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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
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KITSAP COUNTY,  
Appellant,

v.

INTERNATIONAL UNION OF POLICE ASSOCIATIONS  
LOCAL 7408, A/K/A KITSAP COUNTY SHERIFF'S OFFICE  
LIEUTENANT'S ASSOCIATION,

Respondent.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

In *Kitsap County*, 2011 WA PERC LEXIS 116; Decision 10836-A;-PECB (2011), the Public Employment Relations Commission (“PERC”) ruled that Kitsap County had committed an Unfair Labor Practice when it unlawfully withheld wages from the members of the Kitsap County Sheriff’s Lieutenant’s Association by unilaterally passing on the full cost of the increase of health care premiums to the Lt’s Association members. The Lt’s Association incurred \$8,400.16 in attorney’s fees and costs in connection with its Unfair Labor Practices complaint. It filed suit to recoup its fees in Superior Court pursuant to RCW 49.48.030. The Superior Court granted summary judgment in favor of the Lt’s Association and a judgment for fees and costs totaling \$14,175.21.

Kitsap County’s appeal concerns this grant of summary judgment in favor of the Lt’s Association. As demonstrated below, the Trial Court properly determined that RCW 49.48.030 provides a remedy for actions related to wages which arise from Unfair Labor Practices complaints under RCW 41.56.140 and that the remedial nature of RCW 49.48.030, when juxtaposed against the limited authority afforded to PERC to award attorney’s fees as conferred by RCW 41.56.160, precludes application of the Priority of Action Doctrine. The Lt’s Association seeks affirmation of the grant of summary judgment and an attorney fee award in this appeal.

## II. ISSUES RELATED TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a hearing on an Unfair Labor Practices complaint initiated against a public employer pursuant to RCW 41.56.140 constitutes an "action" within the meaning of RCW 49.48.030.
2. Whether, as a matter of public policy, a bargaining representative who succeeds in recovering judgment for wages/salary withheld by a public employer should be allowed to recoup the attorney's fees incurred in obtaining such relief.
3. Whether the Priority of Action Doctrine should apply to an Unfair Labor Practices complaint to defeat an attorney's fee award under RCW 49.48.030 where the authority of the Public Employment Relations Commission to award attorney's fees is limited and where the remedial nature of RCW 49.48.030 is to be construed liberally.
4. Whether the parties' collective bargaining agreement contains an express attorney's fee waiver precluding an action by the bargaining representative for attorney's fees under RCW 49.48.030 based upon an Unfair Labor Practice of the employer.

### III. STATEMENT OF THE CASE

#### *a. Procedural History*

On December 11, 2009, the Kitsap County Sheriffs Office Lieutenant's Association (the "Union," hereinafter the "Lt's Association") filed an Unfair Labor Practice Complaint with the Washington Public Employment Relations Commission ("PERC") alleging that Kitsap County (the employer) committed an Unfair Labor Practice by unilaterally changing its contribution to employee health insurance premiums without providing notice and an opportunity for bargaining. The employer withheld 100% of the increase from the wages of the Lt's Association's membership. A hearing was held before PERC Hearings Examiner Lisa A. Hartrich, who found that the Kitsap County committed an Unfair Labor Practice, and fashioned a remedy which gave full effect to the parties; agreement and included repayment to the Lt's Association's members of the wages withheld from their pay. See *Kitsap County*, Decision 10836 (PECB, 2010). Kitsap County appealed the decision of the Hearings Examiner, which was affirmed in *Kitsap County*, 2011 WA PERC LEXIS 116; Decision 10836-A;-PECB (2011).

After presenting its statutory claim for damages, the Lt's Association commenced suit in Kitsap County Superior Court, seeking a judgment for the attorney's fees it had incurred in the successful prosecution of the ULP, which resulted in the repayment of wages to its members. CP 1 - 18; 19 - 56. Following receipt of Kitsap County's

Answer, CP 19 - 56, the Lt's Association moved for summary judgment.  
CP 57 - 92.

