant to Superintendent Cole's decision. CP at 726, 735-36. It was a simple matter of being disciplined accordingly after misusing her state-issued email account, not once, but twice – and doing so after being investigated and told that the first instance was unprofessional and inappropriate. CP at 376-78, 736-37.

Superintendent Cole took appropriate disciplinary action based on Ms. Cherry's repeated violation of DOC policies, particularly because her emails undermined the steps DOC was taking to meet the requirements of the *Jane Doe* settlement agreement. CP at 724-25, 729. Superintendent Cole has since taken the same action with regard to similar violations by an employee who is not a shop steward. CP at 736.

Additionally, the Appellant makes repeated claims that Ms. Cherry is a threat to management. Brief of Appellant at 4-5. These include assertions that management considers Ms. Cherry to be “adverse to management interests” and “is viewed more and more by management as a challenge and threat to their authority.” Brief of Appellant at 4-5. However, this is not supported by the record. None of these statements were made by management. Brief of Appellant at 4-5. Each of these

comments either lacks citation or was made by Ms. Cherry. CP at 625-27. In actuality, Superintendent Cole testified that he considers Ms. Cherry “very intelligent and knowledgeable” and “a good shop steward.” CP at 726, 738.

**B. The Appellant Is Asking The Court To Legislate By Expanding Washington’s Collective Bargaining Law To Mirror The NLRA**

The Appellant claims that Ms. Cherry’s communications were “concerted activity,” as provided for in collective bargaining law governing *private sector* employees – the NLRA.<sup>6</sup> Assuming for the purposes of argument that assertion is true, it is immaterial, because concerted activity is not one of the enumerated protected rights under Washington’s collective bargaining laws. See RCW 41.80.050; RCW 41.56.040. What’s more, “The Commission does not enforce protections conferred by statutes outside of the collective bargaining statutes it is authorized to enforce.” *Cnty. Coll. Dist. 5*, Decision 8850-A

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<sup>6</sup> The NLRA does not contain a definition of concerted activity; however, the National Labor Relations Board website states that:

[c]oncerted activity . . . is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action.

<http://www.nlrb.gov/rights-we-protect/employee-rights> (last visited October 11, 2012).

(PSRA, 2006) (citing *City of Lynnwood*, Decision 6986 (PECB, 2000) and *King Cy*, Decision 7139 (PECB, 2000)).

Consequently, although chapters 41.80 RCW and 41.56 RCW (collective bargaining laws for state and local governments respectively) protect public employees engaged in union activities, the Commission “has specifically declined to grant protection for concerted activity” when enforcing Washington’s collective bargaining laws. *Univ. of Wash.*, Decision 9550 (PSRA, 2007) (citing *City of Tacoma*, Decision 4444 (PECB 1993) and *City of Bellevue*, Decision 4242 (PECB, 1992)). This Court should also decline to add language that is not in the statutes.

Furthermore, the Appellant’s claim that the Legislature intended to encompass concerted activity in the PSRA was made for the first time at the superior court. Brief of Appellant at 25-29. With some exceptions not present here, “issues not raised before the agency may not be raised on appeal.” RCW 34.05.554; *Faghih v. Dental Quality Assur. Comm’n*, 148 Wn. App. 836, 845-47, 202 P.3d 962 (2009). The issue must properly be raised before the agency; a simple hint or reference in the record is not sufficient. *King Cy. v. Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993). Accordingly, the Court should not consider this issue on appeal.

**1. Concerted Activity Is Not A Protected Employee Right In Washington State And Should Not Be Imputed To Be**

When interpreting statutory language, courts “give effect to the legislature’s intent, primarily derived from statutory language.” *Dot Foods, Inc. v. Wash. Dep’t of Rev.*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Words or clauses should not be added to a statute “when the legislature has chosen not to include such language.” *Id.*

The Appellant is asking PERC and this Court to enforce protections conferred by the NLRA, but not included in Washington law. Brief of the Appellant at 25-30. Overturning PERC’s ruling would redefine and expand Washington’s statute to include “concerted activity” and thus mirror the language of Section 7 of the NLRA.

Employees shall have the right to **self-organization, to form, join, or assist labor organizations, to bargain collectively** through representatives of their own choosing, **and to engage in other concerted activities** for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to **refrain from any or all such activities** except to the extent that . . . .

29 U.S.C. § 157 (emphasis added). This is not what the Legislature intended in RCW 41.80.050.

The term “concerted activity” is conspicuously absent from the text of the Washington statute, even though much of the language parallels

the federal statute. In Washington State, employees who are represented by a union have the right to:

**self-organization, to form, join, or assist employee organizations, and to bargain collectively** through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right **to refrain from any or all such activities** except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

RCW 41.80.050 (emphasis added); *See also* RCW 41.56.040 (providing similar rights for union-represented employees of municipalities and political subdivisions, including district and superior courts). This fact alone suggests that the Legislature did not intend to include “concerted activity” when it enumerated the protected rights of employees covered by RCW 41.80. *See State v. Eaton*, 168 Wn.2d 476, 490, 229 P.3d 704 (2010) (words that are conspicuously absent from a statute show that the Legislature did not intend to include them); *In re Acron*, 122 Wn. App. 886, 890, 95 P.3d 1272 (2004) (where a statute specifically designates the things upon which it operates, there is an inference the Legislature intended all omissions); *Seattle Sch. Dist.*, Decision 5237-B (EDUC, 1996) (while the activity in question may be “concerted activity” under federal law, RCW 41.59 does not contain concerted activity; considering

that the statute was patterned on the NLRA, the omission must be judged as intentional).

