

70165-7

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Court of Appeals Case No. 70165-7-I

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE**

UNIVERSITY OF WASHINGTON,

Appellant,
v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent,

and

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Intervenor/Respondent.

AMENDED BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE

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I. INTRODUCTION

This case arises from the University of Washington's efforts to improve patient access services through consolidation of patient access centers within the UW Medicine consortium. Patient access is the process by which patients receiving service from any of the UW Medicine entities register personal information, verify insurance coverage, schedule appointments, and coordinate referrals, among other services. Prior to 2010, each UW Medicine entity had its own processes for patient access. Rather than have separate access centers for each hospital and clinic, the University decided to consolidate all of the patient access centers, thus enabling patients to have only one point of contact. The Washington Federation of State Employees ("WFSE") represents the employees at Harborview Medical Center who performed this work. Patient services work at the University of Washington Medical Center ("UWMC"), performed by employees in a Service Employees International Union ("SEIU") unit, and at UW Physicians Network ("UWPN"), performed by non-union employees, were included in the consolidation.

Under the Personnel System Reform Act, Chapter 41.80 RCW ("PSRA"), employers must bargain over "wages, hours, and other terms and conditions of employment," generally called mandatory subjects of bargaining. RCW 41.80.020(1). Unlike other labor relations statutes, the

PSRA carves out management rights over which an employer cannot bargain, even if it desires to. RCW 41.80.020(5) provides, “The employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040.” RCW 41.80.040 defines these statutory management rights as follows:

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

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

At issue in this case is whether the management right to change organizational structure by consolidating work units includes moving work out of a bargaining unit. In response to an unfair labor practice complaint filed by WFSE, the Public Employment Relations Commission (“PERC”) narrowly interpreted these statutory management rights.

The PERC correctly held that the University of Washington (the “University”) had the management right to consolidate patient access centers. However, the PERC incorrectly held that the University had a separate, independent obligation to bargain the decision to consolidate patient access work because WFSE bargaining unit work at Harborview

Medical Center was included in the consolidation.

The record establishes that the only reason the University moved work out of the Harborview unit was to consolidate it with work performed by another bargaining unit at UW Medicine and with a large group of unrepresented employees at UW Physicians Network. The movement of the work out of the Harborview unit was an integral part of the overall decision to consolidate and not a separate and distinct decision.

Further, the configuration of bargaining units is not a mandatory subject of bargaining. The University properly declined WFSE's request to bargain over which union would represent the new positions in the consolidated access center – and properly declined to agree to an expansion of WFSE's bargaining unit.

The PERC also erred in holding that the University bargained in bad faith and interfered with employees' collective bargaining rights through its communications to employees about the consolidation. There is little, if any, evidence supporting the PERC's findings of fact on those issues.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error in the Trial Court.

No. 1: The trial court erred in entering its Judgment of March 8, 2013, affirming the challenged portions of the Public Employment Relations Commission's Decisions 11075-A and 11075-B.

B. Assignments of Error by the PERC.

No. 1: The PERC erred in entering the challenged portions of its Decisions 11075-A and 11075-B issued on March 14, 2012 and April 26, 2012, in which it ruled that the University violated the PSRA.

C. Issues Pertaining to Assignments of Error in the Trial Court.

No. 1: Did the PERC erroneously interpret and apply the law by holding that the movement of bargaining unit work out of the WFSE Harborview bargaining unit was distinct from the decision to consolidate patient access centers?

No. 2: Did the PERC erroneously interpret and apply the law by holding that the statutory management rights in RCW 41.80.020(1) and RCW 41.80.005(2) do not give the University the right to consolidate work performed by more than one bargaining unit?

No. 3: Did the PERC erroneously interpret and apply the law by holding that the University had a duty to bargain with WFSE to expand WFSE's bargaining unit?

No. 4: Did the PERC erroneously interpret and apply the law by holding that the WFSE's Harborview bargaining unit represents employees working at UW Medicine prior to a unit clarification?

No. 5: Did the PERC erroneously interpret and apply the law by holding that WFSE represents employees working in the UW Medicine

Consolidated Contact Center when, under federal labor law, the union with a clear majority status represents new units created through consolidation and WFSE does not represent a clear majority?

No. 6: Did the PERC erroneously interpret and apply the law by holding that the University had an obligation to bargain union representation for the new Consolidated Contact Center positions, when Article 48.2(a) of WFSE's labor contract gives the University the right to specify the bargaining unit status of new classifications?

No. 7: Did the PERC erroneously interpret and apply the law by holding that the University bargained in bad faith because it implemented a management right without completing effects bargaining?

No. 8: Is the PERC's decision that the University refused to bargain the effects of its decision to consolidate supported by substantial evidence where WFSE witnesses admit the University bargained over effects?

No. 9: Is the PERC's decision that the University interfered with bargaining rights by telling employees that the University was negotiating with the WFSE behind their backs supported by substantial evidence?

No. 10: Is the PERC's decision that the University interfered with bargaining rights by telling employees that the new positions would be unrepresented supported by substantial evidence?

No. 11: Is the PERC's decision that the University interfered with

bargaining rights through job postings supported by substantial evidence?

No. 12: Did the PERC issue a remedial order that exceeded its authority, was arbitrary or capricious, or was inconsistent with PERC rules when it ordered the University to reimburse WFSE for union dues?

D. Issues Pertaining to Assignments of Error by PERC.

No. 1: Did the PERC erroneously interpret and apply the law by holding that the movement of bargaining unit work out of the WFSE Harborview bargaining unit was distinct from the decision to consolidate patient access centers?

No. 2: Did the PERC erroneously interpret and apply the law by holding that the statutory management rights in RCW 41.80.020(1) and RCW 41.80.005(2) do not give the University the right to consolidate work performed by more than one bargaining unit?

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Consolidated Contact Center when, under federal labor law, the union with a clear majority status represents new units created through consolidation and WFSE does not represent a clear majority?

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No. 7: Did the PERC erroneously interpret and apply the law by holding that the University bargained in bad faith because it implemented a management right without completing effects bargaining?

No. 8: Is the PERC's decision that the University refused to bargain the effects of its decision to consolidate supported by substantial evidence where WFSE witnesses admit the University bargained over effects?

No. 9: Is the PERC's decision that the University interfered with bargaining rights by telling employees that the University was negotiating with the WFSE behind their backs supported by substantial evidence?

No. 10: Is the PERC's decision that the University interfered with bargaining rights by telling employees that the new positions would be unrepresented supported by substantial evidence?

No. 11: Is the PERC's decision that the University interfered with

bargaining rights through job postings supported by substantial evidence?

No. 12: Did the PERC issue a remedial order that exceeded its authority, was arbitrary or capricious, or was inconsistent with PERC rules when it ordered the University to reimburse WFSE for union dues?

III. STATEMENT OF THE CASE

A. Factual Background.

1. University of Washington Medicine.

University of Washington Medicine (“UW Medicine”) is an integrated health system of independent health care entities. Transcript (“Tr.”) 450.¹ UW Medicine includes the University of Washington Medical Center (“UWMC”); Harborview Medical Center (“Harborview”); clinics operated by the University of Washington Physician’s Network (“UWPN”); the School of Medicine; the Seattle Cancer Care Alliance; Northwest Hospital; and Airlift Northwest. Tr. 413; Tr. 449.

Harborview is owned by King County and managed by the University. Tr. 476. The University and WFSE were parties to a contract covering several bargaining units, including the Harborview bargaining unit. Administrative Record (“AR”) 572; 640-42. The WFSE Harborview unit included approximately 25 patient services specialists working at the Patient Access Center (“PAC”), which served Harborview patients

¹ References to the transcript are to the transcript’s page numbers, located in the Public Employment Relations Commission’s Administrative Record (“AR”) at 30-571.

exclusively. Tr. 249; 497; AR 572; 640-42; AR 797-805; Tr. 249; 497.

The University also has a labor contract with Service Employees International Union, Local 925 (“SEIU”). SEIU represents a unit of UWMC employees who perform the same basic work as Harborview’s patient services specialists, at UWMC. Tr. 45-46.

UWPN also operated its own patient access center. UWPN is a private non-profit 501(c)3 organization, and its employees are not represented by a union. Tr. 406-07. UWPN’s patient access center was larger than the PAC at Harborview – UWPN employed more patient services employees than Harborview. Tr. 497.

2. The Consolidation of Patient Access Centers Within UW Medicine.

In 2009, UW Medicine commissioned a study to assess patient services within UW Medicine. Tr. 451-52; AR 700-721. In 2010, the consultant recommended consolidation of the work at Harborview, UWMC, and UWPN into a new entity – the UW Medicine Consolidated Contact Center (“Contact Center”). AR 700-21. The University decided to adopt the consultant’s recommendation. The new patient access center was envisioned as “a whole new department,” with one phone number for all entities within UW Medicine. Tr. 410-11. It would operate under UW Medicine, not Harborview, UWMC or UWPN. Tr. 412. Operating independently from Harborview and UWMC was essential to the new

center's success as a central point of patient access. Tr. 462.

Beginning in March 2010, the University notified its employees and their unions (*i.e.*, WFSE and SEIU) that it was planning to consolidate the patient access centers and create a new center to service UW Medicine. AR 685; 834-35. The University recognized that while it had the right to consolidate access center operations without bargaining, it had an obligation to bargain the effects. Beginning in June 2010, the University and WFSE met and bargained the effects of consolidation. Tr. 419-420.

During their bargaining sessions, WFSE insisted that it represent the new patient access center positions in the Contact Center. Tr. 81. The University recognized that there would be a question regarding which union would represent the new positions. Tr. 414. The new center anticipated hiring WFSE employees from Harborview, SEIU employees from UWMC, and unrepresented employees from UWPN, since those employees would be laid off by the closure of patient access centers. Tr. 414; 439. The University declined to bargain over which union would represent the new positions. Tr. 81.

In October 2010, the new consolidated Contact Center opened. Tr. 424. Every Harborview employee who applied received a job offer. Tr. 501. Upon opening, the center had approximately 67 positions. AR 970. Of those, 27 were from Harborview, 28 came from UWPN, and 12 were

expected to be hired from UWMC during UWMC's phase-out of patient access services. AR 970. Former Harborview employees received over eight days of training. Tr. 329. They learned how to provide services to seven new clinics and learned new protocols. *Id.* When they answer the phone, they now say, "UW Medicine" instead of "Thank you for calling Patient Access Center." Tr. 339-38.

3. Procedural History.

On September 3, 2010, WFSE filed a Unit Clarification Petition. AR 7; *see* WAC 391-35. WFSE sought a ruling that Contact Center employees should be represented by WFSE. AR 7. SEIU intervened. Tr. 443.

On September 21, 2010, WFSE filed this unfair labor practice ("ULP") complaint. AR 1. SEIU filed a motion to intervene in the ULP, but the motion was denied. AR 18-19.

On October 4, 2010, WFSE filed a representation petition, seeking to add Contact Center employees to its Harborview unit through a proceeding under WAC 391-25-440. AR 20. WFSE asked that the representation petition take precedence over this ULP. AR 20. The PERC refused, deciding to resolve this ULP first. AR 20.

On May 25, 2011, a PERC Examiner issued a decision on the ULP. AR 908-930. The Examiner held, "The consolidation entailed a reorganization of the call centers serving its numerous facilities, and was

within the employer's sole prerogative." AR 911. However, she held that the University had a duty to bargain the decision to move patient access work out of WFSE's Harborview unit as a distinct decision. AR 912.

The University appealed the adverse rulings. AR 933-37; 941-961. On March 14, 2012, the Commission issued its decision. AR 1008-1026. The Commission confirmed that the University had the statutory right to decide to consolidate patient access work. AR 1009. However, the Commission found that removing work from the Harborview unit was a separate decision, subject to a separate duty to engage in decisional bargaining. *Id.* The Commission affirmed the Examiner's decision that the University bargained in bad faith and interfered with bargaining rights. *Id.*

The Commission initially reversed the order that former Harborview employees be returned to WFSE, concluding that the pending petitions would be appropriate to address bargaining unit status. AR 1022-23. However, the Commission reversed itself on reconsideration and ordered that former Harborview employees remain represented by WFSE until the representation petitions were resolved. Decision 11075-B, AR 1059-1061.

On May 25, 2012, the University filed a Petition for Review. Superior Court Clerk's Papers ("CP") 1. WFSE intervened. CP 47-49. The trial court dismissed the Petition for Review on March 8, 2013. CP 188. The court concluded there was no reason to find that in adopting RCW

41.80.020(5) the legislature intended to disturb PERC's jurisdiction over bargaining units and that the remedy ordered was not unlawful. CP 187-88. The trial court did not reach other arguments raised by the University.

On August 13, 2013, the PERC issued a decision on WFSE and SEIU's petitions to represent the Contact Center employees. Appendix A, *University of Washington*, No. 11833, 11834, 11835, 11836 __ WL __ (PERC 2013). The Executive Director found that neither WFSE nor SEIU represented the positions because the consolidation "reinvented" patient access work and terminated the community of interest that existed between unions and the employees hired into the new center. *University of Washington*, Finding of Fact No. 27; Conclusions of Law No. 3 and 5.

IV. ARGUMENT

A. Standard of Review

Agency actions are reviewed under the standards set forth in the Administrative Procedure Act ("APA"), chapter 34.05 RCW. Appellate courts sit in the same position as the superior court and apply the standards of review under the Washington Administrative Procedure Act ("APA"), Chapter 34.05 RCW, directly to the record before the agency. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003).

Orders in adjudicative proceedings are reviewed pursuant to RCW 34.05.570(3). A petitioner is entitled to relief if the order exceeds the

agency's statutory authority; the agency erroneously interpreted or applied the law; the order is not supported by substantial evidence in light of the whole record; the order is inconsistent with an agency rule; or the order is arbitrary or capricious. RCW 34.05.570(3)(b),(d), (e), (h) and (i).

Conclusions of law are reviewed under the error of law standard, and "the court may substitute its interpretation of the law for that of PERC." *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997); *IAFF, Local 27 v. City of Seattle*, 93 Wn. App. 235, 239, 967 P.2d 1267 (1998). While deference is often given to PERC's interpretation of the law it administers, deference is not necessary when the statute in dispute is unambiguous. *King County v. PERC*, 94 Wn. App. 431, 437 at n. 4, 972 P.2d 130 (1999). Agencies are expected to follow their own precedent. "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored...." *W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1346 (D.C.Cir.2008), quoting *Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970).

Under the substantial evidence review standard, "substantial evidence" means "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Chandler v. State*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007). "In unfair labor practice

proceedings, the ultimate burdens of pleading, prosecution, and proof all lie with the party that files the complaint.” WAC 391-45-270(a); *Community College District 13*, Nos. 8117-B, 8637-A, 8118-B, 8638-A, 2005 WL 1046286 (PERC, 2005).

The University is petitioning for review of a portion of PERC’s Decision 11075-A (Conclusions of Law Nos. 3, 5, and 6, and Findings of Fact Nos. 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, and 17); and PERC’s Decision 11075-B. CP 1-36; CP 84 at n. 7; AR 933-937.

B. The Duty to Bargain Under the PSRA.

The PSRA requires employers to bargain over “wages, hours, and other terms and conditions of employment,” called mandatory subjects of bargaining. RCW 41.80.020(1). Under RCW 41.80.020(5), “The employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040.”

RCW 41.08.040 defines management rights as follows:

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

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

“Bargaining over matters which fall under statutorily defined ‘management rights’ is prohibited by law.” *State Attorney General*, No. 10733, 2010 WL 1644961 (PERC, 2010) at 4, *aff’d*, No. 10733-A (statutory management rights include the right to reorganize the delivery of services, close regional offices, and eliminate positions).

1. The duty to bargain decisions is distinct from the duty to bargain effects.

Employers have a duty to bargain decisions to change mandatory subjects of bargaining. They also have a duty to bargain a decision’s effects on bargainable subjects. The duty to bargain “effects” applies to all decisions that impact bargainable subjects. “Thus, for example, while an employer need not bargain with its employees’ union concerning an economically motivated decision to terminate a services contract (a non mandatory subject), it must bargain over how the layoffs necessitated by the contract’s termination will occur.” *International Ass’n of Fire Fighters Local 1052 v. PERC*, 113 Wn.2d 197, 201, 778 P.2d 32 (1989).

2. The duty to bargain effects is a duty to bargain the impacts of a change, not the change itself.

Under well-established PERC case law, the duty to bargain effects is a duty to bargain the impacts of a change, not the change itself.

For example, in *City of Bellevue*, No. 10830-A, 2012 WL 1385444 (PERC, 2012), the employer operated an emergency call center. The

employer decided to close the center to join a regional call center, with employees laid off as a result. The union asserted that the decision to close the center and the decision to layoff were separate decisions and each had to be bargained. The PERC rejected this, concluding that the decision to close the center did not have to be bargained – and that “laying off employees was a result of the decision to close its operations, not a separate decision.” *City of Bellevue* at 10. As such, while a decision to lay off would normally require decision bargaining, it did not here because layoffs were integrally related to the closure. *See also City of Kirkland*, No. 10883-A, 2012 WL 1385445 (PERC, 2012).