*b. Undisputed Facts*

The following facts were presented to the Trial Court as the undisputed facts of the case:

- a. The Lt's Association was and is the exclusive bargaining representative of lieutenants employed by the Kitsap County Sheriff.
- b. Kitsap County is a Municipality which has been organized and operates pursuant to the laws of the State of Washington.
- c. The Lt's Association and Kitsap County were parties to a collective bargaining agreement that expired on December 31, 2009. By operation of law, existing wages, hours, and working conditions may not be changed by action of either party without consent of the other party.
- d. In December, 2009 Kitsap County withheld monies from the Lt's Association's members' wages by deducting each individual member's contributions toward the health insurance premiums for his/her choice of the 2010 health benefit plan.
- e. The Lt's Association filed an unfair labor practice complaint with the Washington Public Employment

Relations Commission (PERC) on December 11, 2009, alleging that Kitsap County had changed the status quo – said status quo having been established in October 2009 and described in contract amendment KC-502-06C – as to employees' contributions toward 2010 health care premiums.

- f. PERC issued a decision in 2010 concluding that as to the Lt's Association's members' contributions to their 2010 health benefit premiums, Kitsap County “implemented a unilateral change to the status quo before the parties reached impasse and advanced to interest arbitration.”
- g. PERC concluded in *Kitsap County*, Decision 10836 (PECB 2010), and Decision 10836-A (PECB, 2011), that a certain “percentage” of moneys Kitsap County withheld from members' wages in 2010 constituted a unilateral change in the status quo. PERC then ordered Kitsap County to “calculate the percentage each individual employee paid in 2009, and apply that percentage to the 2010 rates.” PERC ordered the sums withheld from the wages of the Lt's Association's member to be refunded as follows:

Calculate the relative percentages paid by each individual employee for health insurance premiums in 2009, and refund each

employee the amount he or she paid above that percentage for insurance in 2010, beginning with the first withdrawal from the December 2009 paycheck. Interest will be applied. CP 41.

- h. The amounts paid to employees in accordance with PERC's decision were liquidated sums.

It is an undisputed fact that Kitsap County committed an Unfair Labor Practice (“ULP”) by its unilateral alteration of the status quo. See *Kitsap County*, 2011 WA PERC LEXIS 116, 6; Decision 10836-A;-PECB (2011). It is also undisputed that the alteration of the status quo (the ULP) occurred as a result of Kitsap County’s unlawful withholding of portions of wages from the pay of the Lt.’s Association’s members. The Honorable Frank E. Cuthbertson, sitting as a visiting Judge, granted summary judgment in favor of the Lt’s Association on September 17, 2012. Kitsap County’s motion for reconsideration was denied on February 1, 2013.

#### IV. ARGUMENT

- a. *Standard of Review*

The review of a summary judgment order is *de novo*, and the Courts engage in the same inquiry as the trial court. *Thompson v. Wilson*, 142 Wn.App. 803, 810, 175 P.3d 1149 (2008); (citing *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 547, 167 P.3d 555 (2007)). Summary judgment is proper if, viewing the facts and reasonable inferences most favorably to

the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56©; *Clarke v. Office of Attorney Gen.*, 133 Wn.App. 767, 784-85, 138 P.3d 144 (2006), *review denied*, 160 Wn.2d 1006 (2007).

Kitsap County did not argue before the Trial Court that material facts precluded summary judgment, or present evidence of such facts. It has not done so in its appeal. The grant of summary judgment was appropriate.

*b. RCW 49.48.030 is a Remedial Statute that Applies to “Any Action” for the Recovery of Wages.*

RCW 49.48.030 is a remedial statute that should be liberally construed to effect its purpose. *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 152, 948 P.2d 397 (1997), *review denied*, 135 Wn.2d 1003, 959 P.2d 126 (1998). The statute provides as follows:

Attorney's fee in action on wages — Exception.

