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NO. 89344-6

SUPREME COURT
OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFFS' GUILD,
Respondent,

v.

KITSAP COUNTY,
Petitioner.

~~PETITIONER~~
APPELLANT
BRIEF OF ~~PETITIONER~~ KITSAP COUNTY

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I. INTRODUCTION

The question before the Court is whether retroactive concessions from employees in collective bargaining agreements (CBAs) are lawful and constitutional. The Public Employees Collective Bargaining Act (PECBA) allows retroactivity to the day following the expiration of the agreement, which is consistent with the strong public policy underlying the PECBA encouraging negotiated settlements. RCW 41.56.950. Retroactivity is an important bargaining tool for both employers and employees because most agreements are not entirely prospective. It is not unusual for CBAs to be finalized some years after the earlier agreement has expired. Here, the entire agreement was retroactive because it was awarded in 2013, after the 2010-2012 CBA had expired.

The essence of collective bargaining is give and take between employers and employees. The parties here followed the prescribed PECBA process: negotiations beginning in 2009, an impasse declared and issues certified for interest arbitration in 2011, an interest arbitration in 2012 and an award issued in 2013 for the 2010-2012 CBA. Once collective bargaining reaches the final stage of bargaining, interest arbitration, an arbitrator determines a fair compromise of their proposals including retroactive dates of the award. The result of the four year

process was a detailed 32-page award issued by a three member panel, which was a fair and thoughtful compromise of the parties' proposals.

At issue in this case is the panel's award on healthcare premiums. The panel awarded the employer's proposal for increased premium share (which are a small percentage of the total cost), retroactive to the last six months of the contract but did not change the employees' plans. The arbitration panel also compensated for this rise in premium by granting an additional 0.5% wage increase retroactive to the same date, which more than offset the increased premium share.

The superior court determined that the award was arbitrary and capricious, holding a retroactive increase in employee healthcare premiums was illegal and unconstitutional. The superior court ordered only this part of the award stricken, but did not remand it to the arbitrator. Kitsap County, the employer, appeals as the superior court's award as it has enormous public policy impacts for collective bargaining throughout the state.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by finding the portion of the Award retroactively changing employee premiums was arbitrary and capricious.

2. The superior court erred by finding the portion of the Award retroactively changing employee premiums violated the United States Constitution.

3. The superior court erred by finding the portion of the Award retroactively changing employee premiums was illegal.

4. The superior court erred by striking only one provision of the Award without remanding it back to the Arbitrator to refashion the Award.

III. STATEMENT OF ISSUES

1. Did the superior court err by improperly applying the arbitrary and capricious standard and failing to accord sufficient deference to the arbitration panel's decision?

2. Is the superior court's ruling that an arbitration award retroactively increasing employees' health insurance costs is arbitrary and capricious directly contrary to the PECBA, which expressly allows a collective bargaining agreement to be retroactive?

3. Does an interest arbitration award retroactively increasing employees' health insurance costs violate employees' substantive due process rights under the 5th Amendment to the U.S. Constitution?

4. Is an arbitration award that retroactively increases employees' health insurance costs arbitrary and capricious in that it constitutes a

rebate of wages owed to employees or deprives employees of earned wages in violation of RCW 49.52.050?

5. Is an interest arbitration award that retroactively increases the employees' health insurance costs without providing for supplemental open enrollment arbitrary and capricious?

6. Did the superior court err in striking a provision of the interest arbitration award rather than vacating the Award and remanding it back to the arbitration panel for further proceedings?

IV. STATEMENT OF THE CASE

A. Collective Bargaining

As required under RCW 41.56.440, the Kitsap County Deputy Sheriffs' Guild (Guild) and Kitsap County (County) began negotiating the 2010-2012 Collective Bargaining Agreement (CBA) five months prior to the expiration of the 2008-2009 CBA. CP 70. Health insurance proposals were exchanged early in the negotiations, and eventually in October 2011, a mediator certified health insurance as an issue for interest arbitration. *Id.*

The County proposed that the Guild members be moved to the standard county plans, and to increase their employee-only premium share from 0% to 3%, and the dependent premium share from 10% to 15%. CP 23. The County estimated its proposal would save nearly a half million dollars for the three-year contract period, 2010-2012. *Id.* The Guild

proposed no changes to the healthcare premium share or plans. The County maintained the previous percentage split in the 2008-2009 CBA as status quo for 2010-2012 during the course of the bargaining period.

B. Interest Arbitration Proceedings.

Because no agreement was reached on a successor collective bargaining agreement, the matter went to interest arbitration. The parties selected Howell Lankford to arbitrate the matter.¹ Interest arbitration took place before a three-member arbitration panel, which included the neutral arbitrator, Mr. Lankford and two partisan arbitrators selected by each party. The five-day hearing included numerous witnesses and exhibits and briefing submitted by the parties, was completed on October 29, 2012. On February 27, 2013 the panel issued its award (Award) for the contract period of 2010-2012. CP 69-101.

The Award for wages and health insurance were combined, with the effect of a net *increase* in deputies' compensation. In short, while the employees were assessed a retroactive healthcare premium payment for only the last six months of the CBA, this was offset by a corresponding pay increase for the same period. The neutral arbitrator rejected the

¹ The parties jointly selected Arbitrator Lankford, partly based on the fact that he had just completed an arbitration of the Kitsap County Corrections Officers CBA earlier in 2012 and was familiar with Kitsap County issues. CP 70.

Guild's contentions that the retroactive payment was unlawful and thoroughly explained the rationale for the health insurance Award:

. . . I am among the interest arbitrators who have recognized before that 100 percent paid premiums for health benefit plans are no longer standard nor are they sustainable. But that increase would not be acceptable if it were to exacerbate the overall shortfall in total compensation of the Deputies as compared to their peers in comparable counties. On the basis of the entire record, and particularly in light of the County's still reduced workforce and programs, no schedule increase can be justified for 2010 or 2011, and therefore no change in insurance allocation is justified.