3. Employers can implement decisions without waiting to conclude bargaining over effects.

“The Commission [has] determined that an employer ‘may implement decisions within its sole prerogative ... even though required bargaining has not been concluded on the effects of that decision.’” *Washington State – Social and Health Services*, No. 9690-A, 2008 WL 5369618 (PERC, 2008) (quotation omitted). This rule ensures that a union cannot hold an employer’s decision on a non-mandatory subject hostage, thereby effectively preventing the employer from implementing the decision by refusing to come to agreement over the effects. *Central Washington University*, No. 10413-A, 2011 WL 2725841 (PERC, 2011).

4. Bargaining unit configuration is a permissive subject of

bargaining.

The PSRA delegates the determination and modification of state civil service employees' bargaining units to the PERC. "RCW 41.80.080 specifically requires that this Commission determine all questions pertaining to the representation and certification of state civil service employees for purposes of collective bargaining." *Washington State – Early Learning*, Nos. 9880-A and 9881-A, 2008 WL 936570 (PERC, 2008) at 2. "A bargaining unit can only be created under appropriate provisions of Chapter 41.80 RCW." *Id.* at 5. Employers are not permitted to "voluntarily recognize" bargaining units. *Id.*

PERC rules outline the process for certifying appropriate bargaining units and their representatives. WAC 391-25. WAC 391-25-136 provides that state civil service employees should be identified by "job classification and work location" (emphasis added).

In *Pierce County*, No. 7018-C, 2002 WL 1365717 (PERC, 2002), a union represented a bargaining unit of county employees. When the county purchased a hospital, it agreed with the union to add employees who previously worked for the hospital to the union's bargaining unit. The PERC ruled that the parties erred and invalidated the agreement. It explained, "The determination of appropriate bargaining units is a function delegated by the legislature to the Commission." *Pierce County* at 3.

C. The PERC Erred in Holding That the University Had a Duty to Bargain the Decision to “Remove” Patient Access Center Work from WFSE’s Harborview Bargaining Unit.

1. The movement of work from Harborview to the new Contact Center was an integral part of the consolidation decision and thus “decision” bargaining was not required.

The Washington Supreme Court has recognized, at least inferentially, that matters integrally related to a mandatory subject of bargaining do not require separate and independent bargaining. The Court found that while an employer need not bargain with a union concerning “an economically motivated decision to terminate a services contract (a non-mandatory subject), it must bargain over how the layoffs necessitated by the contract’s termination will occur.” *IAFF Local 1052*, 113 Wn.2d at 197. Significantly, the Court did not suggest the employer must bargain the decision to lay off employees, but only how the layoffs would occur. From the Court’s perspective, if the work was going to be terminated, layoffs would be “necessitated by” the underlying decision and thus an independent bargaining obligation on whether to lay off employees was not required. Only the impact of those matters, or in that case the determination of which employees would be laid off, required bargaining.

The PERC also recognized this distinction in the recent *City of Bellevue* case, *supra*. There, the PERC found that actions integrally related with management rights do not have to be bargained as a separate

decision. Only the “effects” as to how the changes will be implemented must be bargained. *See City of Kirkland*, 2012 WL 1385445; *Lenz & Riecker and Local 31*, 340 NLRB No. 21 (2003) (holding that jobs “inexorably” eliminated by a decision to shut down are an effect of that decision and bargaining on them was not required).

The integrally related doctrine is necessary in order to ensure that when a decision is entrepreneurial, the employer can implement it without “decision” bargaining. In *City of Bellevue*, for instance, the decision to lay off employees (which otherwise would be a mandatory subject of bargaining) was directly related to the entrepreneurial right to close the dispatch center and thus no bargaining of layoffs was required. From a practical perspective, what “right” to close the dispatch center would a city have if it was required to bargain over the decision to lay off employees?

Significantly, the legislature incorporated this doctrine into the statutory construct of RCW 41.80. RCW 41.80.020(5) provides that the employer “shall not bargain over matters pertaining to” subjects listed in RCW 41.80.040. (Emphasis added). The legislature clearly intended that state employers not only have the right to make structural changes but they also have the right to make changes “pertaining to” structural changes.

WFSE did not appeal PERC’s decision that the University had the right to decide to close down Harborview’s PAC, create the UW Medicine

Consolidated Contact Center, and consolidate Harborview, UWMC, and UWPN work. The question on appeal is whether that necessarily included the movement of bargaining unit work to the new Consolidated Contact Center. There is no basis for concluding that the movement of work did not “pertain” to the decision to consolidate. The decision was not separate and the University had the right to move the unit work.

UWMC, Harborview, and UWPN are separate entities with their own Boards of Directors. Tr. 453-54. Harborview is owned by King County and managed by the University. Tr. 476. Harborview has its own Board of Directors. *Id.* Harborview and UWMC have their own management structures, including independent Executive Directors. Tr. 402. Each of these organizations operates independently in terms of hiring, firing, and employment. Tr. 402-403.

Prior to the consolidation, every member of UW Medicine had its own “point of entry” for patient service. *See* Appendix A, at 2-5. The principal purpose of consolidation was to combine Harborview and UWMC patient access center work with the UPWN facility. Once the Contact Center opened, there was no way to differentiate the work. *See* Appendix A at 25. All patient calls came to one telephone number. Harborview patients were indistinguishable from UWMC and UWPN patients. Thus, the work performed by WFSE members was combined

with the work performed by UWPN employees and SEIU members, and WFSE's bargaining unit work essentially ceased to exist. *Id.* at 29 ("The community of interest that the former PAC employees shared with the Harborview bargaining unit ceased to exist when the employer reorganized its patient access work.")

If the University cannot transfer work out of the Harborview unit, the right to consolidate the structure of patient services is an empty one. Under the PERC's analysis, what action could the University take to exercise its right to consolidate patient access centers? It simply makes no sense to conclude that the University has the right to consolidate patient access operations without bargaining but cannot actually consolidate until it bargains the decision to remove the work from Harborview.

University representative Ms. Dombrowski explained that having WFSE and SEIU representing the same job in the same location would not work. "[Y]ou can't have people, essentially in the same position, have different representation status, it's just not workable." Tr. 439. For example, labor contracts – whether with WFSE or SEIU – address subjects including uniforms, promotions, staffing, holidays, and work assignments. AR 573-74. A consolidated center where different groups of employees work different hours, wear different uniforms, have different holidays, use different processes for promotions, and cannot perform each other's work

is not a consolidated access center. The PERC recognized this in its recent decision, holding that separate WFSE and SEIU bargaining units in the consolidated center would not be appropriate. Appendix A.

Unlike RCW 41.56, which was created in 1967, when the legislature adopted RCW 41.80 in 2002, it explicitly reserved certain management rights to state employers covered by the new law. RCW 41.80.040(1). Here, the PERC recognized that these statutory management rights allowed the University to consolidate its patient access center operations. Inexplicably, however, the PERC completely ignored the mandate of RCW 41.80.020(5), providing that the employer “shall not bargain over matters pertaining to” the subjects listed in RCW 41.80.040. Even the Examiner described the decision to move WFSE work to the new center as a “related decision” to consolidating patient access centers. AR 912. The legislature clearly intended that state employers not only have the right to decide to make structural changes, but that they also have the right to make changes pertaining to those structural changes.

The PERC’s confusion in this case was predicated, in significant part, on treating this like a traditional “skimming” case. Skimming occurs when an employer transfers work from a bargaining unit to another group of employees, either non-union or represented by another union. Here, the decision made by the University was to consolidate its patient access

operations. The decision made by the University was not to remove work from the WFSE unit, or from the SEIU unit.² Rather, the University simply sought to consolidate all of its patient access operations, recognizing that the ultimate decision on union representation would be made by the PERC (see Section IV(C)(2), below).

The confusion engendered in this matter is manifest by WFSE's inherently inconsistent arguments. WFSE has argued both that the University improperly removed work from the bargaining unit without bargaining and that WFSE continues to represent the employees at the new consolidated center. If WFSE continues to represent the employees, how can the work have been "removed"? Unlike a traditional skimming case, the consolidation decision is a statutory management right. The PERC's traditional skimming analysis is inapposite and contrary to the prohibition over bargaining matters pertaining to a management right.

The PERC has previously recognized this critical distinction. In *State Attorney General*, No. 10733, 2010 WL 1644961 (PERC, 2010),

² For this reason, this case is also distinguished from a recent case between the parties. In *University of Washington v. WFSE*, __ Wn.App. __ 303 P.3d 1101 (2013), the Court concluded that the University attempted to bargain the movement of employees from one bargaining unit to another as a condition of reallocating them to a higher pay grade. The Court found the University's attempt to bargain a change in representational status was improper. In contrast, this case involves statutory management rights. The movement of work out of the WFSE Harborview bargaining unit in this case was necessary and integral to the exercise of a statutory management right. Also, in this case, the University expressly and repeatedly declined to bargain the representational status of the new positions. It was WFSE, not the University, who attempted to bargain an expansion of its bargaining unit to include employees working at UW Medicine.

aff'd, No. 10733-A, the state improved its delivery-service model by consolidating services and closing offices. 2010 WL 1644961 at 6. The PERC held that the elimination of positions and other changes to wages, hours, and working conditions were a “direct outgrowth” of the decision to consolidate and therefore fell “squarely” within the management rights in RCW 41.80.040. *Id.* The Commission explained that employers covered by RCW 41.80 are “privileged to make changes to those subjects covered by RCW 41.80.040 at any time ... even if there is a bargaining obligation with an exclusive bargaining representative.” 2011 WL 6148983 at 3.³

The removal of bargaining unit work from WFSE’s Harborview bargaining unit was an integral part of the management right to consolidate patient access centers. It was not a separate decision, and the PERC erred in holding that the University unlawfully refused to bargain it.

2. The University properly declined to bargain a change to the WFSE’s bargaining unit configuration.

The PERC’s decision that the University should have bargained with WFSE over WFSE’s continued representational status of Contact Center Representatives (“CCRs”) (AR 1015) is also erroneous as a matter of law because the PSRA delegates the determination and modification of state civil service employees’ bargaining units to the PERC. RCW 41.80.080

³ In briefing to the trial court, WFSE cited a number of PERC skimming cases, including some against the University. However, those cases are unrelated to this matter and do not involve exercise of a statutory management right as in this case.

specifically requires that the Commission determine all questions pertaining to the representation and certification of state civil service employees for purposes of collective bargaining.

The University recognized that employees would likely be hired to staff the consolidated center from the centers that would close, including at UWPN and Harborview. Tr. 414. Consistent with the University's practice when an employee moves between organizations (for example, from Harborview to UWMC), Harborview employees would have to apply to work in the new center. Tr. 421. The University also recognized there would be a question regarding which union would represent the new UW Medicine positions. Tr. 414. Since there were two unions involved and a substantial number of non-union employees, the University anticipated that PERC would need to make that determination. Tr. 414; 439.

The record shows that the University properly declined to bargain over which union would represent CCRs. In a May 2010 response to an information request about the positions, the University wrote, "Union representation – to be determined, under state law." AR 698. At a meeting with WFSE in June 2010, the University stated that it could not bargain over which union, if any, would represent the positions. Tr. 81-82; 420.

In fact, WAC 391-25-136, which governs the process for certifying bargaining units of state civil service employees, requires that employees

eligible for representation be identified by “work location.” WAC 391-25-136. Here, the WFSE bargaining unit is defined as certain “classified employees of the University of Washington working at Harborview Hospital.” *University of Washington*, No. 10717, 2010 WL 2150411 (PERC, 2010) (emphasis added); AR 964. Similarly, the SEIU unit is described as the “patient service representatives of the University of Washington Medical Center.” AR 963 (emphasis added).

PERC rules outline the process for certifying appropriate bargaining units and their representatives. WAC 391-35. WFSE was fully aware of the process as it filed a Unit Clarification Petition on September 3, 2010 – before it filed this ULP. AR 7.

Once the consolidation was implemented, WFSE employees would no longer work at Harborview and SEIU employees would no longer work at UWMC. They all would work at UW Medicine – a completely different work location and management structure. *See Appendix A* at 33. The employees were no longer in the WFSE or SEIU bargaining unit as defined by PERC upon implementation of the consolidation.

Thus, the University properly declined to bargain over WFSE’s efforts to expand its bargaining unit, recognizing that union representation would be “determined under state law” through PERC procedures. AR 698. The PERC later determined that WFSE did not represent the

positions because the consolidation created a “separate community of interest” from WFSE’s Harborview unit. Appendix A at 34.

As detailed more fully below, the University recognized that it had an obligation to bargain over the effects of consolidation. The effects included the process of employees moving from the existing to the new patient access center. Bargaining over the transition process, however, did not include bargaining with each of the unions over whether the employees would continue to be represented (or whether the work would be “removed” from the bargaining unit). Those issues, as the PERC and the legislature have made clear, are solely the PERC’s to resolve.

3. WFSE agreed in its labor contract that the University can assign a bargaining unit status to new job classifications.

PERC’s decision that the University improperly assigned CCRs to be unrepresented pending PERC proceedings is also error because the WFSE agreed, in its labor contract, that the University can create new classifications and assign a bargaining unit status to them. Article 48.2(a) provides:

Should the University decide to create, eliminate or modify a class specification which does not involve a major restructuring of the overall classification system, it will notify the Union in advance of implementing the action and negotiate salary. Notification will include the bargaining unit status of the classification and, for newly created or modified classification, considered to be in the bargaining unit, a proposed salary range....Notification will occur at least forty-five (45) days in advance of any proposed implementation date. At the Union’s request, the University will meet and

confer with the Union over its proposed action.

AR 629-30 (emphasis added).⁴

Here, the University informed both unions that it anticipated that the question of who would represent CCRs would be determined “in accordance with state law” by the PERC. AR 698. The PERC’s decision that the University should have done more by agreeing that WFSE represented the new classifications must be reversed.

D. The PERC Erred in Holding That WFSE Represents Contact Center Employees Prior to the Outcome of Unit Clarification Proceedings.

A core principle of collective bargaining law is that employees decide whether and who represents them. RCW 41.80.050. In this case, WFSE advanced irreconcilable positions – that its bargaining unit work was removed from its unit and that it represents the employees who have left the unit. WFSE cannot have it both ways. The PERC erred in holding that WFSE represents employees who were no longer working at Harborview.

Washington courts consider decisions by the federal National Labor Relations Board (“NLRB”) construing the National Labor Relations Act (“NLRA”) persuasive authority when interpreting similar provisions in

⁴ “Once a contract is signed, the parties have met their obligation to bargain as to the matters set forth in the contract, relieving the parties of their obligation to bargain for the life of the agreement. No unfair labor practice will be found if a party makes changes in a manner consistent with the contract.” *City of Mountlake Terrace*, No. 10734, 2010 WL 1644962 at *3 (PERC, 2010). This is termed a “waiver by contract.”

Washington's public sector labor law. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

Under federal law, there is a rebuttable presumption that when an employer consolidates employees performing similar work into a new location, employees at the new facility constitute a separate bargaining unit for purposes of determining union representation. *Gitano Group*, 308 NLRB 1172 (1992); *Penn Enterprises, Inc.*, 2012 WL 2951740 (NLRB General Counsel); *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000). Where the presumption is not rebutted, the NLRB applies a clear majority status test to determine union representation. "If a majority of the employees in the unit at the new facility are transferred from the original bargaining unit, we will presume that those employees continue to support the union... Absent this majority showing, no such presumption arises and no bargaining obligation [with the old union] exists." *Gitano* at 1175 (emphasis added).

In *Gitano*, the NLRB found that a clear majority of employees in the unit at the new facility were transferees from the original bargaining unit. Thus, a new separate bargaining unit was automatically created and represented by the union with majority status. The NLRB noted that its test serves "as a more workable and precise analytical tool to guide employers, unions, and employees to an understanding of their rights and

obligations in this difficult area of the law.” *Gitano*, 308 NLRB at 1176.

Similarly, in *Martin Marietta Chemicals*, 270 NLRB 821 (1984), the employer owned a limestone facility where 159 employees were represented by the Steelworkers Union. *Martin Marietta Chemicals* at 821. When the employer purchased a nearby limestone facility where 93 employees were represented by the Cement Workers Union, the employer merged the two groups into a single operation. The Cement Workers protested and contended their unit was viable and should remain intact. *Id.* The NLRB disagreed. *Id.* It held that the operation was physically consolidated under common management and constituted a new unit. *Id.* The NLRB declined the employer’s request to accrete the Cement Workers into the Steelworkers unit and instead ordered an election take place to determine who would represent the new unit.