*In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary. (Emphasis added).*

Remedial statutes authorize attorney fees “to provide incentives for

aggrieved employees to assert their statutory rights . . . .” *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112, 130 L. Ed. 2d 788, 115 S. Ct. 905 (1995). “A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.” *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). Our courts are directed to “liberally construe remedial legislation to accomplish legislative purpose.” *Gesa Fed. Credit Union v. Mut. Life Ins. Co.*, 105 Wn.2d 248, 255, 713 P.2d 728 (1986); (citing *State v. Douty*, 92 Wn.2d 930, 936, 603 P.2d 373 (1979); and *Peet v. Mills*, 76 Wash. 437, 136 P. 685 (1913)).

When a union controls access to a grievance system, the remedial purpose is furthered by requiring employers to reimburse a union when it incurs attorney fees in the course of recovering wages for an employee. *IAFF Local 46, et al. v. The City of Everett*, 101 Wn. App. 743, 747, 6 P.3d 50, *affirmed* 146 Wn.2d 29, 42 P.3d 1265 (2002). As a result, a labor union may be awarded attorney’s fees for successfully recovering lost wages on behalf of a union member. *IAFF Local 46, et al. v. The City of Everett*, 146 Wn.2d 29, 51, 42 P.3d 1265 (2002).

In *IAFF Local 46 v. The City of Everett*, union members were suspended without pay for disciplinary reasons. The unions challenged the suspensions as a violation of the collective bargaining agreement and the parties submitted the dispute to arbitration under their collective bargaining Agreement’s grievance procedure. One of the requested

remedies was for recovery of wages. An arbitrator ruled that the suspensions violated the collective bargaining agreement and awarded back pay to the members. The unions sued the City for fees, and both sides moved for summary judgment. In reversing the trial court's grant of summary judgment in favor of the City, the Division I Appellate Court ruled that the words "by the aggrieved employee or his assignee," in RCW 49.48.030 should be read very "broadly in light of the overall construction and purpose of the statutory scheme and extended recovery to an entity not named in RCW 49.52.070." *Id.* at 749.

The Washington Supreme Court then granted review and affirmed, recognizing that RCW 49.48.030 "is a remedial statute, which should be construed liberally to effectuate its purpose." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d at 34; (citing *Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 450-51, 815 P.2d 1362 (1991) (recognizing statute's remedial nature and liberal construction requirement); and *Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989)). This liberal construction requires that the coverage of RCW 49.48.030 provisions "be liberally construed [in favor of the employee] and that its exceptions be narrowly confined." *Id.*; (quoting *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996) (interpreting chapter 41.56 RCW) and *Nucleonics Alliance, Local Union No. 1-369 v. Wash. Pub. Power Supply Sys.*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984)). This is consistent with Washington's "long and proud

history of being a pioneer in the protection of employee rights.” *Id.* at 35 (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)).

In applying RCW 49.48.030 to the *City of Everett* grievance arbitration award, the Washington Supreme Court recognized past decisions holding that attorney fees recoverable under RCW 49.48.030 for breach of an employment contract, (*Gaglidari v. Denny’s*, (supra) 117 Wn.2d at 450; and *Kohn v. Ga.-Pac. Corp.*, 69 Wn. App. 709, 727, 850 P.2d 517 (1993)) and for the breach of a labor contract, (*Naches Valley Sch. Dist. No. JT3 v. Cruzen*, (supra) 54 Wn.App. at 399) and that the term “wages or salary owed” in RCW 49.48.030 has been construed to include “back pay,” (*Gaglidari v. Denny’s*, 117 Wn.2d at 449-50; (“front pay”), *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830 (1988); (reimbursement for sick leave), *Naches Valley*, 54 Wn. App. at 398; and commissions, *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 151-53, 948 P.2d 397 (1997)).

In *City of Everett*, the Washington Supreme Court recognized that an “arbitration” may be judicial in nature so as to fit within the definition of an “action” within the meaning of RCW 49.48.030. *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d at 41; (citations omitted).

