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Case No. 89344-6

SUPREME COURT
OF THE STATE OF WASHINGTON

KITSAP COUNTY,

Appellant

v.

KITSAP COUNTY DEPUTY SHERIFFS' GUILD,

Respondent.

ANSWER TO AMICI

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I. INTRODUCTION

This appeal arises following a claim brought by the Kitsap County Deputy Sheriff's Guild against Kitsap County. Amicus Curiae briefs to date have been filed by the King County Sheriff's Office and the Washington State Association of Municipal Attorneys. The Guild answers the two Amici jointly in this brief.

II. ARGUMENT

A. The Amici Misapprehend the Nature of the Guild's Claim and the Vesting Issue Involved.

Amici characterizes the Guild's argument inaccurately and then proceed to attack their mischaracterization. Because Amici misapprehend the actual nature of the issues presented, and the Guild's argument on those issues, their arguments are misplaced.

Both the King County Sheriff's Office and the Municipal Attorney's *assume* that the Guild's argument is based upon some type of statutory entitlement. This is incorrect. The Guild asserts a constitutional entitlement based upon a vesting of property which vested upon performance of services. The property right does not arise from PECBA but from the fact that compensation, already earned, cannot be unilaterally removed.

Amici cite various "due process" property rights cases but all these cases miss the mark. Each and every one of the due process cases cited by Amici relate to *future* deprivation of property. *None* of the cited cases concern "recoupment" of compensation already paid (and likely already mostly consumed) in exchange for services already rendered.

The Amici misapprehension of what the Guild is *actually* arguing here seems to have led them into presenting arguments unrelated to the real issues in this case. The Municipal Attorneys, for example, assert that the Guild has argued that:

RCW 41.56.470 required the County to continue the expired contract during the pendency of arbitration proceedings and therefore created a property right to any benefits under that contract during that period that could not thereafter be diminished by the arbitration panel.¹

But the Guild is *not* arguing that insurance benefits may not “thereafter be diminished.” The Guild *is* asserting that benefits cannot be diminished *retroactively*. The panel certainly retains the right to recalibrate the compensation system *moving forward*.

Nor is the Guild arguing, as both Amici assert,² that PECBA itself directly creates the property right. It is true that RCW 41.56.470 imposes a condition that the “status quo” be maintained. But the Guild is not asserting that the statutory right to the status quo itself directly generates any entitlement to continued preservation of that status quo.

To evaluate what the Guild *actually argues*, and what the *Amici misperceive the Guild argues*, it would be worthwhile to reiterate briefly the Guild’s discussion in its Reply Brief regarding the “tripartite relationship” between the employer, the union and the employees. As

¹ Municipal Attorneys Brief at 3.

² See Municipal Attorneys Brief at 4, Sheriff’s Office Brief at 7-8.

expressed there, in that tripartite relationship, the individual employees have rights *separate and apart* from their collective bargaining agent.

The primary collective bargaining relationship is between the union and the employer, and the employees are third party beneficiaries to that relationship. But the law operates to protect individual employees from harm that might occur to them in that process. Unions and employers have wide berth to redefine the terms and conditions of employment, but they may not harm fundamental interests of the employees, and they may not drop below certain minimum “floors” in setting those terms and conditions where external law mandates recognition of a floor. In one common sense example, a union and employer may not agree to set wages below the statutory minimum in the wage an hour law. Many examples can be provide arising from the panoply of employment laws and constitutional rights individual workers have and this point cannot be seriously disputed.

The Guild has argued, and continues to argue, that the performance of work establishes its own “vested benefit” at the moment the work is performed. Separate and apart from the CBA, although generally shadowing it, there is an individual “deal” between the individual employees and the employer. When the contract expires, the existent status quo that the employees labor under becomes the applicable “floor” for the duration of the contractual hiatus.

As the Municipal Attorneys note, the deputies were “working without a contract.”³ But Amici misapprehend the significance of that, or at least the significance attached to that here by the Guild. “Working without a contract,” as these Deputies have now done for many years, surely is an undesirable state, but the law does not allow employees to be *completely* without protection in these circumstances. Whether or not a collective bargaining law is in place and whether or not any given employer is unionized, the law recognizes that employees get to *keep* the property they have already earned. The Guild’s case really is that simple.

So arguments that characterize the Guild as asserting a perpetual entitlement to existent benefits miss the mark entirely because that is simply not what the Guild asserts or ever has asserted. It is the County’s argument, which once fully extended to its logical extreme, that would create havoc. The County effectively asserts a right to take away earned compensation even years after it has been earned (and likely consumed).

And the context of this case minimized the full extent of potential overreaching. In this case, the employer’s unbridled authority was checked by an arbitration panel (although imperfectly). For nonunionized employees or for those unionized employees lacking arbitration protection (which includes the vast majority of Washington public sector employees) the County effectively asserts an ability to bludgeon its employees into submission through its threats to “recoup.” As will be discussed below, in

³ Municipal Attorneys Brief at 5-6.

practice such authority has not been asserted or, apart from this atypical contract, even claimed, but the potential for creating an imbalance of power is boundless.