In *Boston Gas Company*, 221 NLRB 628 (1975), the employer purchased two companies and merged 38 employees represented by the Steelworkers union with 34 employees represented by the Utility Workers union. The NLRB held that the employees had been “totally commingled and fully integrated” and therefore formed a new unit. *Boston Gas Company* at 628-29. Since neither group was sufficiently predominant to show a clear majority status, the NLRB ordered an election. *Id.*

The PERC has applied the same principles to mergers of bargaining

units. *City of Mount Vernon*, No. 4199, 1992 WL 753337 (PERC 1992). In *Mount Vernon*, the PERC held, “When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation.” Indeed, under PERC’s own rules, employers, including the University, are prohibited from expressing a preference between two unions who seek to represent a group of employees. WAC 391-25-140(3).

In this case, the PERC very recently reached the same conclusion. *University of Washington*, Nos. 11833-11836 (PERC, 2013), Appendix A.. The PERC found that the merger of Harborview and UWMC employees resulted in a new, separate bargaining unit. *Id.* at 11. WFSE did not have a clear majority and WFSE no longer represents those employees. *Id.* at 29 (“Because the employees at the Contact Center can stand alone as their own bargaining unit and the WFSE does not represent a substantial majority of those employees, accretion is not appropriate in this case.”)

In this case, the PERC should have proceeded to decide WFSE and SEIU’s petitions to represent CCRs before reaching this ULP. At a minimum, the PERC should have conducted a *Gitano/Mt. Vernon* analysis before determining whether WFSE represented any CCRs. Former WFSE

employees make up less than a clear majority of CCRs.⁵ AR 970. As such, WFSE should not have been deemed to represent any Contact Center employees. The PERC's contrary conclusion should be overturned.⁶

E. The PERC's Decision that the University Did Not Bargain in Good Faith Regarding the Effects of Consolidation Is Not Supported by Substantial Evidence.

“The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees.” *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 468-69, 938 P2d. 827 (1997) (citation omitted). Parties engaged in labor negotiations “are adversaries and the law does not require them to reach an agreement.” *Id.* at 469. “Parties in negotiations may therefore act in a manner that could be classified as intransigent....” *Id.* In determining whether a violation of the duty to bargain in good faith has occurred, the “totality of circumstances must be analyzed.” *Northshore Utility District*, No. 10534-A, 2010 WL 1644960 (PERC, 2010) at 8. “The evidence must

⁵ According to testimony offered at the hearing, the number of former UWPB employees hired into the Contact Center was a few more than former WFSE Harborview employees. Tr. 497. Especially after SEIU employees and new hires are considered, WFSE clearly did not represent a majority of employees.

⁶ Moreover, employers may lawfully bargain to impasse over, and then unilaterally implement, a change in work assignments that removes work from a union. *Snohomish County*, No. 9540-A, 2007 WL 1959331 (PERC, 2007) at 4. Thus, WFSE does not have an inalienable right to represent patient access center work.

support the conclusion that the respondent's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid an agreement." *Id.*

1. The record proves that the University bargained in good faith regarding the effects of consolidation.

The record conclusively demonstrates that from the beginning, the University recognized its obligation to bargain effects relating to the consolidation and pursued effects bargaining with WFSE in good faith.

On March 23, 2010, the University sent a letter to WFSE and SEIU explaining that it intended to consolidate patient access centers. AR 685, 834-35. It stated, "Before we finalize the timeline for this consolidation, we would like to discuss the strategic best practices vision and review any issues you may have in its implementation." *Id.* The University asked for a meeting with each union. *Id.*

The University's notice to WFSE far exceeded the requirement of the parties' contract, which states the University "will discuss with representatives of the Union significant changes affecting institutional conditions of employment generally affecting bargaining unit employees thirty (30) calendar days in advance of targeted implementation dates" Article 6.2, AR 579.

On March 26, WFSE responded, stating, "[P]lease consider this document as formal notice of the Federation's Demand to Bargain the Call

Center Consolidation at Harborview Medical Center.” AR 695. WFSE neither suggested a meeting date nor requested any further information. *Id.* On April 5, 2010, SEIU responded, demanding “to bargain over the consolidation of the call centers and the effects of any consolidation” on SEIU members. AR 836. Unlike WFSE, SEIU suggested a time for a meeting and requested more information. *Id.*

On May 12, the University responded to SEIU’s information request and, as a courtesy, sent a copy to WFSE. AR 696. The packet included Flexource’s report and the draft timeline.

On May 26, 2010, the University responded to an information request from WFSE. AR 725; 722, 724. In the response, Assistant Director of Labor Relations Dombrowski wrote, “[D]espite our best efforts to meet with the [WFSE] on this reorganization, having a confirmed date of June 14, you decided to cancel this meeting. That is unfortunate. Please reconsider your decision to delay meeting until after July 4.” AR 725. The parties ultimately met, at the University’s request, on June 14. AR 726.

At the June 14 meeting, the University explained that CCRs would be working in a new location and would service all of UW Medicine. Tr. 81-83. “[T]here was a lot of discussion” about how WFSE employees would transition in terms of pay, titles, recruiting, hiring, layoff rights, recall rights, cost of parking, and location of the new center. Tr. 420.

On June 21, 2010, the University sought an increase in the salary range for an existing but unused job classification. AR 735. The University anticipated hiring up to 95 employees in the new center. AR 735-36. On the subject of union affiliation, the University indicated that there was “mixed representation of the locations to be consolidated, multiple unions are involved, as well as a body of employees that is currently non-represented.” AR 736.

During this period, the University also attempted to keep employees informed. On June 24, 2010, the University held an information meeting. AR 727. It invited employees to ask questions and explained what the CCR recruitment process would be. AR 727. The University also began publishing a newsletter after employees complained they were not being kept informed by the University. Tr. 327-28; AR 728.

In correspondence to WFSE representative Evans, Dombrowski explained that the first physical move would occur in early September 2010. AR 732. She explained the transition would be phased, with operations winding down at Harborview and UWPB until mid-October, when the Contact Center would be operational. *Id.* UWMC calls would be redirected after the center opened. Tr. 461.

On June 24, 2010, the University held another bargaining session with WFSE. The parties discussed the application process, whether re-

hired employees would serve probationary periods, and pay. Tr. 87; 92-93. On July 7, Evans asked when the position description would be available. AR 742. Dombrowski responded with a copy of the CCR description. AR 743-745. On July 16, the University posted the position. AR 746. The posting explained that the pay range was pending approval. AR 746.

On July 20, 2010, Evans acknowledged that the University had verbally guaranteed that all Harborview employees would be given a job in the new consolidated center. AR 750. He also advised Dombrowski that WFSE was advising its members to apply for the new positions. *Id.*

On August 3, Dombrowski spoke with Evans about a possible overall resolution. Tr. 437. Later that day, she sent a proposed memorandum of understanding (“MOU”). Tr. 437; AR 751-753. The MOU addressed whether WFSE employees would be hired into new CCR positions; what their job code, pay table, and salary range would be; what pay step they would be placed at; whether they would serve a probationary period; accommodations for work schedules; and an acknowledgement that union affiliation would be determined by the PERC. AR 752-53; Tr. 437. Evans presented a counterproposal (AR 755-56), proposing that Harborview employees be “relocated” to the new center and that they retain all current terms and conditions of employment, including titles, classifications, pay ranges, seniority, and union affiliation. AR 755.

Dombrowski responded expressing disappointment and noting that WFSE's proposal "backtrack[ed]" on its previous offer. AR 838. She told Evans the University expected to formalize offers the week of August 19 and she asked to meet as early as Monday, August 9. *Id.*

WFSE did not respond to the University's August 6 request for a meeting. Two weeks passed. On August 20, having heard nothing from WFSE, Dombrowski wrote again. AR 844. She advised Evans that consistent with her previous communication, job confirmation letters were being sent out. AR 844. She stated that she would send copies to Evans and noted that any employees whose pay had been higher would continue receiving their higher pay. AR 844. Dombrowski asked, "Other than the pay issue, where are we with our impact bargaining?" AR 844.

Evans responded, stating that the parties were "miles apart" on job classifications and union representation. AR 861. He wrote, "It is still our position that the work is exactly the same as what our members are doing currently and the employer has the ability to place our members in the call center in their current classification inside our bargaining unit." AR 861. Dombrowski responded immediately, explaining that representation questions are "PERC's jurisdiction" but welcomed a meeting to seek common ground. AR 861.

On August 24, the University and WFSE met again. AR 848; Tr.

123. They talked about the progress of the consolidation and which union, if any, should represent CCRs. Tr. 123; AR 848. The Union continued to push modifying the Harborview bargaining unit to cover CCRs. *Id.*

Dombrowski explained that having WFSE, SEIU, and non-union employees all working in the same facility, doing the same work, was not feasible. AR 848. Given the differences in pay, benefits and work rules, such a situation would lead to work jurisdiction disputes.⁷ With different seniority lists for WFSE, SEIU, and UWPN employees, even the simplest tasks such as vacation or shift selection would be unmanageable. AR 848. WFSE insisted that its members' seniority continue to apply. AR 755. Evans asked if the University would stipulate that Harborview employees remain represented by WFSE in exchange for an agreement not to file an unfair labor practice charge; however, the University declined. AR 850.

On September 28, 2010, University and WFSE representatives met to discuss the consolidation again. AR 792. Shortly after, WFSE attorney Younglove reiterated that the parties "are still in bargaining." AR 815. That same day, Dombrowski sent Evans an e-mail stating the University was "very willing to continue discussions on effects bargaining" including

⁷ For these reasons the PERC has frequently ruled that work units must not be unduly fragmented. "[U]nit structures which bifurcate a workforce have been found to be inappropriate where boundaries between bargaining units are so vague that it is difficult to tell what work belongs to each bargaining unit." *Washington State*, No. 9951-A, 2009 WL 737566 (PERC, 2009) at 2; *Energy Northwest*, No. 11198, 2011 WL 5067946 (PERC, 2011) at 7 ("The Commission seeks to avoid creating bargaining units that fragment the employer's workforce or would lead to work jurisdiction disputes.")

discussions regarding parking, trial periods, rehire rights, and other items. AR 792. She asked him to “please get back” to her soon. *Id.*

Evans responded on October 1 agreeing to set a meeting, although he was unavailable until the late October. AR 792-93. Dombrowski persisted. On October 7, she asked Evans to make room in his calendar before the end of October. AR 854. Evans failed to do so. AR 794.

Application of the totality of the circumstances test overwhelmingly supports the conclusion that the University acted lawfully. Throughout the process, the University provided WFSE with information WFSE requested as well as information requested by SEIU. The record is replete with the University’s good faith effort to reach a resolution with WFSE.

The parties held five formal bargaining sessions and exchanged numerous e-mails. “[T]here was a lot of discussion” about WFSE employees, including pay, titles, recruiting, hiring, layoff rights, recall rights, parking, and work location. Tr. 420. When the Contact Center opened, the University ensured that all PAC employees received job offers. No one was laid off. Employees earned the same salary. Tr. 262 (Hardy); Tr. 310 (Srey); Tr. 350 (Stills); Tr. 379 (Pugh). Schedules did not change. Tr. 270 (Hardy, “I ended up keeping my schedule.”) Parking is less expensive. Tr. 285 (Hardy). Pursuant to WFSE’s request, employees did not have to serve a probationary period. Tr. 289 (Hardy).

WFSE representative Evans testified that the parties discussed effects during multiple bargaining sessions in the summer of 2010. Tr. 115. He corroborated there were still ongoing negotiations on effects at the time of the hearing.⁸ Tr. 161. The WFSE Director of PERC Activities also confirmed the parties were still bargaining effects. Tr. 215. In fact, WFSE admitted this in its briefing to PERC. AR 989 (“The University did agree to engage in bargaining with regard to the impacts....”)

The PERC reasoned that the University bargained effects in bad faith because it was unwilling to bargain over the subjects it believed were non-mandatory. AR 1019. Again, the PERC’s analysis is flawed. The analysis of whether the University violated the duty to bargain effects in good faith is not dependent on whether it was willing to bargain the decision to consolidate or any other elements of “decision” bargaining. Rather, the focus must be on actual effects bargaining: is there substantial evidence in the record to support a conclusion that that the University did not comply with its good faith obligation to bargain effects? There is not.

The PERC also expressed concern that the University told employees about the consolidation before it told WFSE. AR 1018. The University told employees a few days prior to notifying the Union. In the

⁸ At the time of the hearing in this case in November 2010, Evans testified that the parties were still “actively looking for a November date” to meet and bargain. Tr. 96.

context of a project that would take over six months, and given the very generic information provided to employees at the staff meeting, this fact does not indicate bad faith. As the four WFSE employee witnesses made clear in their testimony, there was nothing stated in the meetings that would support a violation. Tr. 252; 307-08; 343; 370.

The PERC's factual findings are reviewed "for substantial evidence in light of the whole record, *i.e.*, evidence sufficient to persuade a fair minded person of their truth." *PERC v. City of Vancouver*, 107 Wn. App. 694, 703, 33 P.3d 74 (2001). When a finding is not supported by substantial evidence, it is arbitrary and capricious. *Id.* at 709.

The PERC's Conclusion of Law No. 6 – that the University refused to bargain the effects of consolidation – is based on the agency's Findings of Fact Nos. 7, 8, 10, 14, and 16. AR 928. Those findings plainly omit a large volume of undisputed evidence showing the University's attempts to bargain effects. Most notably, the findings omit the bargaining sessions held between the parties on June 24, August 24, and September 28, 2010. They omit evidence that the parties discussed the hiring process, probationary periods, and wages for the new positions. Tr. 87; 92-93. They omit Dombrowski's numerous correspondences to Evans encouraging WFSE to meet and bargain. AR 725; 792; 838; 844; 854. They omit correspondence from WFSE admitting that the parties were

actively bargaining. AR 815. In sum, the PERC failed to consider the totality of the circumstances and its findings of fact and conclusion of law must be reversed. *City of Vancouver*, 107 Wn. App. 694.

2. The PERC erred in holding that the University should have delayed consolidation until it reached agreement with WFSE over the effects.

According to the PERC, one basis for finding a violation was that “[b]y failing to complete effects bargaining prior to implementing the change, the employer violated its duty to bargain in good faith.” Decision at 13, AR 1019-1020. However, PERC directly contradicts its own well-established precedent.

“The Commission [has] determined that an employer ‘may implement decisions within its sole prerogative ... even though required bargaining has not been concluded on the effects of that decision.’” *Central Washington University*, 2011 WL 2725841 at 5.

For example, in *City of Bainbridge Island*, No. 11465, 2012 WL 4481980 (PERC, 2012), a union accused an employer of refusing to bargain the effects of a reorganization that resulted in layoffs. The union claimed that the employer unlawfully implemented the reorganization before the parties completed bargaining over the effects of the reorganization. The PERC held,

The requirement to impact bargaining, however, does not turn a decision’s resultant “impact” back into a “decision”

requiring an employer to halt its implementation process. Such a finding would render the purpose of impact only bargaining useless. Here, the impacts . . . were the results of a decision to reorganize, not initial decisions which could lead to other impacts.

City of Bainbridge Island at 12.

The PERC's ruling that the University should have concluded effects bargaining prior to implementing its management right to consolidate is entirely inconsistent with *City of Bainbridge Island* and *Central Washington University*.

The University agreed to bargain the effects of its decision to consolidate, pursued meetings with WFSE, answered WFSE's requests for information, and made proposals intended to reach agreement over effects. The University was not required to delay implementation of its right to consolidate. Even after the ULP was filed, the University remained committed to bargaining effects. There is no "magic" to effects bargaining and agreements reached at the table can be instituted with retroactive effect, if agreed upon.

The University met its obligation to engage in full and frank discussions on disputed issues. Under the totality of circumstances, the University did not demonstrate a refusal or unwillingness to bargain or avoid agreement. Therefore, the PERC's decision should be reversed.

F. The PERC's Decision that the University's Communications to Employees Interfered with Collective Bargaining Rights Is Not

Supported by Substantial Evidence.

It is an unfair labor practice for an employer to interfere with employees in the exercise of their collective bargaining rights. RCW 41.80.110(1)(a). “The test for interference is whether a typical employee could, in the same circumstances, reasonably perceive the employer’s action as discouraging his or her union activities.” *City of Wenatchee*, No. 8802-A, 2006 WL 516263 (PERC, 2006) at 2. The union bears the burden of demonstrating that the employer’s conduct resulted in “harm to protected employee rights.” *Id.*; *City of Vancouver*, 107 Wn.App. 694.

Employer communications to employees can constitute unlawful interference under certain criteria, including: (1) is the tone coercive as a whole; (2) are the employer’s comments substantially factual or materially misleading; (3) has the employer offered new benefits; (4) are there direct dealings; (5) does the communication disparage, discredit, ridicule, or undermine the union; (6) did the union previously object to such communications; and (7) does the communication appear to have placed the employer in a position from which it cannot retreat? *Northshore Utility District*, No. 10534-A, *supra*. Conversely, it is not unlawful under chapter 41.80 RCW to express views, arguments, or opinion in written, printed, graphic, or visual form if the expression contains no threat of reprisal or force or promise of benefit. RCW 41.80.110(3); *see also Whatcom*

County, No. 7244-A, 2003 WL 1712537 (PERC, 2003).