The Court observed

It is clear that had this case been brought in superior court, attorney fees would have been available. Because RCW 49.48.030 is a

remedial statute, which must be construed to effectuate its purpose, we find no reason to not interpret “action” to include arbitration proceedings. A restrictive interpretation of “action” would preclude recovery of attorney fees in cases involving arbitration even though the employee is successful in recovering wages or salary owed. Thus, it would be inconsistent with the legislative policy in favor of payment of wages due employees. (Citation omitted). Therefore, we hold that “action” as used in RCW 49.48.030 includes grievance arbitration proceedings in which wages or salary owed are recovered. Thus, nothing in the “plain language” of “action” prevents us from interpreting it to include arbitration proceedings.

*Id.*

In this case, the determination of the Unfair Labor Practice was made following a hearing where the parties presented witnesses, subjected such witnesses to cross examination, and presented documentary evidence. Each side then fully briefed its position. *Kitsap County*, Decision 10836 (PECB 2010). Though these proceedings did not take place in a court, they were nevertheless “quasi-judicial” in nature. *Washington Pub. Emples. Ass'n v. Personnel Resources Bd.*, 91 Wn. App. 640, 646-647, 959 P.2d 143, *review denied* 145 Wn.2d 1034, 43 P.3d 21(2002). It is also undisputed that the Lt’s Association succeeded in its ULP prayer relief of the recovery of wages, as the PERC Hearings Examiner specifically ordered that with respect to such wages, Kitsap County was to

refund each employee the amount he or she paid above that percentage for insurance in

2010, beginning with the first withdrawal from the December 2009 paycheck. CP 41.

This award resulted in the exact type of “recovery of wages” that RCW 49.48.030 was designed to address. Kitsap County presents no compelling reason to hold that an award of wages in the context of a Unfair Labor Practices hearing should be any different than a grievance arbitration hearing. The remedial nature of RCW 49.48.030 confirms that there should be no such distinction. The grant of summary judgment was appropriate.

In its Opening Brief at page 8, Kitsap County cites to *City of Moses Lake v. International Ass 'n of Firefighters, Local 2052*, 68 Wn.App. 742, 847 P.2d 16, *review denied*, 121 Wn.2d 1026 (1993) for the proposition that RCW 49.48.030 “does not apply to actions brought under the PECBA.” This blanket assertion is incorrect as the facts of *City of Moses Lake* arose from an interest arbitration proceeding. In *City of Moses Lake*, the City challenged in Superior Court the salary increases awarded to its firefighters by an interest arbitration panel. The Superior Court granted the union’s motion for summary dismissal of the City's complaint, but denied the union's request for attorney fees and interest. *City of Moses Lake v. International Ass 'n of Firefighters, Local 2052*, 68 Wn.App. at 743. *City of Moses Lake* is distinguishable from this case as it involved an arbitrator’s decision to award *salary increases* and, unlike this case, no wages were *unlawfully withheld*. The Appellate Court explained

RCW 49.48.030 provides for the award of attorney fees to persons successful in recovering judgment for wages or salary owed. Here, the City sought review of the arbitrators' award in superior court, as provided in RCW 41.56.450. While the court order enforcing the award results in a salary increase to the Association's members, that effect is corollary, rather than central, to the Legislature's purpose of providing judicial review of the arbitration process. *We therefore hold the wage statute does not apply to an action brought under RCW 41.56.450.*

*Id.* at 748 - 749. (Emphasis added).

RCW 41.56.450 governs “Interest Arbitration” procedures for “Uniformed Personnel.” The statute is separate and distinct from actions (as here) where an Unfair Labor Practice is alleged against an employer under RCW 41.56.140. In contrast, within the context of an Unfair Labor Practice charge, PERC and/or the PERC Hearing’s Examiners are specifically authorized to award withheld wages (back pay) to an aggrieved employee:

WAC 391-45-410 Unfair labor practice remedies — Back pay.