That record requires a 2% increase effective the first pay period in January, 2012, to reduce the lag behind the comparables and at least keep up with the 2011 purchasing power loss. *Moreover, the County's proposal to reallocate the cost structure for health insurance is not acceptable without a small additional increase to balance out that change, and the premium change and 0.5% pay increase should both be effective the first pay period in July, 2012.*

I therefore award no rate increases for 2010 and 2011; a 2.0% schedule increase retroactive to the first pay period in January, 2012; and an additional 0.5% schedule increase retroactive to the first pay period in July 2012 along with a change in insurance cost participation: Retroactive to the premium payroll deductions in July 2012, the Deputies shall pay three percent (3%) of the premium of employee-only coverage and 15% of the premium for dependent coverage. The County shall continue to pay 100% of employee-only dental.^[35]

CP 92-93 (emphasis added). In the footnote, the panel expressly addressed the Guild's argument:

³⁵. The Guild argued strenuously against a retroactive premium participation change and pointed out that a Deputy who might have chosen to shift to a less expensive plan because of the

participation rate change would have no opportunity to do so. The additional 0.5% pay increase that becomes effective at the same time as the insurance cost shift is the panel's answer to that concern, (even though the neutral arbitrator has no doubt of our authority to award retroactive premium shifts).

CP 92-93.

The first draft awards included the same retroactive premium share but a smaller wage increase. CP 413. After partisan arbitrator Jay Kent objected in a lengthy "dissent," CP 417-432, the neutral arbitrator agreed to increase the wages 0.5% "in return for the Guild's *accepting* the new insurance participation numbers." CP 434 (emphasis in original).

Thus, the panel intentionally increased wages 0.5% effective July 2012 to offset the increases in employees' health insurance costs. The panel considered and rejected the Guild's objections that it was unlawful to make the changes in employees' contributions retroactive. Because the arbitration took place in late 2012, the Award was issued in early 2013 and past the contract term, the Award was entirely retroactive.

C. Superior Court Proceedings.

The Guild filed an action in the Pierce County Superior Court seeking judgment declaring that the Award was unconstitutional and

unlawful, an order enjoining the County from implementing the Award, and an order requiring the parties to re-arbitrate the matter. CP 1-4.²

The superior court, Judge James Orlando, granted summary judgment for the Guild, ruling that the provision in the Award changing insurance contributions is an unconstitutional taking violating due process, and arbitrary and capricious. CP 435-37. The superior court ruled that the Award incorporated provisions beyond the lawful authority of the employer, and ordered the terms regarding health insurance contributions stricken, keeping intact the remainder of the Award. *Id.*

The County filed a motion for reconsideration, including a request that the court reconsider whether it should remand the award to the arbitrator to refashion the award consistent with the court's ruling. CP 438-61. The motion was denied. CP 479.

V. ARGUMENT

A. The Award Was Not Arbitrary or Capricious.

This Court reviews the Award *de novo* using an arbitrary and capricious standard of review. RCW 41.56.450; *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 317, 237 P.3d 316 (2010). The scope of review under the arbitrary and capricious

² The Superior Court denied the County's motions to change venue to Kitsap County and judgment on the pleadings. CP 55-64, 332-62, 435-37.

standard is narrow, and very deferential to the arbitrator's factual findings and conclusions of law. *Id.* at 311. The Guild has a heavy burden in this case which it has not carried. The Award was within the statutory authority granted the arbitrator and consistent with the public policy underlying collective bargaining.

As noted, the standard of review for an interest arbitration award under PECBA is deferential, i.e., whether the award is arbitrary or capricious. The superior court erred by incorrectly applying that standard to the Award in this case. RCW 41.56.450 provides:

The neutral chair shall consult with the other members of the arbitration panel, and, . . . shall make written findings of fact and a written determination of the issues in dispute, based on the evidence presented. . . . That determination shall be final and binding upon both parties, subject to review by the superior court upon the application of either party solely upon the question of whether the decision of the panel was arbitrary or capricious.

Id.

An interest arbitration award is “‘final and binding upon both parties,’ subject only to superior court review ‘solely upon the question of whether the decision of the panel was arbitrary or capricious.’” *Almquist v. City of Redmond*, 140 Wn. App. 402, 404, 166 P.3d 765 (2007) (quoting RCW 41.56.450 and RCW 41.56.480, and citing WAC 391-55-245). The decision of the arbitration panel is reviewed by the superior court which

acts in an appellate capacity.” *State Dept. of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 793, 161 P.3d 372 (2007).

“[A]rbitrary and capricious” has been defined as “willful and unreasonable action, without consideration and a disregard of facts or circumstances.” *City of Moses Lake v. International Ass’n of Firefighters, Local 2052*, 68 Wn. App. 742, 746, 847 P.2d 16 (1993) (quoting *Buell v. Bremerton*, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972)). On review, the arbitrary and capricious standard is applied to the record that was made before the interest arbitration panel. *Point Allen Service Area v. Washington State Dept. of Health*, 128 Wn. App. 290, 297, 115 P.3d 373 (2005). Furthermore, the party asserting invalidity bears the burden of establishing it. *Id.*

In *City of Moses Lake*, the city argued the interest arbitration award was arbitrary and capricious because the wages awarded were predicated upon the Seattle Tacoma CPI-U which neither party proposed. 68 Wn. App. at 745. The court held that the award was not arbitrary and capricious because the:

award itself provides a well grounded explanation for the panel's use of the Seattle-Tacoma CPI-U. The foregoing demonstrates a consideration and regard for the facts and circumstances and cannot be classified as arbitrary and capricious conduct. In summary, the panel's use of the Seattle-Tacoma CPI-U was not arbitrary and capricious. . . The salary

increase was based on the facts and circumstances of the case and application of the statutory factors.