The PERC concluded that the University interfered with employees' rights in three ways: the March 2010 staff meetings, communications that CCR positions would be unrepresented, and job postings. AR 1021-22. The PERC's factual findings are not supported by substantial evidence and its legal conclusion on this issue should be reversed.

1. The PERC's finding that employees believed WFSE was negotiating behind their backs has no factual support.

The PERC found that the University's communications to WFSE employees caused them to believe the WFSE was negotiating behind their backs. AR 1021. The PERC also found that informing employees about the consolidation "undermined" WFSE. *Id.* The record does not support the PERC's findings.

In March 2010, the University shared its consolidation plan with employees. Tr. 417. On or about March 19,⁹ PAC Manager Vasiliades told her staff that the patient access centers were going to be consolidated. Tr. 252; 487. In April 2010, University representative Debra Gussin attended a PAC staff meeting. Tr. 256; 449. Employees wanted to know about the consolidation. *Id.* Gussin did not provide any specifics other than to let

⁹ The exact date is not clear from the record; however, Harborview employees attended staff meetings every other Friday. Tr. 251-252. WFSE member Nancy Srey testified she found out about the plan at a second meeting on March 18 or 22. Tr. 302-03. Thus, the staff meeting at issue likely took place on Friday, March 19, 2010.

employees know they were looking at locations and that employees should not get “too excited too soon.” Tr. 257. There was no discussion about whether employees would continue to be represented by WFSE. Tr. 258.

WFSE called four witnesses who attended these staff meetings: Kim Hardy, Nancy Srey, Shinelle Stills, and Regina Pugh. Hardy testified that the message was, “Just that there was going to be a consolidation.” Tr. 252. When asked if the University said anything to her about changing her job class, her job title, or her union representation, she said, “No.” Tr. 307-308. Stills testified that the supervisors said “we were going to be consolidating with another UW medicine call center” but the University did not discuss union representation. Tr. 343. When asked, “So it doesn’t sound like they gave you a whole lot of information in March?”, Stills responded, “No, not at all.” Tr. 343. Pugh testified that the University “just said that they were looking at consolidation, bringing the PAC together with UWPN ... it wasn’t a whole lot of conversation.” Tr. 370.

None of the former PAC witnesses testified that the University told them it was negotiating with WFSE. The only evidence on that came from Evans, who offered second- or possibly third-hand information from unnamed sources. Tr. 68 (“They were also being told that they – that management was meeting with the union.....”) Evans’s testimony was contradicted by Hardy, Srey, Stills, and Pugh. Therefore, the PERC’s

finding of interference based on the staff meetings should be reversed.

2. The PERC's finding that the University told employees they would not be represented by a union is unsupported by evidence in the record.

The PERC also found the University unlawfully told employees that CCRs would be unrepresented. AR 1021. PERC did not identify when this occurred. *Id.* (“The record is not clear when the employer first made this communication to employees.”) The record does not support the finding.

When asked if Vasiliades said anything about whether employees would continue to be in the Harborview bargaining unit, WFSE witness Hardy testified, “No. She never mentioned it.” Tr. 255. When asked if that subject ever came up in any staff meetings, Hardy responded, “No.”¹⁰ Tr. 258. WFSE witness Stills testified the University never said anything to her about not being represented. Tr. 343, 345-46; 306-07.

The only communication regarding the representational status of CCRs was the August 20 job acceptance letters. These were neutral in tone, did not ridicule or disparage WFSE, and accurately conveyed that CCRs were not certified by PERC to be represented.¹¹ AR 764-790. The University genuinely desired that employees exercise their right to select

¹⁰ After Hardy answered “No,” she was asked the same question again and gave a different answer. Tr. 258-59. However, Hardy could not identify when, if ever, she recalled such a communication.

¹¹ At that time, it was anticipated that 9-10 SEIU employees would work in the Contact Center. AR 725.

their own union representative, and not interfere with that right.¹²

3. There is no evidence that the University's act of posting job openings interfered with protected bargaining rights.

Finally, the PERC also found that posting job openings was unlawful interference. In fact, the University used the same process it always uses when an employee applies for a different University entity. Tr. 421. The parties' contract recognizes this. Article 45.1, which applies to vacancies in organizations within the University, requires the University to "make the application process, necessary submittals and the essential skills of the vacant position clear to prospective applicants." AR 625.

Evans testified the parties discussed whether employees would be re-hired in the June meetings. Tr. 87 ("everyone had to apply through their normal process of posting it.") Evans acknowledged the University had assured him that all WFSE employees would be given a job. AR 750. Indeed, WFSE advised its members to apply. *Id.*

WFSE did not present evidence proving that the job postings were a surprise to anyone or that they were perceived as discouraging union activity. Therefore, PERC's findings are not supported by substantial evidence and its conclusion of law should be reversed.

G. The PERC's Remedy Order Exceeds Its Authority, Is Arbitrary

¹² By that time, the University was aware that UWPB employees would constitute a majority and thus believed that the new center would open without either union representing employees, with longer-term issues to be resolved by the PERC.

and Capricious, and Is Inconsistent with PERC Rules.

The PERC may issue an order requiring a party to cease and desist from an unfair labor practice and can take affirmative action to “effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees.” RCW 41.80.120(2).

Even assuming *arguendo* that a violation occurred, it is well-accepted that an employer may not financially support a union. *Edmonds School District*, No. 3167, 1989 WL 549988 (PERC, 1989); 29 U.S.C § 158(a)(2). The prohibition ensures union independence.

The PERC order requires the University to use its own funds and make dues payments directly to WFSE, which is contrary to the unlawful domination prohibition and should be reversed. Especially given the pendency of a representation petition and potential election, the perception created by this remedy is entirely improper. In essence, PERC has ordered the University to engage in an unlawful activity under established labor law doctrine; that order should be reversed.

V. CONCLUSION

For the reasons above, the University requests that the Court set aside the challenged portions of Decision 11075-A and Decision 11075-B.

DATED this 30th day of August, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Amended Brief of Appellant to be served by hand delivery, addressed to the following:

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Donna Murbach, Legal Assistant

APPENDIX A

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

<p>In the matter of the petition of:</p> <p>WASHINGTON FEDERATION OF STATE EMPLOYEES</p> <p>For clarification of an existing bargaining unit of employees of:</p> <p>UNIVERSITY OF WASHINGTON</p>	<p>CASE 23495-C-10-1439</p> <p>DECISION 11833 - PSRA</p> <p>ORDER OF DISMISSAL</p>
<p>In the matter of the petition of:</p> <p>WASHINGTON FEDERATION OF STATE EMPLOYEES</p> <p>Involving certain employees of:</p> <p>UNIVERSITY OF WASHINGTON</p>	<p>CASE 23546-E-10-3593</p> <p>DECISION 11834 - PSRA</p> <p>DIRECTION OF ELECTION</p>
<p>In the matter of the petition of:</p> <p>UNIVERSITY OF WASHINGTON</p> <p>For clarification of an existing bargaining unit of employees represented by:</p> <p>WASHINGTON FEDERATION OF STATE EMPLOYEES</p>	<p>CASE 24270-C-11-1466</p> <p>DECISION 11835 - PSRA</p> <p>ORDER CLARIFYING BARGAINING UNIT</p>
<p>In the matter of the petition of:</p> <p>SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925</p> <p>For clarification of an existing bargaining unit of employees of:</p> <p>UNIVERSITY OF WASHINGTON</p>	<p>CASE 24402-C-11-1472</p> <p>DECISION 11836 - PSRA</p> <p>ORDER OF DISMISSAL</p>

Younglove & Coker, P.L.L.C., by *Edward E. Younglove III*, Attorney at Law, for the Washington Federation of State Employees.

Robert W. Ferguson, Attorney General, by *Mark K. Yamashita*, Assistant Attorney General, for the employer.

Douglas Drachler McKee & Gilbrough, LLP, by *Martha Barron*, Attorney at Law, for the Service Employees International Union, Local 925.

These cases come before the agency following the reorganization of a portion of the University of Washington's (employer) workforce. The employer operates a medical healthcare system, UW Medicine. UW Medicine is an umbrella organization that encompasses a number of healthcare entities, some university owned and other private non-profit entities. The following entities operate under the umbrella of UW Medicine: Harborview Medical Center (Harborview) and its associated clinics, the University of Washington Medical Center (UWMC) and its associated clinics, the University of Washington Neighborhood Clinics (formerly known as the University of Washington Physicians Network), Northwest Hospital and Medical Center, Valley Medical Center, Airlift Northwest, and the University of Washington School of Medicine.

Consolidation of Patient Access Services at UW Medicine

Patient access is the process by which patients receiving services from any of the UW Medicine entities register their personal information, verify insurance coverage, assign payer plans, schedule patient appointments, and coordinate referrals, among other duties. Patient access is the front door to the UW Medicine systems. Prior to 2010, each UW Medicine entity had its own procedures and processes concerning patient access functions.

At Harborview, the Patient Access Center (PAC) coordinated patient access work for Harborview and its associated clinics. The PAC employees performing the patient access work were in the Patient Service Specialist job class. The PAC employees did not perform other duties or work at the Harborview clinics. The employees used a database software called EPIC to record patient registration and insurance information. Melissa Vasiliades oversaw the PAC which was located at the Pat Steele Building on the Harborview Medical Center campus in downtown Seattle. The PAC employees who are currently represented by the Washington Federation of State Employees

(WFSE) are in that union's Harborview bargaining unit. The Harborview bargaining unit is described as:

All full-time and regular part-time nonsupervisory classified employees of the University of Washington working at Harborview Hospital, excluding members of the governing board, employees excluded from the coverage of Chapter 41.06 RCW, students, employees covered by other collective bargaining agreements, confidential employees, and supervisors.

University of Washington, Decision 9391 (PSRA, 2006).

At the UWMC, patient access work was decentralized and handled by the individual specialty clinics within the UWMC. Even though many of those employees were in the Patient Service Specialist job class, the employees performing patient access services at the UWMC Clinics did not exclusively perform patient access work. Those employees had other duties within the clinics. The employees performing patient access work also utilized the EPIC database software. Those employees are currently represented by the Service Employees International Union, Local 925 (SEIU) in that union's Campus-wide Non-supervisory bargaining unit. That bargaining unit is described as follows:

All non-supervisory civil service employees of the University of Washington performing technical, administrative, office-clerical, and support functions in the employer's academic and medical areas of operation, excluding confidential employees, internal auditors, supervisors, and employees included in any other bargaining unit.

University of Washington, Decision 10262 (PSRA, 2008).

At the UW Neighborhood Clinics, patient access was handled by a private entity known as the Virtual Front Desk (VFD). The employees at the VFD, who were not public employees covered by Chapter 41.06 RCW or Chapter 41.80 RCW, provided many of the same services as the employees performing patient access services at Harborview and UWMC.

Patient access at the affiliated medical centers, such as Valley General and the Northwest Hospital and Medical Center, was accomplished according to the policies of the individual center. No standardized system existed and each medical center selected different software to track patient access information.

The separate process and procedures at the UW Medicine entities were not coordinated and integrated with one another. As a result, there was no coordinated ability to assist patients through the UW Medicine system.

In 2009, the employer began a process of evaluating its patient access functions. It hired a private healthcare consultant, Flexsource, to review its patient access operations at UW Medicine and provide recommendations as to how it could deliver its patient access services in a more efficient, effective, and patient-centered manner. After reviewing the employer's patient access operations, Flexsource recommended that the patient access functions be centralized into a single operation to provide universal patient access services across all of the facilities within UW Medicine.

Based upon the Flexsource recommendation, the employer decided to consolidate its patient access service work to a "Contact Center" that was viewed as a shared service for all of the UW Medicine operations, not just Harborview, UWMC, or UW Neighborhood Clinics. The intent of the Contact Center was to create an entity that provided patients a "gateway" or front door into UW Medicine's system where patients could register their personal and insurance information and schedule appointments at the UW Medicine facilities. The Contact Center is located at a new facility in downtown Seattle that is separate and apart from the other UW Medicine facilities.

The employer planned to fully operationalize this consolidation to the Contact Center in steps. First, the employees at the VFD providing support to the UW Neighborhood Clinics would be hired by the employer and moved to the Contact Center. Those former VFD employees would be hired as state civil service employees and covered by Chapter 41.06 RCW. At the same time, the PAC employees at Harborview would be moved over to the Contact Center. An Administrative Coordinator, Program Assistant, and two employees in the Data Entry Operator job class who are

included in the SEIU's Campus-wide Non-supervisory bargaining unit were hired at the Contact Center in mid-2011.

The Contact Center was expected to go "live" in September 2010 and begin performing patient access work for Harborview and the UW Neighborhood Clinics. Patient access services for the UWMC and its clinics, the specialized Harborview clinics, and the affiliated private entities and their clinics was expected to be "on-boarded" over the course of several years with completion expected in 2013. As new clinics were on-boarded to the Contact Center, the volume of patient access calls to the Contact Center increased. The Contact Center hired additional staff as more clinics were on-boarded to the Contact Center in order to handle the increased work.

When on-boarding a specialized clinic, the Contact Center employees would meet with the employees from clinics to learn about any processes unique to the specialized clinic. In on-boarding a private affiliated entity, the patient access data had to be converted to the EPIC system. The goal with on-boarding is to ensure that the Contact Center employee understands the needs of the patients accessing the specialized facility's or clinic's services. Once the Contact Center employees are properly trained regarding a specialized clinic, the majority of the specialized clinics' patient access services would be handled by the Contact Center. The employees at the UWMC specialized clinics continue to perform limited patient access work, but that work has diminished since the Contact Center went live.

In March 2010, the employer informed the WFSE and the SEIU that it was consolidating its patient access services to the Contact Center consistent with the plan outlined above. The employer also notified the WFSE that the PAC would be closed. On March 26, 2010, the WFSE demanded to bargain the Contact Center consolidation. During the subsequent negotiations, the employer notified the WFSE that a new job class was being created for the Contact Center. The new job class, Patient Services Representative – Contact Center, would also be referred to as a "Contact Center Representative." The employer informed the WFSE that the employees working at the PAC would need to apply for the Contact Center Representative positions if they wanted to work at the Contact Center. The employer also informed the WFSE that the employees hired for the Contact Center Representative positions at the Contact Center would not be included in the

Harborview bargaining unit. The WFSE demanded that the work performed by the PAC employees remain as Harborview bargaining unit work and that the PAC employees automatically become employees of the Contact Center. The employer did not agree.¹

In August 2010, all 29 employees performing patient access work at the PAC applied for the Contact Center Representative positions at the Contact Center. On August 20, 2010, the employer notified those 29 PAC employees of their appointment to a position at the Contact Center. The employer also informed the employees that their first day of work would be October 1, 2010.

The Contact Center went “live” and started taking patient access calls on October 21, 2011. When the Contact Center opened, the employees used the EPIC software database. Vasiliades, who oversaw the PAC at Harborview, was hired as the director of the Contact Center. Four additional managers oversee different portions of the center’s operation. Joseph Karduck is responsible for managing the employees who perform patient access work and supervises the Contact Center Representatives.

Commission Cases Related to Patient Access Services Consolidation within UW Medicine

On September 3, 2010, the WFSE filed a unit clarification petition concerning the former PAC employees working at the Contact Center. Case 23495-C-10-1439. The WFSE’s petition seeks a ruling that the employees who transferred from the PAC should still be included in the WFSE’s Harborview bargaining unit regardless of any change in work title or job location since, in the WFSE’s opinion, the employees are still performing bargaining unit work.² On September 21, 2010, the WFSE filed an unfair labor practice complaint against the employer. The WFSE alleged: 1) that the employer failed to bargain in good faith the decision to consolidate the patient access services, and 2) that the employer removed the patient access bargaining unit work from the

¹ A detailed history of the negotiation between the WFSE and the employer can be found in *University of Washington*, Decision 11075 (PSRA, 2011). For purposes of this decision, it is only necessary to state that negotiations occurred between the parties and that the parties did not reach an agreement.

² The SEIU moved to intervene in WFSE’s unit clarification case on September 21, 2010. That motion was initially denied, and on January 12, 2011, the SEIU withdrew its motion. The SEIU was later granted the right to intervene in WFSE’s unit clarification petition.

WFSE's Harborview bargaining unit without first providing notice and an opportunity for bargaining. Case 23515-U-10-5995. On September 28, 2010, processing of the WFSE's unit clarification petition was blocked pursuant to WAC 391-35-110 pending resolution of the unfair labor practice complaint.³

On October 4, 2010, the WFSE filed a representation petition to include Contact Center employees hired from the VFD into its Harborview bargaining unit under WAC 391-25-440.⁴ Case 23546-E-10-3593. On October 5, 2010, the WFSE filed a letter requesting that its representation petition be processed notwithstanding the pending unfair labor practice case. On October 18, 2010, Executive Director Cathleen Callahan denied the WFSE's request.