If an unfair labor practice is found to have been committed, the commission or examiner shall issue a remedial order. In calculating back pay orders, the following shall apply:

(1) Individuals reinstated to employment with back pay shall have deducted from any amount due an amount equal to any earnings the employee may have received during the period of the violation in substitution for the

terminated employment, calculated on a quarterly basis.

(2) Individuals reinstated to employment with back pay shall have deducted from any amount due an amount equal to any unemployment compensation benefits the employee may have received during the period of the violation, and the employer shall provide evidence to the commission that the deducted amount has been repaid to the Washington state department of employment security as a credit to the benefit record of the employee.

(3) Money amounts due shall be subject to interest at the rate which would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of payment.

As Kitsap County correctly asserts in its Opening Brief, “Grievance arbitration is used to resolve labor disputes through the interpretation and application of an already existing collective bargaining agreement.”<sup>1</sup> Contrary to Kitsap County’s assertion at page 12 of its opening brief, in this case, the Hearing’s Examiner was required to interpret and apply the language of the existing collective bargaining agreement within the context of the Lt’s Association’s ULP Complaint. Kitsap County’s effort to create some type of artificial difference or distinction between a grievance arbitration and a ULP, where each involve

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<sup>1</sup> Brief of Appellant at p. 9, citing *City of Everett*, (supra) 146 Wn.2d at 46; (quoting *City of Bellevue v. International Ass 'n of Firefighters, Local 1604*, 119 Wn.2d 373, 376. 831 P.2d 738 (1992)).

issues concerning the withholding of pay, simply fails. In such instances, where wages have been wrongfully withheld, it should not matter if the remedy comes from a grievance arbitrator or a hearings examiner.

*c. Public Policy Supports the Application of RCW 49.48.030*

In its Opening Brief, beginning at page 13, Kitsap County asserts that

Allowing employees' bargaining representatives, but not employers, to recover attorney fees will not promote continued improvement of the relationship between public employers and their employees. The potential that employee organizations can recover attorney's fee and costs will likely create a disincentive to resolving disputes short of ULP complaints, and increase the number of ULP complaints filed against employers.

The exact opposite is probably more true. The remedial nature of RCW 49.48.030 and the reasons for its liberal application, to vindicate rights of aggrieved employees, have been previously discussed above. RCW 41.56.140 makes it an Unfair Labor Practice for public employer

- (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
- (2) To control, dominate, or interfere with a bargaining representative;
- (3) To discriminate against a public employee who has filed an unfair labor practice charge; and
- (4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.

The context in which this case arose was from a ULP involving the unlawful withholding of wages. When the Lt's Association and Kitsap County were unable to reach an agreement concerning the medical benefits, Kitsap County unilaterally passed 100% of the increased cost of the medical benefits on to the Lt's Association's members through the wage withholding. (CP 39). Absent the remedy afforded by RCW 49.48.030, which allows a bargaining unit to recoup the attorney's fees spent in vindicating its rights, a public employer could present "take it or leave it offers," using the threat of shifting such costs to the bargaining unit members, or simply shift such costs with impunity. Absent the ability to recoup its fees, the bargaining unit must then decide whether it could even afford the attempt to vindicate its rights.

The attorney's fees remedy afforded by RCW 49.48.030 dovetails with the statutory requirements of good faith bargaining. The remedy also keeps a "level playing field" since many bargaining units too small to afford even modest attorney's fees in such contexts. The prospect of a fee recovery in such instances allows increased access to counsel and justice. The position argued by Kitsap County in its Opening Brief will actually serve to chill a bargaining unit's exercise of rights.

Finally, as the case law is clear that the remedies afforded by RCW 49.48.030 do not apply to interest arbitration proceedings under RCW 41.56.450, the stated concerns that affirming the Trial Court's grant of summary judgment in this case will somehow "open flood gates" or serve

as a disincentive for public employees and employers to bargain in good faith is simply baseless: this case deals with the specific instance of unlawful *wage withholding* by the employer. This Court's affirmation of the Trial Court's grant of summary judgment will be confined to such fact specific instances (i.e., unlawful wage withholding). Nothing within RCW 49.48.030 authorizes relief outside of this context.