Id. at 746.

Likewise here, the neutral arbitrator explained in a detailed Award the basis for his decision, including the decision to shift healthcare premiums retroactive to the last six months of the contract. CP 69-101. The Award was based on the facts and circumstances of this case and application of statutory factors. Moreover, consideration was explicitly given in the additional wage increase to compensate for the increase in health premiums. CP 92. In the end, the Award was a thoughtful and fair compromise of the parties' proposals, not arbitrary or capricious.

Under the arbitrary and capricious standard, the Court must give great deference to the arbitrator's decision. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 311, 297 P.3d 745 (2013) ("The courts are very deferential to the arbitrator's factual findings and conclusions on the legal questions presented."); *City of Yakima v. Yakima Police Patrolmans Ass'n.*, 148 Wn. App. 186, 192, 199 P.3d 484 (2009) ("Labor arbitration awards are afforded great deference."); *Klickitat County v. Beck*, 104 Wn. App. 453, 460, 16 P.3d 692 (2001) ("We give exceptional deference to an arbitrator's decision, particularly in the realm of labor relations.").

The Supreme Court has noted the important public policy reasons underlying this deference:

Courts do not typically review arbitration awards arising out of a collective bargaining agreement “because extensive judicial review would ‘weaken the value of bargained for, binding arbitration and could damage the freedom of contract.’”

International Union of Operating Engineers, Local 286 v. Port of Seattle, 176 Wn.2d 712, 715, 295 P.3d 736 (2013).

This court will review an arbitration decision only in very limited circumstances, such as when an arbitrator has exceeded his or her legal authority. . . . Reviewing an arbitration decision for mistakes of law or fact would call into question the finality of arbitration decisions and undermine alternative dispute resolution. . . . Further, a more extensive review of arbitration decisions would weaken the value of bargained for, binding arbitration and could damage the freedom of contract.

Kitsap County Deputy Sheriff's Guild v. Kitsap County, 167 Wn.2d 428, 435, 219 P.3d 675 (2009).

Here, the superior court gave *no* deference, let alone great or exceptional deference, to the arbitrator’s decision. The superior court summarily concluded that the labor arbitrator’s decision was a compromise “without really thinking through the significant impact potentially on the deputies.” Verbatim Report of Proceedings, July 19, 2013, 20:2-3. The arbitrator was in the best position to make this decision after a week-long hearing with testimony from numerous witnesses and thousands of pages of exhibits. Moreover, the arbitrator has considerable

expertise in fashioning interest arbitration awards, which should warrant substantial deference to the arbitrator's judgment of the facts and the law.

B. The Trial Court's Ruling is Unlawful and is Directly Contrary to the PECBA, Which Expressly Allows Retroactivity.

The PECBA expressly allows a collective bargaining agreement to be retroactive:

Whenever a collective bargaining agreement between a public employer and a bargaining representative is concluded after the termination date of the previous collective bargaining agreement between the same parties, *the effective date of such collective bargaining agreement may be the day after the termination date of the previous collective bargaining agreement* and all benefits included in the new collective bargaining agreement including wage increases may accrue beginning with such effective date as established by this section.

RCW 41.56.950 (emphasis added). Thus, all benefits may be retroactive.³

The PECBA is to be liberally construed:

The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose.

RCW 41.56.905. See also, *City of Bellevue v. International Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 379-380, 831 P.2d 738 (1992)

("Because RCW 41.56 is remedial in nature, its provisions are to be

³ The issue here deals exclusively with the benefit of healthcare coverage, it was only the terms of the employees' share of the premium costs that changed. Neither the premium nor the plan itself changed.

liberally construed to effect its purpose”) (citing *380 PUD 1 v. Public Empl. Relations Comm’n*, 110 Wn.2d 114, 119, 750 P.2d 1240 (1988)). If the legislature had intended increases in employee premium shares must be prospective only, it could have said so.

Employee insurance premium contributions may be retroactive, whether expressly agreed to in a negotiated contract or resulting from an interest arbitration award. Nothing in the PECBA would lead to a conclusion that a retroactive increase in employees’ share of insurance premiums is unlawful.

Retroactivity in collective bargaining agreements is the norm particularly for uniformed personnel that have interest arbitration rights. This is a typical situation where negotiations begin before the new contract term and an award is issued after the expiration of the term, about a four year process. The parties bargain the retroactive date of their proposals along with the proposal itself. If retroactivity were unlawful or unconstitutional, then it would change the entire scope of collective bargaining, including arbitration, and would be directly contrary to the letter and spirit of the Public Employees Collective Bargaining Act.

1. The Employer And Employees May Lawfully Agree to Retroactively Increase Employee Healthcare Premium Share.

The superior court found the arbitrator did not have the authority to issue a retroactive premium change because the County and Guild could not have lawfully agreed to it in collective bargaining. The PECBA however has no such limitation for mandatory subjects of bargaining including benefits.⁴ It is the essence of negotiation in collective bargaining that the parties put together proposals that include a variety of terms and conditions, some of which are concessions.⁵ If the County had known in 2009 that a shift in healthcare premiums could not be retroactive, it would have changed its proposals and strategy accordingly, or would have at least put a timeframe on acceptance of the proposals so that the Guild could not simply delay responding and thereby nullify the County's proposal.

The general policy underlying the PECBA favors negotiated agreements. *City of Bellevue*, 119 Wn.2d at 384 (citing RCW

⁴ RCW 41.56.030(4) defines "collective bargaining" as "the performance of the mutual obligation of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement . . . except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter."