On May 25, 2011, Examiner Karyl Elinski issued a decision in the unfair labor practice case. The Examiner found the employer had the right to reorganize its operation. However, she also found the employer unlawfully refused to bargain the removal of bargaining unit work, breached its good faith bargaining obligation concerning the effects of its decision to reorganize its operation, and interfered with employee rights. *University of Washington*, Decision 11075 (PSRA, 2011). The Examiner ordered the employer to restore the conditions that existed prior to the employer's unfair labor practices and undo the consolidation of the patient access work to the Contact Center. The employer appealed that decision to the Commission.

On September 23, 2011, the employer filed a unit clarification petition seeking a ruling regarding the representation status of the Contact Center employees. Case 24270-C-11-1466. Specifically, the employer sought clarification of whether the Contact Center work belongs to the WFSE's Harborview bargaining unit, the SEIU's Campus-wide Non-supervisory bargaining unit, or is unrepresented. On November 2, 2011, processing of the employer's unit clarification

³ WAC 391-35-110 states, in part: A unit clarification proceeding may control or be controlled by an unfair labor practice proceeding. If a petition for clarification under this chapter is pending at the same time as a complaint under Chapter 391-45 WAC involving all or any part of the same bargaining unit, the Executive Director has the discretion to withhold processing of one of the related proceedings pending the outcome of the other related proceeding.

⁴ WFSE filed a second unit clarification petition, Case 23552-C-10-1441, seeking to accrete the newly hired Contact Center employees into its Harborview bargaining unit but withdrew that petition in lieu of its representation petition.

petition was blocked pursuant to WAC 391-35-110 pending resolution of the WFSE's unfair labor practice complaint.

On November 16, 2011, the SEIU filed a unit clarification petition concerning the work being performed at the Contact Center. Case 24402-C-11-1472. The SEIU asserts that the Contact Center work belongs to its Campus-wide Non-supervisory bargaining unit because the Contact Center work is similar to the work being performed by the employees in its bargaining unit. On November 22, 2011, processing of the SEIU's unit clarification petition was blocked pursuant to WAC 391-35-110 pending resolution of the unfair labor practice complaint.

On March 12, 2012, the Commission ruled on the employer's appeal of the WFSE's unfair labor practice complaint. *University of Washington*, Decision 11075-A (PSRA, 2012). The Commission held that the employer had the right to reorganize its workforce. The Commission also agreed with the Examiner that the employer unlawfully removed bargaining unit work from the WFSE's bargaining unit without first satisfying its bargaining obligation, refused to bargain in good faith, and interfered with protected employee rights. However, because the employer had the right to reorganize its workforce, the Commission modified the Examiner's remedial order and permitted the employer's reorganization of the patient access work to the Contact Center to stand. *University of Washington*, Decision 11075-A.

On April 26, 2012, the Commission issued a second decision clarifying that the WFSE continued to represent the former PAC employees at the Contact Center pending the results of these unit clarification and representation petitions. *University of Washington*, Decision 11075-B (PSRA, 2012). The employer appealed the Commission's decision to King County Superior Court. The employer's right to reorganize its workforce is not a subject of the appeal. On May 8, 2013, the King County Superior Court affirmed the Commission's decision and dismissed the appeal. The employer has appealed to the Court of Appeals.

The Hearing on the Unit Clarification and Representation Petitions

Because none of the parties were contesting the employer's right to reorganize its workforce under the statute, processing of the parties' unit clarification and representation petitions was unblocked

on June 4, 2012. Hearing Officer Dario de la Rosa conducted hearings on November 13, 14, and 15, December 6 and 19, 2012, and January 15, 30, and 31, 2013.

At the outset of the hearing, the WFSE moved to limit the evidence to those events that occurred up to the date of its petitions. The WFSE also made a motion to exclude the SEIU from the proceedings. The Hearing Officer denied both motions.

The SEIU made a motion to intervene in the WFSE's representation petition. The Hearing Officer denied that motion at that time because the SEIU had not demonstrated that it had the support of the unrepresented employees. The SEIU subsequently filed showing of interest cards demonstrating it had the support of at least 30 percent of the employees at the Contact Center, which allow the SEIU to propose its own bargaining unit configuration.

During the December 6, 2012 hearing, the employer made a motion to amend its petition to include the administrative coordinator, a program assistant, and the two employees in the Data Entry Operator positions. The Hearing Officer granted the employer's motion over the objection of both the SEIU and the WFSE. The parties filed briefs to complete the record.⁵

ISSUES PRESENTED⁶

1. Are the unit clarification petitions timely under WAC 391-35-020?
2. If the employer's unit clarification petition is timely, did the Hearing Officer err in granting the employer's motion to amend its unit clarification petition?
3. Did the Hearing Officer err in declining the WFSE's motion to limit the evidence to the date of its petition?

⁵ The Hearing Officer exercised his authority under WAC 391-25-350(4)(c) to allow the parties to file briefs of 40 pages. Transcript, page 1574, line 12-13. Although WFSE and SEIU have not raised this issue, it should be noted that the employer filed a 50 page brief. A party filing an overlength brief without the permission of the Executive Director, Hearing Officer, or Commission does so at her or his own peril.

⁶ On the last day of hearing, the Hearing Officer engaged in an on-the-record discussion with the parties about the issues that he believed presented themselves in these matters to assist the parties with their briefs. The issues explained by the Hearing Officer closely conform to the issues presented.

4. If any of the unit clarification petitions are timely, are the WFSE's Harborview bargaining unit and the SEIU's Campus-wide Non-supervisory bargaining unit still appropriate and, if they are not, how should they be modified?
5. If any of the unit clarification petitions are timely, what impact, if any, does the WFSE's representation petition have on the processing of those unit clarification petitions?
6. Should the SEIU's motion to intervene in the WFSE's representation petition be granted in light of the SEIU's submission of a showing of interest?

All three petitions are timely under WAC 391-35-020. The employer's and the SEIU's petitions were filed a little less than and a little more than one year after the Contact Center became operational, respectively. The petitions are timely given the nature of the employer's reorganization. The employer's reorganization was not a static event; rather, the reorganization evolved over time in such a manner that the full impact of the reorganization could not accurately be determined at the time the Contact Center became operational.

The Hearing Officer also correctly granted the employer's motion to amend its petition. Although the motion was made more than one year after the filing of its petition, the facts demonstrate that the administrative coordinator, the program assistants, and employees in the Data Entry Operator job class who work at the Contact Center share a community of interest with the Contact Center Representatives who work in the center. It would be inappropriate to exclude those employees from the scope of these petitions.

As such, the Hearing Officer did not err by denying the WFSE's motion to limit the evidence. Because the employer's and the SEIU's petitions are timely, limiting the evidence to date of the WFSE's petition would have precluded facts regarding those petitions as well as the impacts of the employer's reorganization. Such limitation would also have precluded this agency from properly applying the RCW 41.80.070 unit determination criteria.

Although timely, the WFSE's unit clarification petition must be denied. The process of reorganizing the former PAC employees to the Contact Center and combining them with an almost equal number of unrepresented employees performing the same work inextricably shifted the

community of interest of all of those employees away from the existing Harborview bargaining unit and to the Contact Center. Due to this shift in the community of interest, it would be inappropriate to accrete the unrepresented employees at the Contact Center to the Harborview bargaining unit. The WFSE's unit clarification petition is dismissed. For these same reasons, it is inappropriate to attempt to include the unrepresented employees at the Contact Center into the WFSE's Harborview bargaining unit through a WAC 391-25-440 self-determination election.

The SEIU's unit clarification petition must likewise be denied. The SEIU's Campus-wide Non-supervisory bargaining unit has not exclusively performed patient access work. Even though some employees in that bargaining unit have performed patient access work, members of the WFSE's Harborview bargaining unit, including the former PAC employees, have also performed that work. Therefore, the SEIU cannot claim that it has exclusive jurisdiction over patient access work, and that petition is dismissed.

Turning to the employer's petition as amended, the evidence demonstrates that the employees performing patient access work at the Contact Center, including the employees in the Administrative Coordinator, Program Assistant, and Data Entry Operator job classes, all share a community of interest that is distinct from either the WFSE's Harborview bargaining unit or the SEIU's Campus-wide Non-supervisory bargaining unit. Accordingly, both of those bargaining units are clarified to remove these positions, and the employees in the Patient Services Representative – Contact Center, Administrative Coordinator, Program Assistant, and Data Entry Operator job classes working at the Contact Center shall compose their own bargaining unit within the employer's workforce.

Normally, when a bargaining unit is clarified to remove employees, the removed employees become unrepresented unless those employees are placed in another existing appropriate bargaining unit through the clarification process. However, the WFSE's representation petition sought to include the unrepresented employees performing patient access work at the Contact Center in its Harborview bargaining unit. While that petition cannot survive in its current form, the cards submitted by the WFSE, in addition to the employees that it already represents, indicated that it has support of at least 30 percent of the employees working at the Contact Center. The

WFSE's representation petition will be administratively amended to allow the employees in the Contact Center the opportunity to vote on their representation. Additionally, the SEIU has historically represented some of the employees working at the Contact Center and has submitted showing of interest cards demonstrating support of at least 10 percent of the employees working at the Contact Center. Accordingly, the SEIU's motion to intervene in the WFSE's representation petition is granted and a representation election is ordered to allow the employees to express their desires regarding representation for purpose of collective bargaining.

DISCUSSION

Applicable Legal Standard

The determination and modification of bargaining units and the certification of the exclusive bargaining representative of appropriate units is a function delegated to this Commission by the Legislature. RCW 41.80.070; *Central Washington University*, Decision 10215-B (PSRA, 2010). When this agency certifies a bargaining unit, the work performed by the employees in that bargaining unit becomes the historic work jurisdiction of that unit. *See, e.g., Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001)(bargaining unit work is defined as "work that bargaining unit employees have historically performed"). If an employer assigns new work to employees in a bargaining unit, that work becomes historical bargaining unit work unless there is a prior agreement between the employer and the exclusive bargaining representative to make the transfer of work temporary. *See City of Snoqualmie*, Decision 9892-A (PECB, 2009); *see also State – Social and Health Services*, Decision 9551-A (PSRA, 2008).

No hard-and-fast rule exists proscribing how bargaining units should be described. Historically, new bargaining units are described by the work performed by the employees in the unit, as opposed to the job classes within that unit. The use of generic terms avoids the need to revisit and revise the bargaining unit description should a job title be changed or a new job title added within the occupational type. *University of Washington*, Decision 8392 (PSRA, 2004). The bargaining unit description also instructs the employer and the exclusive bargaining representative about which employees are included or excluded from the bargaining unit. Defining bargaining units by the work the employees perform ensures that the duty to bargain is enforced if an attempt is

made to transfer that work outside of the bargaining unit. *See University of Washington*, Decision 8392.

Defining the bargaining unit by work is not always possible where employers are larger and include multiple divisions or work groups, where similar duties are performed by several groups of employees, and where one or more unions represent employees performing the same or similar functions in different bargaining units. *Central Washington University*, Decision 10215-A (PSRA, 2009), *aff'd*, Decision 10215-B. A different type of bargaining unit description may be necessary and appropriate. This is especially true of employers under the jurisdiction of Chapter 41.80 RCW. *Central Washington University*, Decision 10215-A, *citing University of Washington*, Decision 10496 (PSRA, 2009), and *University of Washington*, Decision 10495 (PSRA, 2009). Each unit is examined individually and, based upon the factual situation presented, bargaining units will be described in a manner that clearly provides the parties with a clear understanding of which employees are included in the bargaining unit.

However, even where the Commission defines a bargaining unit by job class, the work being performed by the employees in the bargaining unit still becomes the historical work jurisdiction of the bargaining unit. A change in title or reallocation does not presumptively or automatically result in an employee's removal from a bargaining unit if that employee continues to perform the same work. *Central Washington University*, Decision 10215-A; *see also City of Tacoma*, Decision 6780 (PECB, 1999) (an employer's civil service system and classifications cannot overrule the Commission's authority to place employees in appropriate bargaining units). Any attempt to remove historical bargaining unit work is still subject to collective bargaining. *See Snohomish County*, Decision 9540-A (PECB, 2007).

Under RCW 41.80.020(2)(c), an employer's classification and compensation plan is not subject to bargaining. *University of Washington*, Decision 10490-C (PSRA, 2011).⁷ Regardless of the employer's authority to make modifications to a classification system for employees, the Legislature vested to this Commission the specific authority to modify bargaining units under the

⁷ The Commission's holding that the subjects covered by RCW 41.80.020(2)(c) were not subject to bargaining is not currently on appeal. *See* footnote 5, *supra*.

provision of RCW 41.80.070. Provided each unit continues to be appropriate, nothing in Commission decisions or rules precludes employees in the same job class from being in two different bargaining units. Thus, even where an employee's job class is changed to a job class that is included in a different bargaining unit, a presumption still does not exist that the employee needs to be moved to that other unit. Rather, a meaningful change in circumstances must exist before this agency will apply the unit clarification standards to determine if any existing bargaining unit needs reconfiguration.

The Unit Clarification Process –

Included with this agency's authority to determine an appropriate bargaining unit is the power to, upon request, modify that unit through a unit clarification proceeding. *See Pierce County, Decision 7018-A (PECB, 2001)*. Unit clarification cases are governed by the provisions of Chapter 391-35 WAC.

The general purpose of the unit clarification process is to provide a mechanism to make changes to an existing bargaining unit based upon a change in circumstances in order to ensure the unit's continued appropriateness. *See, e.g., Toppenish School District, Decision 1143-A (PECB, 1981)* (outlining the procedures to remove supervisors from existing bargaining units). Unit clarifications alter the composition of a bargaining unit.⁸ The Commission adopted WAC 391-35-020 to govern the time frames during which unit clarifications may be filed so as to minimize the disruptions on the parties as well as the employees. That rule states, in part:

Time for filing petition — Limitations on results of proceedings.

TIMELINESS OF PETITION

- (1) A unit clarification petition may be filed at any time, with regard to:
 - (a) *Disputes concerning positions which have been newly created by an employer.*

⁸ A preference exists for resolving representation proceedings prior to unit clarification proceedings. WAC 391-35-110(1) states that if a petition for unit clarification is pending at the same time as a representation petition filed under Chapter 391-25 WAC, processing of the unit clarification petition shall be suspended and all issues concerning the description of the bargaining unit shall be determined in the representation proceeding. As demonstrated by the facts of this case, this rule cannot be applied mechanically.

(b) *Disputes concerning the allocation of employees or positions claimed by two or more bargaining units.*

...

LIMITATIONS ON RESULTS OF PROCEEDINGS

(3) *Employees or positions may be removed from an existing bargaining unit in a unit clarification proceeding filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions.*

(4) Employees or positions may be added to an existing bargaining unit in a unit clarification proceeding:

(a) Where a petition is filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions; or

(b) Where the existing bargaining unit is the only appropriate unit for the employees or positions.

(5) Except as provided under subsection (4) of this section, a question concerning representation will exist under chapter 391-25 WAC, and an order clarifying bargaining unit will not be issued under chapter 391-35 WAC

(emphasis added).

The change in circumstance that triggers a unit clarification petition under WAC 391-35-020(3) and (4) must be a meaningful change in an employee's duties and responsibilities. *University of Washington*, Decision 10496-A (PSRA, 2011), citing *City of Richland*, Decision 279-A (PECB, 1978). A mere change in job titles is not necessarily a material change in working conditions that would qualify under Chapter 391-35 WAC to alter the composition of a bargaining unit through the unit clarification process. See *University of Washington*, Decision 10496-A. Other types of changes to the workplace environment, such as a reorganization of an employer's workforce, are occurrences that could trigger a unit clarification petition. See *Lewis County*, Decision 6750 (PECB, 1999). Absent a recent change in circumstances, a unit clarification petition will be dismissed as untimely. *University of Washington*, Decision 11590-A (PSRA, 2013).

A unit clarification petition may also be filed at any time with respect to newly created positions; however, an order clarifying a bargaining unit will not be issued and a question concerning representation will exist when the unit clarification petition is not filed within a reasonable time

period after the creation of a new position. WAC 391-35-020(1)(a), (5)(a); *Seattle School District*, Decision 10986 (PECB, 2011). The longer a union waits to seek accretion after a position is created, the more likely it will be that the petition will be untimely and a history of bargaining will have developed showing that the positions are historically unrepresented.

The Commission's rules only state that the clarification petition must be filed within a reasonable time of the changes. The rules do not set forth a specific timeframe in which the change must have occurred. Timeliness is determined by the factual circumstances of each particular case. Reorganization and the reassignment of duties are events that do not occur overnight, and some deference must be granted to allow an employer to alter its reorganization plan should circumstances require such changes. Furthermore, if employees are being reallocated to a new job classification based upon *a recent change in duties*, it may be necessary for the reallocation process to be completed so that a proper unit determination can be made. *See University of Washington*, Decision 10263 (PSRA, 2008).