*d. The Priority of Action Doctrine Does Not Apply, and the Lt's Association's Suit in Superior Court Was Not an "Appeal" of the PERC Decision Given PERC's Limited Authority to Fashion Fee Awards*

The Trial Court correctly determined that the limited authority granted to the Public Employment Relations Commission to award attorney's fees, when juxtaposed against remedial nature of RCW 48.49.030, precluded application of the Priority of Action Doctrine.

Kitsap County's arguments for imposition of Priority of Action Doctrine fail for several reasons; first, the Lt's Association's right to recoup its fees arises outside the terms of its collective bargaining agreement by virtue of RCW 49.48.030. As a result, a separate suit was required for it to recover its fees. See *IAFF Local 46, et al. v. The City of Everett*, 101 Wn. App. at 750. In addition, the collective bargaining agreement between the Lt's Association and Kitsap County was silent as to the power to award attorney fees within the context of an Unfair Labor Practice complaint, thus requiring the Superior Court's involvement. *Id.*

The Priority of Action Rule Doctrine applies to administrative

agencies and the courts and generally applies only if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) the requested relief. *Mutual of Enumclaw Ins. Co. v. Human Rights Comm'n*, 39 Wn.App. 213, 692 P.2d 882 (1984). The identity must be such that a decision of the controversy by one tribunal would operate as *res judicata* in the other. *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981).

In contrast to the remedial nature of RCW 49.48.030, the authority conferred upon PERC to award attorney's fees is limited: PERC may award attorney's fees only

if it determines that the fees are necessary to make its orders effective, *and* the defenses to the unfair labor practice charge are frivolous, *or* the violation evinces a pattern of conduct showing a patent disregard of good faith bargaining obligations.

*Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn.App. 809, 814, 991 P.2d 1177 (2000) (emphasis in original). Given these requirements, a fee award is not automatic. *Id.*

While RCW 41.56.160 gives PERC extraordinary discretion in order to accomplish the purposes of the Public Employees' Collective Bargaining Act, the statute does not expressly specify or mandate awards of attorney fees as a remedy. Instead, the statute is worded in the most general terms: "The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders . . . ." As a result, the courts have interpreted this statute as one which *authorizes*

attorney fees, but does not requires such awards as a matter of course.

*Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn.App. at 815; (citing *State ex rel. Washington Fed'n of State Employees v. Board of Trustees*, 93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980)).

In matters involving the Public Employees' Collective Bargaining Act, fee awards are not automatic, but should be reserved only for cases in which a defense to the unfair labor practice charge can be characterized as “frivolous or meritless.” *Green River Community College, Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 439 (1986); (citing *State ex rel. Washington Fed'n of State Employees v. Board of Trustees*, 93 Wn.2d 60, 69 (1980); (see also *Lewis County v. Public Employment Relations Com*, 31 Wn. App. 853, 866, 644 P.2d 1231 (1982): (attorney fees are awarded “as a punitive remedy in response to egregious conduct, recidivist conduct, or to frivolous defenses asserted by a party”)).

Here, the Lt's Association's ULP before PERC and the relief requested in superior Court, resulting in the grant of summary judgment, were not identical in terms of the subject matter or requested relief. As described above, the case law interpretation of the Public Employees' Collective Bargaining Act demonstrates that PERC's authority to award fees is limited in nature. By contrast, the case law interpreting RCW 49.48.030 dictates that an attorney's fees award is *mandatory* (i.e., fees “shall be assessed”) and the case law demonstrates that the statute is to be construed *liberally* so as to “provide incentives for aggrieved employees to

assert their statutory rights . . . .” *Hume v. American Disposal Co.*, 124 Wn.2d at 673.