⁵ For example, an employer may propose a wage increase in exchange for employees' agreement to eliminate premium holiday pay.

41.56.030(4)). The PECBA expressly preserves the employer's right to bargain wages and benefits. RCW 41.56.030(4); *Int'l Ass'n of Fire Fighters, Local 1445 v. Kelso*, 57 Wn. App. 721, 732, 790 P.2d 185 *rev. denied*, 115 Wn.2d 1010 (1990) ("It is axiomatic that, in bargaining, the parties retain the power of decision and are not required to agree.")

In 1971, the Washington Legislature adopted an amendment explicitly allowing retroactive provisions in collective bargaining agreements, RCW 41.56.950, because it would improve the relationship between public employers and their employees. 1974 Op. Att'y Gen. No. 19. Until then, there was a dispute about whether a retroactive pay increase in a collective bargaining agreement was in violation of the Washington Constitution, art. II, sec. 25. *See, Christie v. Port of Olympia*, 27 Wn.2d 534, 179 P.2d 294 (1947).⁶

The issue then was the constitutionality of a retroactive pay increase, now it is the constitutionality of a retroactive employee premium increase. However, the underlying principle is the same: public employers and employees are more likely to reach a negotiated settlement if *all* the terms

⁶ The *Christie* court held that the wage increase to longshoreman after the war labor board heard their dispute was not "true retroactive pay" because it "accrued in strict pursuance to a contract made before the work was done," so it did not violate the Washington State Constitution, art. II, sec. 25: *Christie*, at 543-44. RCW 41.56.950 codified that retroactive pay pursuant to a collective bargaining agreement is lawful.

and conditions of employment for the entire contract period are on the table.

Furthermore, an unequal application of retroactivity is contrary to the stated purpose of PECBA, which is to provide uniformity in the application of bargaining rules. RCW 41.56.010. If the parties were limited to the superior court's ruling, then bargaining becomes unfairly lopsided with employees having tremendous incentive to delay bargaining to limit or eliminate any concessions on their part.

Ultimately, employees would also be negatively impacted because an employer would offer less if employees were limited on the concessions they could offer the employer. This result is explicitly contrary to the PECBA policy encouraging parties to reach a negotiated agreement. If the County in this case had known that a shift in premiums could only be prospective, the County would have changed its proposals and entire bargaining strategy as well as its approach in the interest arbitration hearing. Yet the County did not have the opportunity to adjust its proposals and strategy accordingly because it relied on PECBA and particularly on the provision allowing retroactivity.

2. The County's Healthcare Proposal was a Mandatory Subject of Bargaining Certified by PERC for Arbitration.

After two years of negotiations, the parties proceeded to the next step required by the PECBA: mediation. The mediator, who was appointed by PERC, was not successful in helping the parties reach a settlement, so the mediator declared an impasse and certified issues for arbitration pursuant to PECBA:

If an agreement has not been reached following a reasonable period of negotiations and mediation, and the executive director, upon the recommendation of the assigned mediator, finds that the parties remain at impasse, then an interest arbitration panel shall be created to resolve the dispute. The issues for determination by the arbitration panel shall be limited to the issues certified by the executive director.

RCW 41.56.450; CP 70. One of the issues certified for arbitration was "Health and Welfare," which was the County's proposal to increase the Guild's share of the premium for the entire contract period and change the Guild members to the standard county plans. CP 70, 91.

There are three categories of issues related to collective bargaining: (1) mandatory issues, (2) permissive issues, and (3) illegal issues. *State Patrol Lieutenants Ass'n v. Sandberg*, 88 Wn. App. 652, 657, 946 P.2d 404 (1997). Mandatory issues that must be bargained must also be certified. A PERC mediator cannot declare an impasse on a permissive subject of bargaining unless the parties agree, and in no circumstance can a PERC mediator declare impasse and certify for arbitration an illegal

subject of bargaining. Illegal issues are not the proper subject of collective bargaining and may not be considered in the collective bargaining process. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 174 Wn. App. 171, 183, 297 P.3d 745 (2013).

Thus, if the County's proposal for a retroactive increase in healthcare premiums is illegal under the superior court's ruling, the PERC mediator acted unlawfully in certifying the issue for arbitration. In any case, the parties proceeded to arbitration with the understanding that the economic certified issues were retroactive. CP 238, 368.

3. The Panel Had Authority to Retroactively Increase Employee Healthcare Premium Share.

Interest arbitration is the final step in collective bargaining with uniformed personnel. If negotiation and mediation are not successful, then the parties choose a neutral arbitrator and agree to allow the arbitrator to issue an award. As it is for the parties, the interest arbitration panel's authority is drawn directly from the PECBA. PECBA requires the arbitration panel to make its award consistent with the considerations listed in RCW 41.56.465:

(1) In making its determination, the panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and, as additional standards or guidelines to aid it in reaching a decision, the panel shall consider:

- (a) The constitutional and statutory authority of the employer;
- (b) Stipulations of the parties;

(c) The average consumer prices for goods and services, commonly known as the cost of living;

(d) Changes in any of the circumstances under (a) through (c) of this subsection during the pendency of the proceedings; and

(e) Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment.

RCW 41.56.465.⁷ The panel examined and applied the above factors in detail in the Award. CP 75-80.

In addition, an arbitrator, like the parties, is confined to the terms of the contract and may not make an award outside the timeframe of the term of the contract. In this case, the term was not at issue as both parties agreed to a three year term from 2010-2012. CP 70. Because interest arbitration took place late in 2012 and an Award was issued in early 2013, the panel had no choice but to make the Award entirely retroactive.