Furthermore, the NLRA was enacted in 1935. RCW 41.56 was enacted in 1967 and RCW 41.80 was enacted in 2002. The Legislature did not see fit to include concerted activity as a protected right when constructing either collective bargaining statute, nor has it amended either statute to add it. The Washington State Legislature was most certainly aware of the NLRA when it drafted Washington's collective bargaining laws, as they are very similar. In fact, RCW 41.80.050 and Section 7 of the NLRA are *virtually identical* except for the federal statute's inclusion of the words "and to engage in other concerted activities." *Compare* 29 U.S.C. § 157, *with* RCW 41.80.050. Accordingly, it is reasonable to conclude that the Legislature modeled RCW 41.80.050 on Section 7 of the NLRA and deliberately chose not to include "concerted activity" as a protected employee right in Washington's collective bargaining laws.

**2. The NLRA Was Enacted To Protect The Rights Of Private Sector Employees, Not Those Of Public Employees**

The NLRA (29 U.S.C. §§ 151-69) applies exclusively to **private** sector employees who may or may not be asserting their collective bargaining rights. The PSRA (RCW 41.80) applies to collective bargaining between **public** employees and their Washington state

employers. The Appellant fails to take into consideration the vast differences between collective bargaining in the public and private sectors when arguing that overturning the Commission's interpretation of the statute would do no more than effectuate the remedial purpose of the statute and bring State law into alignment with the federal rule applicable to private sector employees. Brief of Appellant at 30.

The principal difference is that state officials have constitutional and statutory duties that transcend their role as employer for the purposes of collective bargaining. The PSRA acknowledges these differences and the need to protect the continuity of government functions. For instance, the State is prohibited from bargaining management rights. Specifically:

The employer shall not bargain over rights of management which, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:

- (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
- (2) The employer's budget and the size of the agency workforce, including determining the financial basis for layoffs;
- (3) The right to direct and supervise employees;
- (4) The right to take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies; and
- (5) Retirement plans and retirement benefits.

RCW 41.80.040.

Additionally, state employees are prohibited from striking or refusing to perform their duties. RCW 41.80.060. Accordingly, employee rights are appropriately more narrowly defined under state collective bargaining law than under the NLRA and should remain that way.

Finally, “Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language.” *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005) (citing *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000)). “Language is unambiguous when it is not susceptible to two or more interpretations.” *State v. Delgado*, 148 Wn.2d 723, 726, 63 P.3d 792 (2003) (citing *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993)). The language in RCW 41.80.050 is unambiguous – concerted activity is not a protected employee right. Therefore, we respectfully ask that this Court honor the decision of the Legislature to not include “concerted activity” as an employee protected right in Washington State and accordingly not impute it to be such a right.

## **VI. CONCLUSION**

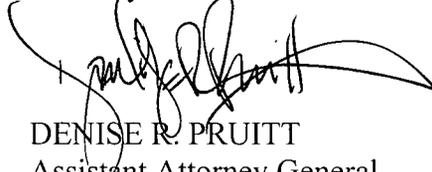
The Appellant has not shown that Ms. Cherry engaged in protected union activity. Evidenced by her own admission, Ms. Cherry’s emails

were not sent in her capacity as a shop steward, were not intended to assist the Union in any way, did not involve collective bargaining issues, and were not meant as a challenge to DOC. As a result, there is substantial evidence to support PERC's finding that Ms. Cherry's emails were not protected activity.

When reviewing the Examiner's decision, the Commission correctly applied the proper legal standards, and correctly interpreted and applied the collective bargaining laws. Due to the absence of protected union activity, PERC correctly applied state collective bargaining law in holding that discrimination and employer interference did not occur. For these reasons, DOC respectfully requests that the Court affirm the decisions of both the Superior Court and the PERC Commission.

SUBMITTED this 17th day of October, 2012.

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

DEPUTY

NO. 43604-3-II

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

TEAMSTERS LOCAL UNION NO.  
117 and PHYLLIS CHERRY,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF CORRECTIONS,

Respondent.

CERTIFICATE OF  
SERVICE

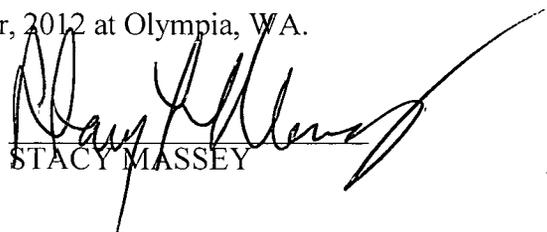
I certify that I served, or caused to have served, a copy of Respondent's Brief on all parties or their counsel of record on October 17, 2012, as follows:

Via Depositing in U. S. Mail Postage Prepaid

TO: Daniel Swedlow  
Counsel for Appellant  
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Tukwila, WA 98168

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

Dated this 17th day of October, 2012 at Olympia, WA.

  
STACY MASSEY