The standards by which a PERC Hearings Examiner is authorized to award fees are thus different from the standards which a trial court operates when fashioning remedies under RCW 49.48.030, the former being a matter of limited discretion and the latter affording no such discretion. In its Opening Brief at page 17, citing the *State - Corrections*, Decision 11060-A (PRSA 2012) and the case cited therein, Kitsap County correctly indicates that “an award of attorney’s fees in unfair practice proceedings in an extraordinary remedy, and . . . is used sparingly.” This actually reinforces why the Priority of Action Doctrine should not apply to this case. The Trial Court properly concluded this<sup>2</sup> and this Court may properly reach the same conclusion.

For the same reasons set forth above, given the limited authority of PERC to fashion fee awards, the Lt’s Association’s suit in Superior Court is not an “appeal” of the PERC award. There is no basis for reversal.

*e. The Lt’s Association Did Not Waive its Rights in the Collective Bargaining Agreement to Request Attorney’s Fees*

The Lt’s Association did not waive its rights to request attorney’s fees in the Collective Bargaining Agreement because the agreement is silent as to attorney’s fees awards arising from Unfair Labor Practice

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<sup>2</sup>  
See VRP at 22 -23.

complaints. Kitsap County's argument is premised upon Section F(3)(d) of the Collective Bargaining Agreement ("CBA"), but its argument fails because the CBA section upon which Kitsap County places its reliance applies to grievance arbitration proceedings only.

Section F(1) of the CBA provides as follows:

Scope of Procedure: Except as provided herein, grievances or complaints arising between the Employer and the I.U.P.A. on behalf of employees or on its own behalf with regard to matters effecting the I.U.P.A. as an entity or any employee subject to this Agreement, with regard to the interpretation or application of this Agreement, may be resolved through the following procedure. No complaint or grievance involving the same incident, problem, or other matter may be filed under this grievance procedure and the Civil Service Commission. If such a concurrent filing occurs, the complaint or grievance filed under this grievance procedure shall be immediately dismissed.

Section F(3) pertains to the *Grievance* procedure process only. This section does not apply to Unfair Labor Practice complaints. Step 1, entitled "Oral Discussion," requires a meeting between the "aggrieved employee" (with or without a [Lt's Association] representative) and the employee's supervisor "within ten (10) calendar days of the alleged grievance . . ." If the grievance is not resolved at Step 1, the Step 2 process requires a "Written Grievance" and a resulting investigation by the Sheriff or "a designee," to be performed certain time frames specified within section F(3).

Continuing, in the event the parties are unable to resolve a Grievance at Step 2, Step 3 allows the Lt's Association to "submit the matter to *arbitration* under the procedures described below." (Emphasis added). Section 3(a) provides for a choice of arbitrators from a list from the Federal Mediation and Conciliation Service, and provides alternatively that "the parties may, by mutual agreement request a list of nine (9) names from the Public Employment Relations Commission (PERC)."

Kitsap County's argument is based upon Section F(3)(d), which specifically relates to "Costs of Arbitration" only. Nothing within the CBA addresses the right to such awards within the context of a ULP. Here, the underlying controversy never proceeded as a grievance or through the grievance/arbitration process, but was instead prosecuted as an Unfair Labor Practice through the Public Employment Relations Commission. Kitsap County cannot demonstrate that the underlying controversy was pursued as a "Grievance" under the CBA or that the parties proceeded through Steps 1, 2 or 3 of the grievance/arbitration process. This is fatal to its position.

It is axiomatic that a Court may not compel parties to arbitrate matters which the parties have not agreed to arbitrate. The matters subject to compulsory arbitration are "only such matters properly submitted to arbitration and as the parties otherwise agree." *Price v. Farmers Ins. Co. of Washington*, 133 Wn.2d 490, 498, 946 P.2d 388 (1997). Likewise, a Court may not compel or fashion remedies outside of the scope of the

parties' agreement where such remedies are not authorized within the agreement. This is precisely what Kitsap County asked, which is to apply the CBA's "Costs of Arbitration" provisions (which the parties agreed would apply to grievance arbitrations only) to an Unfair Labor Practice complaint (for which the parties have no agreement). This violates the most basic principle of contract law which states that courts are not to "make" agreements for the parties where none exist. See *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake); *Haire v. Patterson*, 63 Wn.2d 282, 287, 386 P.2d 953 (1966) ("[w]here the parties have not reached agreement, there is nothing for equity to enforce.") and *Sea-Van Investments Associates v. Hamilton*, 125 Wn.2d 120, 129, 881 P.2d 1035 (1994) (quoting *Setterlund v. Firestone*, 104 Wn.2d 24, 26, 700 P.2d 745 (1985) ("It seems necessary to reiterate once again that negotiation, not litigation, is the proper method for agreeing upon these vital terms"))).