When a unit clarification petition is found to be timely under WAC 391-35-020, the appropriateness of the existing bargaining unit or units is inherently at issue. Even if appropriateness is assumed, as opposed to litigated, this agency may still review the appropriateness of a bargaining unit. *Mead School District*, Decision 7183-A (2001). In determining whether an existing bargaining unit or units remain appropriate in a unit clarification proceeding, the Commission applies the same statutory unit determination criteria used to establish the unit's initial appropriateness.

Accretions –

Ordinarily, employees are permitted a voice in the selection of an exclusive bargaining representative. RCW 41.80.080. Accretions are the exception to the statutory rule of employee free choice. Accretions are a form of unit clarification where employees are placed into an existing bargaining unit without the benefit of being able to vote on representation. An accretion may be ordered when, following a change in circumstances, unrepresented employees logically belong in only one existing bargaining unit and the positions can neither stand on their own as a separate unit or be logically accreted to any other existing bargaining unit. *Pierce County*,

Decision 6051-A (PECB, 1998), *citing City of Auburn*, Decision 4880-A (PECB, 1995). In order for an accretion to be directed, the resulting bargaining unit must be an appropriate. The party proposing accretion bears the burden of demonstrating that the conditions for accretion are present. *Pierce County*, Decision 6051-A.

Application of Standards

The WFSE's Petition –

The WFSE filed its unit clarification petition on September 3, 2010. The purpose of the WFSE's petition was to ensure that employees performing patient access work *and* who were included in the WFSE's Harborview bargaining unit *remained* in that bargaining unit. The WFSE originally sought to defend its existing work jurisdiction. It did not initially seek to add or subtract any positions from its Harborview bargaining unit. The WFSE sought to clarify that it continued to represent those employees transferred to the Contact Center from the PAC. However, in its brief, the WFSE argues that its Harborview bargaining unit is the only appropriate unit for the patient access work being performed at the Contact Center. Therefore, the WFSE argues that the unrepresented employees performing patient access work should be accreted to its bargaining unit.⁹

The Employer's Petition –

The employer filed its unit clarification petition on September 23, 2011. In its petition, the employer asserts that the employees at the Contact Center should be included in a separate bargaining unit apart from either the WFSE's Harborview bargaining unit or the SEIU's Campus-wide Non-supervisory bargaining unit. The employer also asserts that the WFSE's representation petition should control these proceedings and that all of the nonsupervisory Contact Center employees should be permitted an opportunity to vote as to whether they wish to be

⁹ The WFSE filed its representation petition to include the unrepresented employees at the Contact Center in its Harborview bargaining unit on October 4, 2010. The WFSE's brief does not comment on the merits of its representation petition and its arguments demonstrate a preference for its unit clarification petition over the representation petition. Although WAC 391-35-110(1) arguably demands that a representation proceeding be processed before a unit clarification petition, the same unit determination analysis in this case is ultimately required for both the WFSE's unit clarification and representation petitions. While WFSE's arguments do not technically conform to the original purpose of its petition, WFSE's arguments have been given full consideration due to the complex nature of these proceedings.

represented in a separate bargaining unit. In the alternative, the employer suggests that a unit determination election could be ordered to determine which bargaining unit the Contact Center employees desire to be included in.

The SEIU's Petition –

The SEIU filed its unit clarification petition on November 16, 2011. In its petition, the SEIU asserts that its Campus-wide Non-supervisory bargaining unit historically performed patient access work and therefore the patient access work at the Contact Center should be accreted to that bargaining unit.

ISSUE 1 – Timeliness of the Petitions

The first step in the analysis for any unit clarification petition is to determine whether the petition is timely. If a petition is untimely, the results sought by that petition cannot be granted. *See, e.g., University of Washington, 10496-A (PSRA, 2011).*

Analysis Regarding Timeliness

WFSE's Petition –

None of the parties assert that the WFSE's petition is untimely. The facts demonstrate that the WFSE's petition is timely. The WFSE's unit clarification petition as originally filed is timely because it was filed within a reasonable time of the employer's announced change. The PAC employees were notified of the shift to the Contact Center. Those employees applied for new positions at the Contact Center and were offered new positions at the Contact Center by the employer. These specific events occurred at the start of a process that extended over a substantial period of time that warrants a review of the continued appropriateness of the Harborview bargaining unit.

The WFSE's petition is also timely under WAC 391-25-020(1)(a) because it concerns positions that are newly created positions. The employees formerly employed at the VFD were not state civil service employees within the meaning of RCW 41.80.005(6) when they were hired to work at

the Contact Center. Those former VFD positions are newly created positions of the employer, and a unit clarification petition concerning those positions could be filed at any time.

Employer's and SEIU's Petitions –

The SEIU and the employer assert that their petitions are timely, the WFSE does not. The WFSE asserts that the employer filed its petition almost a year after the Contact Center went live and the SEIU filed its petition more than one year after the Contact Center opened. The WFSE points out that the SEIU filed its petition more than six months after the first UWMC Clinic was on-boarded. According to the WFSE, these are not within reasonable time periods of the new employees being hired or the alleged change in circumstances. The WFSE argues that reasonableness should be timed from when the filing party knew or should have known of the change in circumstances. The WFSE also claims that the continued on-boarding of UWMC Clinics is not a series of new change in circumstances, but only a continuation of initial event. The WFSE asks that a “reasonableness” standard be applied that would require a party to file a unit clarification petition within a reasonable time from when it knew or should have known of the change in circumstances.

Although the employer and the SEIU filed their petitions a little less than and more than one year after the Contact Center opened respectively, their petitions are nevertheless timely. In *City of Auburn*, Decision 4880-A (PECB, 1995), the Commission overturned a hearing officer's ruling that a unit clarification petition was not timely because it was filed almost two years after the position at issue was created. The Commission stated that ensuring the appropriateness of existing bargaining units outweighed any claim of timeliness that may have existed. The Commission therefore signaled that the statutory requirement that bargaining units remain appropriate could supersede a claim that the unit clarification petition has not been timely filed, particularly where the evidence strongly suggests an inappropriate bargaining unit would result through inaction.

Furthermore, the petitions concern newly created positions that are claimed by two different bargaining units. Under WAC 391-35-020(2)(b), a petition concerning positions that are claimed by two different bargaining units may be filed at any time. While a service center similar to the

PAC may not have existed for the employees performing patient access work at the UWMC, the employees in the SEIU's Campus-wide Non-supervisory bargaining unit performed patient access work. The SEIU has a colorable claim to the patient access work being performed at the Contact Center. This agency has an obligation to ensure that the patient access work is located in an appropriate unit and to ensure that the bargaining units remain appropriate following a recent change in circumstances.

Finally, these cases differ significantly from previous unit clarifications involving this employer and these parties. In *University of Washington*, Decision 11590, *aff'd*, Decision 11590-A (PECB, 2013), this employer's unit clarification involving the Specimen Processing Technician job class was not timely because there had been no *recent* change in circumstances in the duties, skills and working conditions of the employees that altered their community of interest. The evidence demonstrates that although the employer changed the job class of the employees in 2012, there had been no meaningful change to the working conditions of the employees since at least 2004 that altered their community of interest. Here, the employer's and the SEIU's petitions were filed a little less than and a little more than a year from the date the Contact Center went live. These timeframes are not unreasonable given the nature of the reorganization.

ISSUE 2 – Employer's Motion to Amend its Petition

During the fourth day of hearing, the employer made a motion to amend its petition to include the employees in the Data Entry Operator job class and administrative employees as part of this proceeding. Those employees are represented by the SEIU and included in its Campus-wide Non-supervisory bargaining unit. Both the WFSE and the SEIU objected to the employer's motion, which was granted by the Hearing Officer. The WFSE and the SEIU assert that the motion was not timely and it should have been denied.

The SEIU has historically represented the Data Entry Operator and administrative job classes that are included in the SEIU's Campus-wide Non-supervisory bargaining unit. The employer argued that these positions needed to be considered to ensure that all of the Contact Center employees

were included in its petition. The Hearing Officer granted the employer's motion to amend its petition, but also instructed the parties to brief this particular issue.

Under WAC 391-35-070, a unit clarification petition may be amended by the petitioner "under such conditions as the executive director or the commission may impose." Although this rule provides latitude for dealing with proposed amendments, there is no absolute guarantee that amendment will be allowed in all circumstances. *Pierce County*, Decision 7035 (PECB, 2000). At a minimum, the general rule permitting amendments must be read in conjunction with other rules which impose substantive and/or procedural limitations on unit clarification proceedings under Chapter 391-35 WAC. *Pierce County*, Decision 7035.

The positions at issue were added to the Contact Center in July 2011, but the employer did not make its motion until December 6, 2012, a period of 17 months. This record demonstrates, however, that it is necessary to consider these positions in order to ensure that the bargaining units remain appropriate. Accordingly, the Hearing Officer correctly granted the employer's motion.

ISSUE 3 – The WFSE's Motion to Limit the Scope of Evidence

Because the parties' petitions are timely, the next question that must be answered is the scope of the evidence to be associated with these petitions. At hearing and through its brief, the WFSE asserts that the evidence considered for its petition should be limited to the factual situation that existed at the time it filed its petition. The Hearing Officer denied the WFSE's motion to limit the evidence to the factual situation that existed at the time the WFSE filed its petition and accepted evidence that post-dated the WFSE's petition.

To support its argument, the WFSE cites to *State – Corrections*, Decision 9269 (PSRA, 2006), for the proposition that a unit clarification case "takes the parties and the employees as it finds them when the petition is filed." The WFSE also asserts that the Commission's rules regarding the timing of the evidence should be strictly followed in order to prevent this employer from benefitting from its unfair labor practices. The employer has been found to have committed several unfair labor practices surrounding the reorganization of the patient access work.

In *State – Corrections*, the Washington State Department of Corrections (Corrections), announced in May 2004 that it was closing its Tacoma Pre-Release facility in April 2005. The inmates housed at that facility were in transition from high-security incarceration to work release in the community. The employees who worked at the Tacoma facility were represented by the WFSE as part of its community corrections bargaining unit. In February 2005, Corrections announced that it was opening a new facility, the Mission Creek Corrections Center for Women. The operation of that facility resembled a traditional prison, as opposed to a transitory facility. When the facility opened in May 2005, the inmates from Tacoma pre-release were transferred to the Mission Creek Corrections Center.

On February 7, 2005, Teamsters, Local 117 (Local 117) filed a petition to accrete the employees at Mission Creek Corrections Center to its institutions bargaining unit that consisted of all the corrections officers working for the department. The WFSE intervened, claiming that the employees belonged in its community corrections bargaining unit.

The Executive Director ruled that the work belongs in Local 117's bargaining unit. The Executive Director's decision did state that cases decided under Chapter 391-35 WAC take the parties and the employees as it finds them when the petition is filed. *State – Corrections*, Decision 9269, citing *City of Dupont*, Decision 4959 (PECB, 1995), *aff'd*, Decision 4959-A (PECB, 1995).¹⁰ Nonetheless, the decision considered evidence that *post-dated* Local 117's petition, such as the manner in which the employees at Mission Creek Corrections Center phased into their new positions between March and May 2005 and how Corrections reorganized its management structure in August of 2005. Thus, no firm requirement exists that precludes facts that post-date a unit clarification petition from being considered to accomplish the unit determination.¹¹

¹⁰ The *City of Dupont* decision stemmed from a representation petition filed under Chapter 391-25 WAC.

¹¹ The cases cited in *State – Corrections* deal with issues surrounding an employee's eligibility to be included in a bargaining unit based upon the confidential or supervisory exclusions. Those types of cases examine the facts as they exist at the time of the petition to ensure that employees are not precluded from exercising their collective bargaining rights based upon speculation or newly assigned duties. *Bates Technical College*, Decision 10421 (PECB, 2009), citing *City of Yakima*, Decision 9983-A (PECB, 2008).

The WFSE also relies on *Washington State University*, Decision 11180 (PSRA, 2011), for the proposition that the signing of a new collective bargaining agreement precludes consideration of events occurring subsequent to the signing of that agreement. The WFSE's reliance is equally misplaced. That case concerned a supervisory position and WAC 391-35-020(2)(b) requires that a unit clarification petition concerning a supervisory position be filed *before* the signing a collective bargaining agreement. Petitions concerning new positions or a change in circumstances have no such timing requirement.

With respect to the WFSE's assertion that the employer should not be allowed to benefit from its illegal acts, the employer's illegal actions have drawn out a prompt consideration of the various petitions at issue. Nonetheless, the Commission found that the employer had the statutory right to reorganize its workforce. *University of Washington*, Decision 11075-A. Furthermore, while the employer may have improperly considered the former PAC employees as unrepresented employees, the employer has the right to challenge the continued appropriateness through the unit clarification process notwithstanding its unfair labor practices. The employer has consistently taken the position the employees at the Contact Center should be in a separate bargaining unit as the result of its lawful reorganization.

The WFSE's motion to limit the scope of the evidence was properly denied. The circumstances surrounding a unit clarification petition may require post-petition evidence to be considered, particularly when examining a reorganization of an employer's workforce. Had the evidence been limited to the date of the WFSE's unit clarification petition, September 3, 2010, any evidence concerning the opening and operation of the Contact Center would have been precluded and this agency's ability to conduct a proper review of the existing bargaining units would have been hampered. Furthermore, the employer's and the SEIU's petitions are also timely, and limiting the scope of the evidence to the date of the WFSE's petition would have improperly precluded facts that are pertinent to those petitions from being included in the record.

ISSUE 4 – Merits of the Unit Clarification Petitions

Turning to the merits of each petition, the result sought by the WFSE and the SEIU cannot be granted and the result sought by the employer must be granted.

The WFSE's petition cannot be granted because the former PAC employees working at the Contact Center no longer have a community of interest with the employees in the Harborview bargaining unit. The WFSE cannot demonstrate that the Harborview bargaining unit is the only appropriate bargaining unit for the Contact Center employees. Additionally, the WFSE cannot demonstrate that it would be inappropriate for the Contact Center employees to stand alone as a separate bargaining unit. The same conclusion is reached regardless of whether the facts are examined at the time the WFSE filed its petition or when the employer more fully understood the changes brought about by reorganization.

The SEIU's petition cannot be granted because it cannot demonstrate that the Contact Center employees share a community of interest with the Campus-wide Non-supervisory bargaining unit and that bargaining unit is the only appropriate bargaining unit for the Contact Center employees. The creation of the Contact Center shifted the community of interest for employees performing patient access work to the Contact Center itself. While the SEIU's Campus-wide Non-supervisory bargaining unit historically performed some patient access work, it has not performed that work exclusively. Any patient access work that the Campus-wide Non-supervisory bargaining unit continues to perform is limited and not of a similar nature in either scope or substance to the employees performing patient access work at the Contact Center. The SEIU's claim that its Campus-wide Non-supervisory bargaining unit is the only logical bargaining unit for the patient access work is not supported by the record.

The employer's petition must be granted because the evidence demonstrates that the Contact Center employees now share a separate and distinct community of interest as a result of the reorganization.

Application of Standards – Unit Determination Criteria

In determining the appropriate bargaining unit, RCW 41.56.060 directs the Commission to examine the following: the duties, skills, and working conditions of the employer; the history of collective bargaining; the extent of organization among the employees and the desires of the employees. Examining each component in turn demonstrates the following:

Duties, Skills and Working Conditions –

The record demonstrates that the employees at the PAC provided services to just Harborview and its associated clinics. Patient access work at the UWMC Clinics historically was performed by employees represented by the SEIU. This record also clearly demonstrates that patient access work at the VFD was historically performed by unrepresented employees who were not eligible for collective bargaining rights.

When the Contact Center went live, it did not perform patient access work for only the Harborview Medical Center and its associated clinics. Rather, it started performing patient access services for all of UW Medicine, including UWMC and the UW Physicians Network, and the affiliated private entities. This reorganization and change to the employer patient access work is significant. Prior to the reorganization, at least two different groups of represented employees and one unrepresented group of employees performed patient access work. The affiliated private entities selected their own methods for patient access work. Patient access work was not coordinated across UW Medicine. By centralizing the patient access work to the Contact Center and giving that entity responsibility for all of the patient access work at UW Medicine, the employer has materially changed the scope of its patient access work.

The creation of the Contact Center is not an expansion of the existing PAC operation. Rather, the Contact Center is a combination of two distinct patient access operations, the PAC and VFD, as well as patient access work historically performed by the UWMC Clinics and the affiliated private entities. Although the former PAC employees are still performing patient access work at the Contact Center, the universe of clientele that they serve has vastly expanded. The former PAC employees must now be trained to take patient access calls for all of UW Medicine, and not just Harborview. The Contact Center employees' working conditions have also been altered. The

employees are now housed in a centralized office, as opposed to the decentralized work environment that existed for the PAC, VFD, and UWMC Clinics.