Interest arbitration is not “imposed” on either party, but the final step of bargaining a contract with uniformed personnel. “Interest arbitration is used to determine the terms of the contract between the parties when they

⁷ “[A] liberal construction should be given to all of RCW 41.56 and conflicts resolved in favor of the dominance of that chapter.” *Mun. of Metro Seattle v. Division 587, Amalgamated Transit Union*, 118 Wn.2d 639, 644, 826 P.2d 167 (1992) (quoting *Rose v. Erickson*, 106 Wn.2d 420, 424, 721 P.2d 969 (1986)); *WA State Patrol Lieutenants Ass’n v. Sandberg*, 88 Wn. App. 652, 657, 949 P.2d 404 (1997) (“[C]ourts must construe [the Act] liberally. Liberal construction requires this court to narrowly interpret any exception limiting its application”) (citing *Peninsula Sch. Dist. No. 401 v. Public Sch. Employees*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996)).

cannot negotiate an agreement and results in a new agreement.” *City of Bellevue v. Int’l Ass’n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 376, 831 P.2d 738 (1992) (citing *Mun. of Metro Seattle v. Public Empl. Relations Comm’n*, 118 Wn.2d 621, 632, 826 P.2d 158 (1992)). Although PECBA favors negotiated agreements, parties in arbitration agree to relinquish the power of decision to the arbitrators.

Thus, interest arbitration is part of and an extension of collective bargaining. “It is more appropriate to view interest arbitration not as a substitute for collective bargaining, but as an instrument of the collective bargaining process that displaces certain economic tactics.” *City of Bellevue*, 119 Wn.2d at 381-82.

In *City of Bellevue*, the Court explained the policies underlying the required interest arbitration where the parties cannot agree on a negotiated agreement:

Despite the strong policy favoring negotiated labor agreements over those created through interest arbitration, this policy has yielded to countervailing policies in labor disputes between public employers and uniformed personnel. Recognizing the public policy against labor strikes by uniformed public employees, the Legislature in 1973 enacted certain amendments to the PECBA to create “an effective and adequate alternative means of settling disputes” involving uniformed employees. . . . The interest arbitration provisions express and effectuate the countervailing policy of “promot[ing] ... dedicated and uninterrupted public service” of

uniformed employees.

Id. at 379

Consequently, other than the factors listed in RCW 41.56.465, nothing in the PECBA limits the authority of an arbitration panel to determine terms and conditions of agreements between a county and its law enforcement officers.⁸ RCW 41.56.950 expressly permits terms and conditions of a subsequent collective bargaining agreement to be retroactive to the termination of the previous agreement between the same parties.

Healthcare proposals were exchanged in 2009, negotiated for two years, certified for arbitration by a mediator in 2011, arbitrated in a five day interest arbitration in 2012, and ultimately an arbitration panel awarded part of the County's healthcare proposal in 2013 retroactive to the last six months of the 2010-2012 contract period. CP 70. The parties followed the lengthy and lawful process set out by PECBA in every respect. *Id.* The panel issued an award which was a fair compromise of the parties' proposals. The process and result are exactly what was intended

⁸ In contrast, the legislature substantively limits collective bargaining over health care benefits for many state employees including Washington State Patrol. RCW 41.56.473(1).

by PECBA. The superior court ruling would forever alter collective bargaining and eviscerate the process and purpose of the PECBA.

C. An Interest Arbitration Award Retroactively Increasing Employees' Health Insurance Costs does not Violate Employees' Substantive Due Process Rights Under the 5th Amendment to the U.S. Constitution.

1. Employees Do Not Have a Vested Right to the Economic Terms of an Expired Contract, But Have a Temporary Right to the Maintenance of Status Quo.

The superior court ruled that retroactively increasing employees' share of health insurance costs constitutes a governmental taking of an employee's vested right in violation of the 5th Amendment of the U.S. Constitution. The ruling effectively holds that employees have a vested right to the level of contributions paid by an employer during a contract hiatus.

During the hiatus of a collective bargaining agreement, neither party may unilaterally change existing terms and conditions of employment:

During the pendency of the proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other . . .

RCW 41.56.470. Thus, an employer may not alter the rate of compensation, including contributions toward insurance, and employees must remain on the job and continue to perform work at the level that existed when the contract expired until a new agreement is reached.

Status quo in this context and others is simply a temporary holding pattern until a dispute is resolved or an agreement is reached.⁹ The PECBA explicitly states that the status quo is only to be maintained “during the pendency of the proceedings;” PECBA does not suggest that existing terms should be maintained permanently. RCW 41.56.470. If either party makes a unilateral change of a mandatory subject of bargaining during status quo, then the remedy is to seek a ruling from PERC as to whether it was an unfair labor practice. RCW 41.56.140. If a change is made during the contract period, then the parties have a contractual right to a grievance arbitration.

A temporary right to the status quo of the terms and conditions of an expired agreement during negotiations and arbitration cannot be more of a right than the right to those same terms and conditions during the contract period. At the expiration of the contract, the healthcare premium share is no longer an agreed upon term, they are terms imposed by PECBA to preserve the contract terms until a new agreement is reached. Whether a contract right or one imposed by statute, it is not a vested right.

⁹ See for example, the requirement to maintain status quo during a temporary restraining order. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435, (1974) (ex parte restraining orders should be restricted to serving their underlying purpose of preserving status quo just so long as is necessary to hold a hearing, and no longer.)