Kitsap County's reliance upon *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 48, 42 P.3d 1265 (2002) is misplaced since in that decision the Washington Supreme Court specifically recognized the general rule in labor arbitration "that each side shall pay its own attorney fees unless there is 'specific statutory or contractual authorization' to the contrary" (quoting *Fairweather's Practice and*

*Procedure in Labor Arbitration* 497 (Ray J. Schoonhoven ed., 4th ed. 1999)) but based upon RCW 49.48.030 (and the absence of anything within the CBA which prohibited a fee award), *confirmed* the award of attorney fees where the union obtained a favorable wage recovery on behalf of its member employee.

While parties to a CBA are free to agree that “each side pay their own fees and costs,” the CBA here addresses fees/costs only within the context of grievance arbitrations and contains no such limitations concerning Unfair Labor Practices. Here, there was no waiver precluding a fee award as claimed.

This controversy did not proceed through the grievance process specified in the CBA. Instead of electing to pursue a grievance under the CBA, the Plaintiff elected to pursue its remedies as an Unfair Labor Practice pursuant to RCW 41.56.040, RCW 41.80.110, and WAC 391-45-050. As this did not proceed as a “grievance” within the context of the CBA, but as an Unfair Labor Practice Complaint. As result, the Court cannot enforce the grievance provisions of the CBA to achieve the result that Kitsap County has argued.

*f. Lt's Association's Request for Attorney's Fees on Appeal*

In accordance with RAP 18.1, the Lt's Association respectfully requests that it be awarded its attorney's fees incurred in its opposition to Kitsap County's appeal. Washington law is clear that a party who successfully defends the appeal of a judgment based upon RCW 49.48.030

is entitled to an award of its attorney's fees on appeal. *Wise v. City of Chelan*, 133 Wn.App. 167, 175, 135 P.3d 951 (2006); (citing RCW 49.48.030 and *Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 727, 850 P.2d 517 (1993)).

## V. CONCLUSION

Kitsap County has failed to demonstrate error on the part of the Trial Court and any basis for reversal by this Court. The remedial nature of RCW 49.48.030 makes an award of attorney's fees mandatory. There are no cases cited within Kitsap County's Opening Brief which require a different result, nor does the language of the parties' CBA preclude an award. Public policy, which encourages good faith bargaining, and prohibits actions which chill the exercise of bargaining rights, compels the same result.

For these reasons, the award of summary judgment should be AFFIRMED in all respects and the Lt's Association should be awarded its attorney's fees and costs incurred in these appellate proceedings.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of October, 2013.

Law Offices of STEPHEN M. HANSEN, P.S.



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STEPHEN M. HANSEN, WSBA #15642  
Attorney for Respondent

**DECLARATION OF SERVICE**

I, SARA B. PERRY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON AS FOLLOW:

That on the 1<sup>st</sup> day of October, 2013, I  e-mailed  mailed via regular U.S. mail  faxed  delivered by legal messenger a true and correct copy of this document to:

Ms. Jacqueline Aufderheide  
Chief Civil Deputy Prosecuting Attorney  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS 35A  
Port Orchard WA 98366-4681  
[jaufderh@co.kitsap.wa.us](mailto:jaufderh@co.kitsap.wa.us)

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 1<sup>st</sup> day of October, 2013, at Tacoma, Washington.

  
\_\_\_\_\_  
SARA B. PERRY, Legal Assistant

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