History of Collective Bargaining –

This record demonstrates that the WFSE has historically and successfully represented the former PAC employees. Because the employees at the VFD were not public employees eligible to collectively bargain under Chapter 41.80 RCW, the WFSE has no history of representing those employees. Additionally, the SEIU has historically represented employees at all of the UWMC Clinics who performed some patient access work.

Extent of Organization –

The evidence demonstrates that the employer's purpose for creating the Contact Center was to centralize its patient access services work to provide a more efficient, effective and uniform service focused on the patient. When patients call the centralized contact number for UW Medicine, their first contact is with an employee at the Contact Center. The only patient access work not performed by the Contact Center is performed by some employees in the Patient Service Specialist job class at the UWMC Clinics who are included in the SEIU's Campus-wide Non-supervisory bargaining unit. However, these employees are not dedicated solely to performing patient access work in a manner similar to the employees at the Contact Center. The only time that UWMC Clinics perform patient access work is when a patient calls the clinic directly. Furthermore, while these types of direct patient contacts happen occasionally at the clinics, their frequency has declined since the creation of the Contact Center, and the employees at the clinics often refer the caller to a Contact Center employee to complete the registration process.

At the time the WFSE filed its unit clarification petition, the Contact Center employees performing patient access work consisted of 29 former PAC employees and 27 former VFD employees. There were no employees in the Administrative Coordinator, Program Assistant, or Data Entry Operator job classes employed at the Contact Center at that time. At the time of the hearing, there were 116 employees in the Contact Center Representative job class, seven lead employees, two employees in the Data Entry Operator job class, and two administrative employees.

Desires of Employees –

Although “desires of the employees” is one of the unit determination criteria listed in RCW 41.80.070, testimony under oath is an inherently coercive and inappropriate method for ascertaining the desires of employees. *Valley Communications Center*, Decision 4465-A (PECB, 1994). Generally, the desires of employees are ascertained through the election process. *Central Washington University*, Decision 9963-B (PSRA, 2010).

Avoidance of Excessive Fragmentation –

Historically, the Commission considered fragmentation of the employer's workforce as one aspect of the “extent of organization” analysis. *State – Attorney General*, Decision 9951 (PSRA, 2008), *aff'd*, Decision 9951-A (PSRA, 2009). The inclusion of a unique “fragmentation” criterion in Chapter 41.80 RCW, in addition to the four unit determination criteria found in every other federal or state collective bargaining statute, must be presumed to have an explicit meaning. Chapter 41.80 RCW puts consideration of excessive fragmentation forward as a separate criterion with the same weight as the other four. *State – Attorney General*, Decision 9951. As referenced above, the employer's purpose for creating the Contact Center was to consolidate its patient access services work into one location. Thus, the employer sought to minimize its already fragmented workforce through the creation of the Contact Center.

The Appropriate Bargaining Unit

To successfully accrete the unrepresented employees at the Contact Center to either WFSE's Harborview bargaining unit or the SEIU's Campus-wide Non-supervisory bargaining unit, the WFSE and the SEIU needed to demonstrate that their respective bargaining unit was the only appropriate bargaining unit for the employees and that the employees could not stand alone as a separate bargaining unit. Based upon the change in circumstances, both the WFSE and the SEIU have failed to demonstrate both elements of the accretion test.

The Contact Center is a Distinct Entity –

The Contact Center is a distinct vertical operation within UW Medicine. All of the employees at the Contact Center perform or support the process of patient access. These employees work side-by-side in a unique work setting under common supervision. While other employees in the

employer's workforce are in similar job classes, none perform patient access work in a manner similar to the employees at the Contact Center.

The reorganization of the patient access work inextricably shifted the community of interest of the patient access work to the Contact Center. As a dedicated operation that services all of UW Medicine, the Contact Center represents an organizational move on the part of the employer to *not* identify patient access work with any facility within UW Medicine other than the Contact Center itself.¹² In reorganizing its patient access work to the Contact Center, the employer also created a distinct and separate operation within its workforce. The employees at the Contact Center are the only employees in UW Medicine who perform this level of patient access work and are in their own department. When a patient calls the Contact Center, they are calling the center itself, and not any particular clinic of Harborview, UWMC, the UW Physicians Network, or any other UW Medicine Facility that utilizes the Contact Center for patient access work.

The fact the Contact Center is a new facility separate and apart from any other UW Medicine entity also weighs heavily towards a finding that the employees at this facility be in their own bargaining unit. In *City of Bellingham*, Decision 7322-B (PECB, 2002), the City of Bellingham ceased performing dispatcher work and transferred that work to a new entity, WhatComm. A union petitioned to represent the employees at WhatComm, but the incumbent union of the transferred employees argued that those employees continued to be employees of Bellingham and included in an existing bargaining unit. The Executive Director agreed that the employees were employed by a new employer and the Commission affirmed. In reaching his conclusion that the dispatcher employees were now a separate bargaining unit, the Executive Director found that the employees were moved to a new facility that altered their previous community of interest.

¹² The WFSE claims that the Contact Center employees continue to identify with Harborview because the employees are issued Harborview Medical Center identification badges and because many of the employees still use the Harborview Medical Center's human resources staff for personnel issues. While the employees may have been issued identification badges that indicate they are Harborview Medical Center employees, those badges only provide access to the Contact Center and will not permit them to access many areas of Harborview. The fact that the employees at the Contact Center have contacted Harborview's human resources for employee assistance is also not indicative that these employees do not share their own community of interest. The testimony demonstrates that while some employees have contacted Harborview's human resources office for employee assistance, the employer demonstrated that human resources is a shared service across UW Medicine. Thus, the employees at the Contact Center could conceivably contact any of the UW Medicine human resources offices for assistance.

The community of interest that the former PAC employees shared with the Harborview bargaining unit ceased to exist when the employer reorganized its patient access work. The consolidation of patient access work to the Contact Center included more than just physically moving certain employees who continued to perform essentially the same work. The consolidation also included more than just hiring new employees to supplement an existing workforce. Rather, the employer's reorganization "reinvented" patient access work for all of UW Medicine in such a manner that it simply cannot be said that the Contact Center is an expansion of the existing PAC. Instead of a decentralized and unintegrated process that was administered by the various entities, the employer created a uniform and integrated process for patient access. This is particularly true for the affiliated private medical centers which converted their patient access software to the EPIC software so that the Contact Center could provide the affiliates patient access services. Because the employees at the Contact Center can stand alone at their own bargaining unit and the WFSE does not represent a substantial majority of those employees, accretion is not appropriate in this case.

Leaving the former PAC employees in the WFSE's Harborview bargaining unit could lead to work jurisdiction issues and inappropriate bargaining unit configurations if the unrepresented employees remain unrepresented or select a different bargaining unit. Because the employees in the Contact Center Representative job class are currently included in the WFSE's Harborview bargaining unit, that unit must be clarified to remove those employees so that all of the employees in the Contact Center Representative job class at the Contact Center have the same representational status.

The employees in the Data Entry Operator job class and the two administrative employees must also be removed from the SEIU's Campus-wide Non-supervisory bargaining unit. The WFSE and the SEIU argue that these employees do not share a community of interest with the Contact Center Representatives performing patient access work. The record demonstrates otherwise.

Unlike the employees in the Contact Center Representative job class, the Data Entry Operators do not take incoming calls from patients seeking to register or schedule patients at UW Medicine Clinics. Rather, the Data Entry Operators work with the Contact Center's Referral Team that

handles patient referrals to UW Medicine Clinics that come from outside of the UW Medicine systems. The referral team consists of employees in the Data Entry Operator and Contact Center Representative job classes. The Data Entry Operators will enter the patient's information into a queue of requests which is prioritized depending on the instructions that accompany the request. The Contact Center Representative will then attempt to contact the patient to schedule an appointment. While there may be differences in the duties of the Contact Center Representative and Data Entry Operator job classes, these are two positions that work side-by-side to accomplish their work and the Referral Team is an integrated operation within the Contact Center. Accordingly, it would be inappropriate to exclude these employees from the scope of the employer's petition.

The raw number of employees that are involved in the reorganization also leads to a conclusion that the employees at the Contact Center share a separate community of interest. At the time the Contact Center opened, approximately 29 employees transferred from the PAC at Harborview to the Contact Center.¹³ Thus, the WFSE represented only 51.7 percent of the employees performing patient access work at the Contact Center. This is not a substantial majority that would warrant accretion of the unrepresented employees to the Harborview bargaining unit.

As of November 15, 2010, 27 employees who worked at the VFD were employed at the Contact Center, and a total of 60 employees worked at the Contact Center in the newly created Contact Center Representative job class. This number does not include supervisors, managers, and employees in the Program Operations Specialist job class. At the time of the hearing, there were 116 employees in the Contact Center Representative job class, seven lead employees, two

¹³ The evidence demonstrates that as of November 15, 2010, only 23 employees who formerly worked at the PAC remained employed at the Contact Center due to attrition or other circumstances. The employer did not consider the newly hired employees who replaced the former PAC employees to be direct replacements and did not consider them to be part of the Harborview bargaining unit. During the hearing the WFSE attempted to ascertain which newly hired employees replaced the former PAC employees. The WFSE claimed that any newly hired employee who replaced a former PAC employee should also be considered a former PAC employee. Although the WFSE was unable to conclusively demonstrate which employees were direct replacements for former PAC employees, the evidence nevertheless establishes that shortly after the Contact Center opened, 29 former PAC employees who were represented by the WFSE worked at the Contact Center.

employees in the Data Entry Operator job class, and two administrative support staff employed at the Contact Center.¹⁴ These numbers call WFSE's majority status into question.¹⁵

The WFSE takes the position that the Contact Center Representative's community of interest should be judged against the entirety of its Harborview bargaining unit at the time the petition was filed. Because the Harborview bargaining unit contains over 1000 employees, including the 29 former PAC employees, the WFSE asserts that it clearly represents an overwhelming majority of employees and therefore accretion is appropriate. The WFSE's position is premised on the assumption that the patient access work as it existed at the PAC continues to be part of its Harborview bargaining unit following the reorganization and creation of the Contact Center. These arguments fail to consider the impact that reorganization had on the employer's patient access operations and the shift in the community of interest that occurred as the result of the reorganization.

Finally, a finding that the employees at the Contact Center constitute an appropriate separate bargaining unit would not unduly fragment the employer's workforce. A bargaining unit that constitutes the entirety of a vertical structure of an employer's workforce, such as a department or division, is generally considered to be an appropriate bargaining unit. For example, in *Washington State University*, Decision 9613-A (PSRA, 2007), the Commission held that a vertical bargaining unit consisting of that university's dining services was an appropriate bargaining unit. Additionally, bargaining units that encompass all employees in a single job class of an employer's workforce are horizontally structured bargaining units and are generally considered appropriate. See *University of Washington*, Decision 8392. While Commission precedent favors bargaining unit configurations that are vertical or horizontal or consist of all employees of an employer's workforce, there is no absolute requirement that employees be organized in these fashions and neither horizontal nor vertical bargaining unit configurations are presumptively appropriate. See *State – Attorney General*, Decision 9951-A (PSRA, 2009). Provided justification under the unit

¹⁴ This number does not reflect the managerial and supervisory employees. The parties stipulated at hearing that those employees are not subject to these petitions.

¹⁵ By November 15, 2010, a period of just two months, the WFSE did not represent a majority of the employees performing patient access work. See Exhibit 68.

determination criteria exists, other unit configurations are possible. Here, a bargaining unit of just the employees in the Contact Center is an appropriate vertical bargaining unit under RCW 41.80.070.

Contact Center is not an Extension of the PAC –

The record demonstrates that the WFSE's Harborview bargaining unit is no longer a logical location for the patient access work, much less the only logical location as the test requires. Although the WFSE asserts that the Contact Center is merely a continuation of the PAC and the patient access work at the Contact Center remains historical WFSE Harborview bargaining unit work, the facts demonstrate otherwise. The Contact Center is not a successor or continuation of the PAC. Rather, the Contact Center is effectively a new operation.

The Commission applies the "substantial continuity" test in examining whether a public employer is required to continue to recognize the exclusive bargaining representative of employees who are part of a newly acquired operation. The substantial continuity test evaluates whether the employer has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operation." *Bremerton-Kitsap County Health Department*, Decision 2984 (PECB, 1988), quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). The factors that are examined include (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

In *Bremerton-Kitsap County Health Department*, Decision 2984, the substantial continuity test was applied to determine whether employees transferred to a different division of the same public employer's operation should continue to be represented in a manner similar to that which existed before the transfer. There, this agency certified a bargaining unit of "all full-time and regular part-time home health aides of the employer." At the time the unit was certified, the employees in the Home Health Aid job class were included in the employer's "Home Health Services Program." The employer discontinued the Home Health Program, transferred the employees to the employer's Nursing Division, and assigned the Home Health Aide employees to a new

“Community Health Aide” job class. The employer then claimed that the employees in the Community Health Aide job class were no longer represented because the home health aide bargaining unit evaporated as a result of the transfer. However, the evidence demonstrated that the "Community Health Aide" workforce was composed entirely of employees drawn from the "Home Health Aide" classification and pre-existing bargaining unit. The employees had similar skills, some virtually identical duties, substantially the same "senior citizens" clientele, and similar supervision and working conditions. Therefore, it was found that a substantial continuity existed between the Home Health Aide and the Community Health Aide work, so the union continued to represent those employees.

Applying the substantial continuity test to this case produces a different result. The PAC and Contact Center were both in the business of providing patient access services. The employees who transferred from the PAC are essentially performing a similar type of work and are using the same EPIC computer software to perform that work. However, the supervision, work location, and clientele of the former PAC employees have been substantially altered. Additionally, the workforce of the two entities is not the same. In *Bremerton-Kitsap County Health Department*, the workforce had not been altered. At the time the Contact Center opened, two separate and distinct workforces, the former PAC and VFD employees, composed the workforce. A third workforce of newly hired patient access employees has been added on a consistent basis as more clinics are on-boarded. Thus, there is not a substantial continuity between the PAC and the Contact Center and the Contact Center is not a continuation of the former PAC operation.

Contact Center is not an Extension of UWMC and its Clinics –

The SEIU claims that the Contact Center’s patient access work is functionally integrated with the work performed by other employees in the SEIU’s bargaining unit. The SEIU over-exaggerates the factual interactions between the two groups of employees.

The record demonstrates that employees in the Patient Service Specialist job class working at certain UWMC Clinics perform some patient access work. The Patient Service Specialists at times receive calls from patients asking to schedule appointments with the specialized clinic. The Patient Service Specialist will contact the Contact Center and work with a Contact Center

Representative to register and schedule the patient. However, the level of patient access work performed by the Patient Service Specialists at the clinics has diminished since the opening of the Contact Center. The bulk of the work performed by the employees in the Patient Service Specialist job class at certain UWMC Clinics is not associated with the “front door” patient access work being performed at the Contact Center. Rather, the bulk of the Patient Service Specialists at the clinics perform work that is associated with supporting the mission of the individual clinic.

Conclusion for WFSE’s Unit Clarification Petition –

The WFSE’s unit clarification is dismissed. The result sought by the petition cannot be granted because the WFSE’s Harborview bargaining unit is no longer a logical location for the patient access work and the patient access. The evidence demonstrates that the employees in the Contact Center have their own community of interest and can stand alone as a separate bargaining unit.

Conclusion for SEIU’s Unit Clarification Petition –

The SEIU’s unit clarification is dismissed for the same reasons as the WFSE’s unit clarification petition. The result sought by the petition cannot be granted because the SEIU’s Campus-wide Non-supervisory bargaining unit is not a logical location for the patient access work and the patient access work can stand alone as a separate bargaining unit. Additionally, the evidence demonstrates that the employees in the Contact Center have their own community of interest and can stand alone as a separate bargaining unit.

Conclusion for the Employer’s Unit Clarification Petition –

Turning to the merits of the employer’s petition both as originally filed and as amended, the employer’s request to clarify that the employees at the Contact Center constitute a separate appropriate bargaining unit is granted for the same reasons that the WFSE’s and the SEIU’s petitions are denied. This record demonstrates that the reorganization of the patient access work at the Contact Center has created a separate community of interest for the employees.

Accordingly, the WFSE’s Harborview bargaining unit and the SEIU’s Campus-wide Non-supervisory bargaining unit are each clarified to exclude any employees who are working at the Contact Center. Normally, if a bargaining unit were clarified to remove positions, the position

would be unrepresented. This would be particularly true in this case since the WFSE did not represent a majority of the employees at the Contact Center when the employer filed its petition. However, because the WFSE also filed a representation petition concerning some of the employees at the Contact Center, the effects of that petition must also be determined.