2. Employees' Healthcare Premiums are Not Factually or Legally Analogous to Retirement Benefits.

The superior court erroneously relied on *Navlet v. Port of Seattle*, 164 Wn.2d 818, 823, 194 P.3d 221 (2008), a case dealing with retirement benefits. The parties' lawfully negotiated and arbitrated healthcare premium share is neither factually nor legally analogous to retirement benefits. That case required the court to determine whether retirement health and welfare benefits provided in a collective bargaining agreement vested for life with employees who reached retirement eligibility during the term of the agreement.¹⁰ Under the CBA, the Port promised to "maintain the current level of medical, welfare, dental and related benefits during the duration of this contract and . . . continue to provide the same level of coverage currently provided to eligible employees, eligible retirees, and dependents." *Id.* at 824. After the CBA expired, the Port ceased contributing to the welfare trust fund, which administered the welfare benefits provided for eligible employees and retirees, and upon ceasing contributions, the trustees terminated the welfare trust's coverage for all employees and retirees. *Id.* at 823.

In *Navlet*, the court held that

¹⁰ See also, *Bakenhaus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956) (holding that it was unlawful to change a pension pursuant to a statute once a retiree's pension had vested).

retirement welfare benefits conferred in a collective bargaining agreement constitute deferred compensation where the parties negotiate for such benefits as part of the total compensatory package. The compensatory nature of the benefits creates a vested right in the retirees who reached eligibility under the terms of the applicable collective bargaining agreement. Once vested, the right cannot be taken away and will survive the expiration of the agreement.

Id. at 841. The *Navlet* court reasoned that collective bargaining “creates a relationship through which the employee who negotiates for retirement benefits forgoes the full present value of his or her service with the expectation of receiving that value after he or she completes the service.”

Id. at 837. See also, *Farver v. Dep’t of Ret. Sys.*, 97 Wn.2d 344, 346, 644 P.2d 1149 (1982) (“Pension and other retirement plans are unique property rights . . . in the nature of deferred compensation. As such they are not mere expectancies but are vested rights possessed by employees”).

The *Navlet* court also reasoned that if retirement benefits did not vest at the time they are conferred then the contractual right would cease upon expiration of the collective bargaining agreements:

Furthermore, the PECBA limits collective bargaining agreements to a three-year term. RCW 41.56.070. Without vesting, an employee who retires during the course of any one collective bargaining agreement would lose his or her ability to protect any retirement benefit conferred in that agreement less than three years after receiving the benefit. Therefore, the current collective bargaining agreement offers the retiring employee the only opportunity to ensure that retirement benefits will survive the term of the agreement. An employee would reasonably expect that negotiated retirement benefits

will continue beyond the current agreement because the employee has no real ability to negotiate for the continuation of such benefits after he or she retires.

164 Wn.2d at 840.

Navlet concerned benefits to be received *upon retirement*. Employee health insurance premiums paid on behalf on current employees are not a retirement benefit or deferred compensation. No language existed in the parties' expired collective bargaining agreement extending health insurance benefits into retirement. Health insurance premiums do not induce employees to complete their required services before they receive the benefit. See *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 915, 468 P.2d 666 (1970) (recognizing the generally accepted rule in most jurisdictions that "[a] retirement pension is pay withheld to induce continued faithful service").

Unlike employee healthcare premiums, pension benefits constitute deferred or future compensation, and the right to such compensation vests at the moment the employee accepts an offer to work in exchange for the promise of future benefits. 164 Wn.2d at 841. And also unlike employee health care premiums, retirement benefits are unique property rights that vest because the employee forgoes present wage value in exchange for a future benefit. *Id.* at 837-838. And unlike other collective bargaining issues, a retiree has no other chances to bargain the retirement benefits.

To determine whether pension benefits vest, the focus is on the expectations of the employee at the time the retirement benefits are conferred, rather than the express language of the contract. *Id.* at 837-838. Even if retiree benefits were analogous here, the expectation of the employees cannot be anything other than the maintenance of status quo of healthcare premiums until settlement or an arbitration award which will change the status quo. Health insurance premiums paid on behalf of current employees are not a retirement benefit or deferred compensation. Health insurance premiums do not induce employees to complete their required services before they receive the benefit. The County made no express or implied contractual promise binding it to the insurance contributions it paid, provisionally, by reason of the statutory obligation to maintain the status quo during negotiations and the arbitration proceeding. Employees had no reasonable expectation that the employer's contributions for health insurance would never be reduced.

The Guild's reliance on *Foley v. Carter*, 526 F. Supp. 977 (D. C. D.Ct. 1981) is also inapposite. *Foley* concerned federal legislation that retroactively reduced the wage rate after the work was performed. *Id.* The court held that prospective reductions because of a change in statute were constitutional, but that:

A different rule must apply with regard to the retroactive reduction of a federal employee's pay by Congress . . . As of October 1, 1979, or October 8, 1979, affected non-Article III judicial officials had an effective statutory right to a 7.02% or 12.9% increase in their rates of pay. That right was lost as of October 12, 1979, when Public Law 96-86 became law and reduced the statutory increase to 5.5%, but for work performed during the intervening period of eleven or four days, the affected employees are due the rates effective at those times.

Id. at 985.

In contrast, here there is neither legislation changing the amount of premium contributions nor any contractual agreement expressly or impliedly assenting to the status quo amount of employees' share of premiums. The amount of premiums paid by the County during the contract hiatus was provisional, pending a negotiated agreement or arbitration award.

3. Wages and Benefits Cannot Vest at the Expiration of a Contract and be Retroactive In a New Contract.

Either status quo is temporary until settlement or an award is issued, or status quo "vests" the current wage and benefits which would effectively eliminate retroactivity in collective bargaining. In other words, the wages and benefits at the expiration of a contract are either a vested right which cannot be changed, up or down, or they are a holding pattern until an agreement is reached. The Guild cannot have it both ways by demanding retroactive increases in wages and benefits while also claiming

that those wages and benefits are vested property rights only when wages decrease retroactively.