B. The Amici Misapprehend the Nature of the Existent Collective Bargaining System and the Impact of the Pierce County Ruling on that System

The Sheriff's Office repeats the County's claim that sustaining the Pierce County ruling will "eviscerate the balance of power."⁴ The Municipal Attorneys likewise predict great harm that will befall the State. These prophecies of doom are misplaced because Amici misapprehend the actual status quo in at least two respects: 1) the prevailing collective bargaining practices concerning retroactivity, and 2) the current collective bargaining system and law and its requirements for timely resolution of contract disputes.

The County's description of the existing retroactivity practices, although entirely inaccurate, are not so puzzling to the Guild because, after all, it was the County's woeful misunderstanding as to the limits of its power that created all this litigation to begin with. What the Guild does find puzzling though, is that the Amici seems to reiterate the same bizarre description of perceived reality, a peculiar system in which retroactive reductions in health insurance are some type of common occurrence.

The Guild can only respond to these claims in the strongest possible terms. There is utterly no basis in *any* identifiable reality to what the Amici

⁴ Sheriff's Office Brief at 5.

and the County assert as the prevailing practice. With all due respect, if the Amici really believe their construction, they are perceiving some type of “alternative universe” of collective bargaining utterly foreign to any experience the Guild has lived.

Amici and the County make a lot of claims about how things “really work,” but without any evidence. As the Guild identified in its Reply Brief, a simple review off all the existing Interest Arbitration Awards issued over the past nearly 40 years indicates that the Lankford Award is a complete outlier.⁵ The Guild challenges the County to identify any instance in what it seeks here has previously occurred or at least has occurred to any appreciable degree.

And in that regard, we are not just limited to published interest arbitration awards. If the prevailing practice was as described, wouldn't one have expected some litigation to have arisen on the subject already? The County argues that the Guild's relatively thin precedents cited suggest the Guild's assertions are wrong. The Guild, in turn, replies (and Judge Orlando seemed to agree) that what the County seeks lacks practicality and defies common sense; *this just isn't done*.

Yet there is another body of cases, besides the interest arbitration cases, that demonstrate that the Amici (and County) expression of reality is itself not anchored in reality. Besides the nearly 200 interest arbitration decisions, PERC has published *thousands* of unfair labor practice rulings.

⁵ <http://www.perc.wa.gov/intarbawards.asp>

These rulings cover a range of subject, but many of them occur relate to the bargaining process and its realities.

RCW 41.56.140 makes it an “unfair labor practice” (ULP) for employers “refuse to bargain.” A parallel duty is imposed on unions in RCW 41.56.150. There are a varieties of means in which a party can violate the mandate to bargain, but a large number of these ULP decisions concern a breach in the “good faith” bargaining rules.

In the real world of Washington State public sector collective bargaining, most employer and unions work together somewhat reasonably, not always perfectly harmoniously but with a respect of the rights of the other and a recognition (although not always acceptance) of stated interests of the other party. This back-and-forth normally leads to contract agreement without undue strife or litigation. But at times overly aggressive parties overreach and violate their obligations. These “pathological” relationship breakdown situations are reflected in the published ULP decisions of PERC. These include a wide range of conditions in which negotiations broke down, often the employer seeking to assert its supposed power to dictate the result, and the union then caught in the vice and responding by filing a ULP.

This is what the Guild finds exceptionally noteworthy here in the context of the Amici argument: If forced imposition of retroactive compensation reductions were such a common practice, one that the Pierce County ruling would allegedly “eviscerate”, *why is there not a single PERC*

ULP decision discussing this type of negotiations breakdown? Surly unions so imposed union would probably be at least try to fact back using the ULP process. For the Guild the answer to this question is clear: As indicated, with all due respect, the Amici are describing an alternative collective bargaining universe which is entirely unhinged from identifiable real world realities.

There is also predicted harm to the perceived “status quo” as perceived by Amici — the unfairness by unions that will now improperly “drag out: the process. Apart from the fact that this perceived harm assumes a current bargaining practice than actually exist the Amici argument also misapprehends the current collective bargaining system and statute.

The King County Sheriff’s Office, for example, describes a breakdown in its relationship with its Deputies (apparently Deputies as it alleges it “overpays”) and portrays itself as a victim without recourse in addressing this recalcitrant Guild. Even assuming all the facts the Sherriff’s counsel reports are at all true, the conclusions drawn are not. The employer is not as claimed without recourse.

The Sheriff’s Office asserts that PERC remedies for dilatory bargaining tactics are “limited to admonishments and directives.”⁶ This is not true. It is true that these are the normal remedies issued in the “garden variety” dilatory bargaining ULP. But PERC has the ability to impose

⁶ Sheriff’s Office Brief at 5.

additional remedies in order to effectuate the purpose of the act. And they have.

PERC has broad remedial authority, including the imposition of other sanctions or economic penalties. These remedies generally fall under the rubric of “extraordinary remedies,” which the Commission has reserved for situations involving egregious or repetitive misconduct, including in some cases dilatory tactics if it constitutes a pattern of conduct showing a patent disregard of a party’s good faith bargaining obligations.⁷ The appropriate extraordinary remedy should reflect the purpose of Chapter 41.56 RCW.⁸ The remedy must not be punitive and it cannot be something that is beyond what can be obtained at the bargaining table.⁹

The typical extraordinary remedy is awarding attorneys’ fees and costs.¹⁰ *The extraordinary remedy of attorney fees may be imposed on unions as well as employers.*¹¹ Atypical extraordinary remedies include totally voiding a labor agreement, ordering interest arbitration, and requiring labor relations training.¹²

⁷ See *PUD 1 of Clark County*, Decision 3815-A (PECB, 1992).

⁸ *Kitsap Transit*, Decision 11098-B (PECB, 2013), citing *METRO v. PERC*, 118 Wn.2d 621,633 (1992).

⁹ *Kitsap Transit*, Decision 11098-B (PECB, 2013), citing *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce County*, Decision 1840-A (PECB, 1985); RCW 41.56.160.

¹⁰ See e.g. *City of Bremerton*, Decision 6006-A (PECB, 1998); *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *PUD 1 of Clark County*, Decision 3815 (PECB, 1991); *City of Kelso*, Decisions 2633 (PECB, 1988).

¹¹ Compare *PUD 1 of Clark County*, Decision 3815 (PECB, 1991) and *Spokane County Fire District 9*, Decisions 3773-A and 3774-A (PECB, 1992).

¹² See e.g. *Snohomish County*, Decision 9834-B (PECB, 2008); *Western Washington University*, Decision 9309-A (PSRA, 2008).

Amici also argue that this balance of power is shifted because now unions will have a “new” motive to delay. Apart from the fact that, as discussed, nothing in the Pierce County rulings creates any shift in actual bargaining practices and that PERC has robust remedies available for wilful delays, this argument also misapprehends the structure of the collective bargaining statute itself.

The County got itself snared in the trap of the contract expiring before the Award was issued based on its own mistakes. Attempts by attorneys to be clever without a proper understanding of the existent legal framework can often create negative consequences for their clients. In fact, the law permits CBA to be extended up to six years, not just the three stipulated to here by the County.¹³

The Guild finds it remarkable that the employers here now claim that the balance of power is shifting and the unions now are incentivized to delay bargaining. The Guild also finds it noteworthy that in the large body of PERC cases identified above concerning bad faith bargaining, the *overwhelming* number of dilatory bargaining cases involve allegations *against the employers*. Practical realities indicate that it is often the employers that seek to gain “bargaining leverage” by dragging out bargaining, forcing employees to work without a contract and its protections, and often threatening to withhold retroactivity.

¹³ RCW 41.56.070

There is a clear legislative solution available — if the policy issues raised by Amici had sufficient merit — and one need not be too imaginative to locate it. As identified in the Reply Brief, the existing state collective bargaining system imposes tight bargaining deadlines on at least one set of parties — the ferry system and its employees. RCW 47.64.170 describes an elaborate scheduling system with tight and enforceable timeframes that effectively mandates that arbitration impasses will be resolved prior to November 1 of each applicable year.

The Guild and its undersigned counsel are completely unaware of any concerted effort by cities and counties to lobby the legislature a similar system. Given that the vast majority of delays, as reflect in PERC ULP decisions, are associated with stalling *employers*, one would expect that any such decision by public employers to adopt such a system might actually be warmly embraced by union advocates.

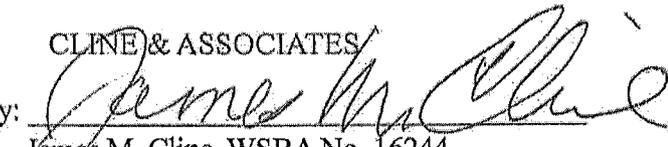
The point here is that such a “fix” to a problem (that does really exist) is available. If the Cities and Counties think that the Pierce County ruling creates a whole batch of new problems for them, the Guild submits they should seek a legislative amendment redefining the bargaining system before they pursue the alternative course, at issue here, of violating the constitutional rights of their employees to keep the wages they have earned.

III. CONCLUSION

The problems identified by Amici are not really problems and the arguments they characterize the Guild as making are not being made by the

Guild. A true rendition of real world conditions suggests that Judge Orlando's ruling is grounded in practical realities and law and should be affirmed.

DATED this 19th day of February, 2014, at Seattle, WA

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CERTIFICATE OF SERVICE

I certify that on February 19, 2014, I caused to be filed via email and U.S. Mail the original of the foregoing ANSWER TO AMICI BRIEF, and this *CERTIFICATE OF FILING & SERVICE* in the above-captioned matter. I further certify that on this same date, I caused to be served via Electronic Mail and U.S. Mail true and accurate copies of the same above-referenced documents on the party below:

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

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Attachments: 2-19-14 Reply Brief - Guild.pdf; 2-19-14 Answer to Amici.pdf

Kitsap County v. Kitsap County Deputy Sheriff's Guild / 89344-6:

Attached please find Reply Brief of Respondent and Answer to Amici

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