If vested, then employees nullify the Legislature's intent to provide status quo at the expiration of a bargaining agreement during the pendency of the proceedings. RCW 41.56.470. The Legislature also contemplated that awards would be retroactive. RCW 41.56.950. Former Attorney General Slade Gordon explained the critical interplay of status quo and retroactivity: "the existence of some form of interim arrangement arrived at prior to, and covering the period of wage negotiations is necessary in order to permit an ultimate wage settlement to be made 'retroactive' to a date prior to the date of execution of the collective bargaining agreement in which it is contained." 1974 Op. Att'y Gen. No. 19.

If status quo must be maintained "during the pendency of the proceedings" then by definition it is temporary and subject to change. That change of course is the new collective bargaining agreement which may be effective the day after the date of the termination of the previous collective bargaining agreement, or to whenever the parties agree or the arbitrator awards. Not only would vesting of status quo wages and benefits nullify the collective bargaining statutes, but vesting would mean that any change, up or down in wages would be a constitutional violation.

As previously explained, the courts and ultimately the Legislature have resolved that a retroactive increase in wages is not a violation of the Washington Constitution. RCW 41.56.950. The same principles regarding retroactivity then are contrary to the superior court's ruling that retroactivity in healthcare premiums is a taking under the United States Constitution.

To hold that provisional payments made by an employer during a contract hiatus and interest arbitration proceedings vests as a property right in employees effectively removes the employer's and employees' power of decision which the PECBA strives to preserve. As interest arbitration is an extension of collective bargaining, and parties to collective bargaining may agree to make employee insurance premium contributions retroactive, so too may employees be required to concede to retroactive increases in employee premium contributions when awarded pursuant to interest arbitration.

D. The Award Was Not a Rebate or Deprivation of Earned Wages.

The superior court ruled the Award is an unlawful contravention of the State wage withholding law, RCW 49.52.050. However, RCW 49.52.060 expressly provides that an employer may "withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law . . . nor shall the provisions of RCW 49.52.050

make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation. . .”

Neither is the retroactive increase in insurance contributions a rebate of wages.

The Washington Legislature enacted the [Wage Rebate Act] WRA as an Anti-Kickback statute in 1939 ‘to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from employees in order to circumvent collective bargaining agreements.’ The ‘fundamental purpose of the legislation, as expressed in both the title and body of the act, is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages.’

LaCoursiere v. CamWest Dev., Inc., 172 Wn. App. 142, 148-149, 289 P.3d 683 (2012) (quoting *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 519-20, 22 P.3d 795 (2001)).

Furthermore, the County’s provisional payment of insurance premiums pursuant to PECBA was, by terms of the Award, an overpayment of wages. Washington State’s labor regulations expressly authorize deductions from wages for overpayment of wages. RCW 49.48.200(1) provides that “Debts due the state or a county or city for the overpayment of wages to their respective employees may be recovered by the employer by deductions from subsequent wage payments as provided in RCW 49.48.210, or by civil action.” Similarly, the U.S. Department of Labor, Wage and Hour Division, which administers the Fair Labor Standards Act (FLSA), recognizes the employer’s right to reduce

employee wages by advancements made. FLSA 2004-19NA (“It has been our longstanding position that where an employer makes a loan or an advance of wages to an employee, the principal may be deducted from the employee’s earnings even if such deduction cuts into the minimum wage or overtime pay due the employee under the FLSA”.)

An Award increasing employees’ share of the cost of insurance retroactive to July 2012 is obviously not a rebate or underpayment, but is an overpayment of wages which the employer may lawfully recoup.

E. The Award is Not Arbitrary and Capricious for its Lack of a Supplemental Open Enrollment.

The superior court ruled the Award arbitrary and capricious because deputies could not retroactively opt out of coverage, drop dependents, or change plans. However, specific to this issue of a supplemental open enrollment, there was considerable discussion and ultimately consideration in the form of an additional 0.5% wage increase. CP 92. Far from being arbitrary and capricious, the detailed Award specifies the evidence presented and the justifications for the arbitrator’s conclusions.

The Guild’s argument that the Award is unlawful because deputies could not retroactively opt out from coverage is a red herring. As previously explained, during negotiations which began in 2009 employees were aware of the County’s health insurance proposals and knew they

were certified for arbitration since 2011. Employees could have avoided the risk of higher premiums by opting out of coverage, dropping dependents, or changing to less expensive plans during open enrollments in November 2010, 2011, 2012 and 2013. Moreover, the Guild members cannot retroactively opt out of coverage for themselves or their dependents when they have already used that benefit.

The County is in the same position as the Guild in that it is aware that an arbitrator may award different plans or premium shares. However, unlike the Guild who can opt out of insurance or change dependents each year during open enrollment, the County cannot adjust plans and premiums during status quo in order to account for the risk that an arbitrator may award a more expensive plan or an increased premium share to the County. Both sides understand the risk, but only one party can take any action in accordance with the risk and that is the Guild.

Deputy Jay Kent explains in his declaration that the Guild was well aware of the proposals but made no changes during open enrollment because they expected the arbitrator to rule in their favor:

I take issue with the county's argument that our members should have changed their enrollment in advance of the arbitration decision. The members had no real way of knowing what the arbitrator would decide and we certainly would not advise them to drop coverage in anticipation of the arbitrator unlawfully issuing a retroactive change in benefit and were stunned when he did so in the face of the clear legal arguments

presented by our counsel. So it would make no sense for the Guild to advise its members to act on a potential future event that we did not predict would actually occur.

CP 414-15. See also, CP 231-32 (Declaration of Andy Aman). Essentially, he argues that because they guessed wrong, the County owes them another enrollment period, which begs the question, if they had guessed correctly, the County would not owe them a special open enrollment period? Ultimately it is irrelevant how well the Guild predicted the outcome, what is relevant is that they knew of the risk every year during open enrollment and have now had four opportunities to address that risk. CP 230.

An additional or supplemental open enrollment could have been included in the Award, but it was not. The arbitrator is not limited in his award to the parties' proposals. *City of Moses Lake*, 68 Wn.App. at 746. The arbitrator heard extensive testimony and argument regarding a supplemental open enrollment and ultimately chose the least complicated retroactive healthcare award by changing the Guild's premiums only the last six months of the contract but keeping their current healthcare plans in place.¹¹

¹¹ If the Court holds that a supplemental open enrollment should have been awarded, then the County respectfully requests that the Court remand the award to the arbitrator to refashion the award accordingly.

Moreover, the arbitrator heard the Guild's arguments regarding its inability to opt out and addressed those concerns by expressly offsetting the increases in employees' insurance contributions by a 0.5% wage increase, both effective July 2012. If the Award had been implemented, every deputy would have received a lump sum payment and no deputy would have seen a deduction from wages. The Award did not ignore the Guild's concerns and even gave additional consideration so that there would not be any impact on them.

The Award did not include the County's proposal to change the Guild's healthcare plans to match those of the rest of the County. CP 92. Granted, retroactively changing plans or the components of plans such as the deductible would be complicated and it is unlikely an arbitrator would award such a proposal. Thus because an award had to be retroactive, the County's major cost saving proposal regarding healthcare insurance was not awarded, which left the County's proposal for a modest premium shift on the existing plans.

The Guild members' plans are exactly the same as those they enrolled in during open enrollment. The six month retroactive premium increase was modest and still the Guild pays less than most of its comparables and less than the rest of the County for a richer plan. And even the modest increase was compensated for with an additional wage

increase so that no deputy would see a deduction from wages. The award was not arbitrary and capricious for its lack of a supplemental open enrollment.

F. Reformation of the Award Violates This Court's Directive.

The Award was a compromise of the parties' proposals, and superior court's striking of one part of the Award changes the entire dynamic of the complete Award. Just as the parties made proposals that were a package deal, the panel also considered the entire package when making its decision which included an in depth examination of the County's finances for the three years of the contract, comparable counties, and the increasing cost of health care. CP 70-80. In addition, the panel considered the cost of each Guild proposal to the County, as well as the savings to the County with its healthcare proposal, when making its award. CP 70-95.

The Supreme Court recently clarified that a court may not substitute its judgment for the arbitrator's and change the award. The reviewing court may vacate and remand the award or affirm it in its entirety, but it may not strike a provision from the award. *Int'l Union of Operating Engineers*, 176 Wn.2d at 725-726 ("We also take this opportunity to clarify that a trial court that properly vacates an arbitration award does not have authority to impose its own remedy. Instead, trial courts facing such a situation should remand for further proceedings") (citing *United*

Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n. 10, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510–11, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001); see also, *Snoqualmie Police Ass'n v. City of Snoqualmie*, 165 Wn. App. 895, 905, 273 P.3d 983 (2012).

Here, the superior court should have remanded the decision back to the panel to reformulate the Award consistent with the Court's ruling. It is abundantly clear that the 0.5% wage increase was awarded to compensate for the increase in healthcare premiums. A ruling that excises one part of an award irreparably alters the balance of the compromise contrary to the arbitrator's and the parties' intent. By striking the healthcare provision in the Award, the Court unlawfully imposed its own remedy.

V. CONCLUSION

This Court has recognized that the State's "ever-worsening economy may ultimately require some pay reductions rather than pay raises." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 601, 229 P.3d 774 (2010). Numerous cases hold that a government employer may reduce employee compensation. *Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 510 U.S. 1141; *Barnes v. District of Colum*, 611 F. Supp. 130 (D.C. D.Ct. 1985); *Carlson v. City of*

Hackensack, 983 A.2d 203 (N.J. 2009); *State ex rel. Mullin v. City of Mansfield*, 269 N.E.2d 602 (Ohio 1971).

The superior court's ruling contravenes collective bargaining laws and policy and ultimately will impact public finances. If retroactivity were to only apply to economic terms that benefit employees, employees would have a great incentive to delay agreements, and employers would have little incentive to offer proposals that would necessarily increase in cost as each day of the contract goes by.

For the above reasons, the County respectfully requests that the Court reverse the superior court ruling. In the alternative, the County requests that the Court remand the issue to the arbitrator to refashion an appropriate remedy.

Dated this 19th day of December, 2013.

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Kitsap County Prosecuting Attorney



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CERTIFICATE OF SERVICE

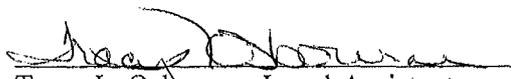
I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On December 19, 2013, I caused to be served in the manner noted a copy of the foregoing document upon the following:

James M. Cline Cline & Associates 2003 Western Avenue, Suite 550 Seattle, WA 98121-2141
<input checked="" type="checkbox"/> Via U.S. Mail
<input type="checkbox"/> Via Fax:
<input checked="" type="checkbox"/> Via E-mail: jcline@clinelawfirm.com
<input type="checkbox"/> Via Hand Delivery

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

DATED December 19, 2013, at Port Orchard, Washington.


Tracy L. Osbourne, Legal Assistant
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OFFICE RECEPTIONIST, CLERK

To: Tracy L. Osbourne
Cc: Jacquelyn M. Aufderheide; Deborah A. Boe; jcline@clinelawfirm.com
Subject: RE: Case No. 89344-6, Brief of Petitioner Kitsap County

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Subject: Case No. 89344-6, Brief of Petitioner Kitsap County

Case No. 89344-6
Kitsap County Deputy Sheriffs' Guild v. Kitsap County

Good morning,

Attached please find BRIEF OF PETITIONER KITSAP COUNTY for filing in the above-referenced case number, filed by

Deborah A. Boe, Deputy Prosecuting Attorney
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Sincerely,

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