ISSUE 5 & 6 – WFSE’s Representation Petition and SEIU’s Motion to Intervene

Under WAC 391-25-440, a self-determination election will be directed when one labor organization petition for a group of historically unrepresented employees and only where the resulting bargaining unit is deemed appropriate.¹⁶ The fact that the SEIU has filed a motion to intervene in the WFSE’s representation petition does not automatically render the petition inappropriate. The SEIU needed to demonstrate that the petitioned-for employees could appropriately be included in its bargaining unit for intervention to be granted.

The unit determination analysis applied to the WFSE’s unit clarification petitions demonstrates that the community of interest for the patient access work shifted away from the Harborview and Campus-wide Non-supervisory bargaining units and to the Contact Center. This is true even if the petition had been allowed to be processed through the WFSE’s request. The employer consistently took the position that the employees at the Contact Center constitute a separate bargaining unit. Had the representation petition been processed as the WFSE requested, the parties would have gone to hearing on the appropriateness of including the unrepresented employees to the WFSE’s Harborview bargaining unit and the same result would have been reached – the employees at the Contact Center have their own separate community of interest.

¹⁶ That rule states, in part: (1) Where only one employee organization seeks to add an employee or group of previously unrepresented employees to an appropriate bargaining unit, which it already represents, under this chapter and the relevant statute, the organization may petition for a self-determination election to ascertain the employees’ desire to be included in its existing bargaining unit.
(2) In order to invoke the self-determination election procedures under this section, the petitioning organization shall:
(a) Demonstrate that it has the support of at least thirty percent or more of the unrepresented employees to be included in the appropriate existing unit;
(b) Affirmatively state on the petition filed under WAC 391-25-070 that it requests a self-determination election to add the petitioned-for employees into an existing appropriate bargaining unit;
(c) Provide an accurate description of the existing bargaining unit that the petitioning organization seeks to merge the unrepresented employees into; and
(d) *Demonstrate that the resulting bargaining unit is appropriate under the appropriate statute.*

Direction of Election –

In most instances, the WFSE's representation petition would be dismissed for seeking an inappropriate bargaining unit. However, both the WFSE and the SEIU have historically represented employees that are included in the Contact Center. Additionally, both the WFSE and the SEIU have filed showing of interest cards demonstrating that they have the support of at least 30 percent of the employees at the Contact Center. None of these employees should have their collective bargaining rights extinguished without due process. *See State – Enterprise Services*, Decision 11663 (PSRA, 2013). Accordingly, the WFSE's representation petition shall be administratively amended and a representation election will be conducted for the following appropriate bargaining unit:

All full-time and regular part-time civil service employees employed by the University of Washington Contact Center, excluding supervisors, confidential employees, employees in other bargaining units, and all other employees.

The SEIU's motion to intervene in the WFSE's representation petition is granted based upon the sufficiency of the showing of interest provided. "WFSE", "SEIU", and "No Representation" shall be the three choices on the ballot and the provisions of RCW 41.80.070 and Chapter 391-25 WAC shall apply. Although an election has also been directed in this case, the employer's unit clarification has been granted. The parties appeal rights shall be governed by WAC 391-35-210.

FINDINGS OF FACT

1. The University of Washington (employer) is an institution of higher education within the meaning of RCW 41.80.005(10).
2. The Washington Federation of State Employees (WFSE) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).
3. Service Employees International Union, Local 925 (SEIU) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

4. The employer operates a medical healthcare system, UW Medicine. Under the umbrella of UW Medicine are a number of public and affiliated private healthcare entities, including but not limited to Harborview Medical Center (Harborview) and its associated clinics, the University of Washington Medical Center (UWMC) and its associated clinics, the University of Washington Neighborhood Clinics (formerly known as the University of Washington Physicians Network), Northwest Hospital and Medical Center, Valley Medical Center, Airlift Northwest, and the University of Washington School of Medicine.
5. Patient access is the process by which patients receiving services from the UW Medicine entities register their personal information, verify insurance coverage, assign payer plans, schedule patient appointments, and coordinate referrals, among other duties. Prior to 2010, Harborview, UWMC, and the UW Neighborhood Clinics each had its own procedures and process concerning patient access functions.
6. At Harborview, the Patient Access Center (PAC) coordinated patient access work for Harborview and its associated clinics. The PAC employees performing the patient access work were in the Patient Service Specialist (PSS) job class. The employees at the PAC provided services to just Harborview and its associated clinics.
7. The PAC employees who are currently represented by the Washington Federation of State Employees (WFSE) are in that union's Harborview bargaining unit.
8. At the UWMC, patient access work was decentralized and handled by the individual specialty clinics within the UWMC. Even though many of those employees were in the Patient Service Specialist job class, the employees performing patient access services at the UWMC Clinics did not exclusively perform patient access work. Those employees had other duties within the clinics. The employees performing patient access work at UWMC provided services to just UWMC and its associated clinics.
9. The employees in the Patient Service Specialist job class at the UWMC and its associated clinics are represented by the SEIU in its Campus-wide Non-supervisory bargaining unit.

10. At the UW Neighborhood Clinics, patient access was handled by the private entity known as the Virtual Front Desk (VFD). The employees at the VFD were not public employees covered by Chapter 41.06 RCW or Chapter 41.80 RCW, but they did provide many of the same services as the employees performing patient access services at Harborview and UWMC. The employees performing patient access work at the UW Neighborhood Clinics provided services to just the UW Neighborhood Clinics.
11. Patient Access at the affiliated medical centers was accomplished according to the policies of the individual center.
12. In 2009, the employer began a process of evaluating its patient access functions. It hired a private healthcare consultant, Flexsource, to review its patient access operations at UW Medicine and provide recommendations as to how it could deliver its patient access services in a more efficient, effective, and patient-centered manner. After reviewing the employer's patient access operations, Flexsource recommended that the patient access functions be centralized into a single operation to provide universal patient access services across all of the facilities within UW Medicine.
13. Based upon the Flexsource recommendation, the employer decided to consolidate its patient access service to a "Contact Center" that was viewed as a shared service for all of the UW Medicine operations, not just Harborview, UWMC, or UW Neighborhood Clinics.
14. The Contact Center is located at a new facility in downtown Seattle that is separate and apart from the other UW Medicine facilities.
15. The employer planned to fully operationalize this consolidation to the Contact Center in steps. First, the employees at the VFD providing support to the UW Neighborhood Clinics would be hired by the employer and moved to the Contact Center. Those former VFD employees would be hired as state civil service employees and covered by Chapter 41.06 RCW. At that same time, the PAC employees would be moved over to the Contact Center.

16. Patient access services for the UWMC and its clinics, the specialized Harborview clinics, and the affiliated private entities and their clinics was expected to be “on-boarded” over the course of several years with completion expected in 2013. As new clinics were on-boarded to the Contact Center, the volume of patient access calls to the Contact Center increased. The Contact Center hired additional staff as more clinics were on-boarded to the Contact Center in order to handle the increased work.
17. In March 2010, the employer informed the WFSE and the SEIU that it was consolidating its patient access services to the Contact Center consistent with the plan outlined above.
18. On March 26, 2010, the WFSE demanded to bargain the Contact Center consolidation. During the subsequent negotiations, the employer informed the WFSE that a new job class was being created for the Contact Center. The new job class, Patient Services Representative – Contact Center, would also be referred to as a “Contact Center Representative.” The employer informed the WFSE that the employees working at the PAC would need to apply for the Contact Center Representative positions if they wanted to work at the Contact Center. The employer also informed the WFSE that the employees hired for the Contact Center Representative positions at the Contact Center would not be included in the Harborview bargaining unit. The WFSE demanded that the work performed by the PAC employees remain Harborview bargaining unit work and that the PAC employees automatically become employees of the Contact Center.
19. On August 20, 2010, the employer notified the 29 PAC employees who applied for positions at the Contact Center of their appointment to positions at the Contact Center.
20. The Contact Center went “live” and started taking patient access calls on October 21, 2011. When the Contact Center opened, the employees were still using the EPIC software database.
21. An Administrative Coordinator, Program Assistant, and two employees in the Data Entry Operator job class who are included in the SEIU’s Campus-wide Non-supervisory bargaining unit transferred to the Contact Center in mid-2011.

22. At the time the Contact Center opened, approximately 29 employees transferred from the PAC to the Contact Center.
23. As of November 15, 2010, 27 employees who worked at the VFD were employed at the Contact Center, and a total of 60 employees worked at the Contact Center in the newly created Contact Center Representative job class. This number does not include supervisors, managers, and employees in the Program Operations Specialist job class.
24. At the time of the hearing, there were 116 employees in the Contact Center Representative job class, seven lead employees, two employees in the Data Entry Operator job class, and two administrative support staff employed at the Contact Center.
25. Newly hired employees in the Contact Center Representative job class were not included in any bargaining unit.
26. When the Contact Center went live, it did not perform patient access work for only Harborview Medical Center and its associated clinics. Rather, it started performing patient access services for all of UW Medicine, including UWMC and the UW Physicians Network, and the affiliated private entities.
27. The consolidation of patient access work to the Contact Center included more than just physically moving certain employees who continued to perform essentially the same work. The consolidation also included more than just hiring new employees to supplement an existing workforce. Rather, the employer's reorganization "reinvented" patient access work for all of UW Medicine in such a manner that it simply cannot be said that the Contact Center is an expansion of the existing PAC. Instead of a decentralized and unintegrated process that was administered by the various entities, the employer created a uniform and integrated process for patient access. The Contact Center is a combination of two distinct patient access operations, the PAC and VFD, as well as patient access work historically performed by the UWMC Clinics and the affiliated private entities. Although the former PAC employees are performing essentially the same duties at the Contact Center as they did at the PAC, the universe of clientele that they serve has vastly expanded. The former

PAC employees must now be trained to take patient access calls for all of UW Medicine, and not just Harborview.

28. On September 3, 2010, the WFSE filed a unit clarification petition concerning the former PAC employees working at the Contact Center. Case 23495-C-10-1439. The WFSE's petition sought a ruling that the employees transferred from the PAC are still included in the WFSE's Harborview bargaining unit regardless of a change in work title or job location since, in the WFSE's opinion, the employees were still performing bargaining unit work. On September 28, 2011, processing of the WFSE's unit clarification petition was blocked pursuant to WAC 391-35-110 pending resolution of the unfair labor practice complaint described in Finding of Fact 29.
29. On September 21, 2010, the WFSE filed an unfair labor practice complaint against the employer. The WFSE alleged: 1) that the employer failed to bargain in good faith the decision to consolidate the patient access services, and 2) that the employer removed the patient access bargaining unit work from the WFSE's Harborview bargaining unit without first providing notice and an opportunity for bargaining. Case 23515-U-10-5995.
30. On October 4, 2010, the WFSE filed a representation petition to include the newly hired VFD employees into its Harborview bargaining unit under WAC 391-25-440. On October 5, 2011, processing of the WFSE's representation petition was blocked pursuant to WAC 391-35-110 pending resolution of the unfair labor practice complaint described in Finding of Fact 29.
31. On September 23, 2011, the employer filed a unit clarification petition seeking a ruling regarding the representation status of the Contact Center employees. Case 24270-C-11-1466. Specifically, the employer sought clarification of whether the Contact Center work belongs to the WFSE's Harborview bargaining unit, the SEIU's Campus-wide Non-supervisory bargaining unit, or is unrepresented.
32. On November 16, 2011, the SEIU filed a unit clarification petition concerning the work being performed at the Contact Center. Case 24402-C-11-1472. The SEIU asserts that

the Contact Center work belongs to its Campus-wide Non-supervisory bargaining unit because the Contact Center work is similar to the work being performed by the employees in its bargaining unit. On November 22, 2011, processing of the SEIU's unit clarification petition was blocked pursuant to WAC 391-35-110 pending resolution of the unfair labor practice complaint.

33. On the first day of the hearing, the SEIU made a motion to intervene in the WFSE's representation petition. The Hearing Officer denied that motion at that time because the SEIU had not demonstrated that it had the support of at least 10 percent of the petitioned-for employees. The SEIU subsequently filed showing of interest cards demonstrating it had the support of at least 30 percent of the employees at the Contact Center.
34. During the December 6, 2012 hearing, the employer made a motion to amend its petition to include the Administrative Coordinator, a Program Assistant, and the two employees in the Data Entry Operator positions. The Hearing Officer granted the employer's motion over the objection of both the SEIU and the WFSE.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.80 RCW and Chapter 391-35 WAC.
2. Based upon Findings of Fact 17 through 28, the unit clarification petition filed by the WFSE is timely.
3. Based upon Findings of Fact 21 through 28, the unrepresented employees working at the University of Washington Contact Center cannot be accreted to the Harborview bargaining unit represented by the WFSE. The employees working at the Contact Center can stand alone as their own bargaining unit and do not belong to the Harborview bargaining unit.
4. Based upon Findings of Fact 17 through 27, and 32, the unit clarification petition filed by the SEIU, Local 925, is timely.

5. Based upon Findings of Fact 21 through 28, the unrepresented employees working at the University of Washington Contact Center cannot be accreted to the SEIU's Campus-wide Nonsupervisory bargaining unit. The employees working at the Contact Center can stand alone as their own bargaining unit and do not belong to the Campus-wide Non-supervisory bargaining unit.
6. Based upon Findings of Fact 17 through 28, the unit clarification petition filed by the University of Washington as amended is timely.
7. Based upon Findings of Fact 21 through 28, the classified employees working at the Contact Center share a community of interest and constitute an appropriate stand alone bargaining unit under RCW 41.80.070.

ORDER

1. Case 23495-C-10-1439 - The unit clarification petition filed by the Washington Federation of State Employees is dismissed.
2. Case 24402-C-11-1472 - The unit clarification petition filed by the Service Employees International Union, Local 925 is dismissed.
3. Case 24270-C-11-1466 - The unit clarification petition filed by the University of Washington is granted.
 - a. The Washington Federation of State Employees' Harborview bargaining unit is modified to remove the employees in the Patient Service Representative – Contact Center Representative job class working at the University of Washington Contact Center.
 - b. The Service Employees International Union, Local 925's Campus-wide Non-supervisory bargaining unit is modified to remove the employees in the

Administrative Coordinator, Program Assistant, and Data Entry Operator job classes.

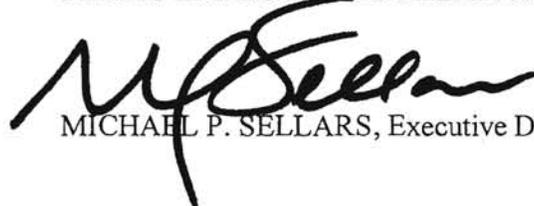
4. Case 23546-E-10-3593 - The representation petition filed by the Washington Federation of State Employees is administratively modified and a representation election shall be conducted under the provisions of Chapter 391-25 WAC for a bargaining unit described as follows:

All full-time and regular part-time civil service employees employed by the University of Washington Contact Center, excluding supervisors, confidential employees, employees in other bargaining units, and all other employees.

The Washington Federation of State Employees, Service Employees International Union, Local 925, and No Representation shall be the choices on the ballot. The eligible employees shall be those employees in the Patient Service Representative – Contact Center Representative, Administrative Coordinator, Program Assistant, and Data Entry Operator job classes who are employed at the Contact Center on the date of this order and remain employed at the time of the tally.

ISSUED at Olympia, Washington, this 13th day of August, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-35-210.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY:  ROBBIE DUFFIELD

CASE NUMBER: 23495-C-10-01439 FILED: 09/03/2010 FILED BY: PARTY 2
DISPUTE: MISC CLARIF
BAR UNIT: ALL EMPLOYEES
DETAILS: -
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
PAMELA G. BRADBURN, COMMISSIONER
THOMAS W. McLANE, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 08/13/2013

The attached document identified as: **DECISION 11834 - PSRA** has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY: *[Signature]*
SILVIA ROBBIE DUFFIELD

CASE NUMBER: 23546-E-10-03593 FILED: 10/04/2010 FILED BY: PARTY 2
DISPUTE: QCR UNORGANIZED
BAR UNIT: MISCELLANEOUS
DETAILS: -
COMMENTS:

EMPLOYER: UNIVERSITY OF WASHINGTON
ATTN: PETER DENIS
1100 NE CAMPUS PARKWAY
BOX 354555
SEATTLE, WA 98105-6207
Ph1: 206-616-3564 Ph2: 206-841-2872

REP BY: MARK YAMASHITA
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UNIVERSITY OF WASHINGTON
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Ph1: 206-543-4150 Ph2: 206-616-7935

PARTY 2: WA FED OF STATE EMPLOYEES
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PAMELA G. BRADBURN, COMMISSIONER
THOMAS W. McLANE, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

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PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY:  ROBBIE DUFFIELD

CASE NUMBER: 24270-C-11-01466 FILED: 09/23/2011 FILED BY: EMPLOYER
DISPUTE: COMMUNITY INT
BAR UNIT: ALL EMPLOYEES
DETAILS: Patient Services Specialists
COMMENTS:

EMPLOYER: UNIVERSITY OF WASHINGTON
ATTN: PETER DENIS
1100 NE CAMPUS PARKWAY
BOX 354555
SEATTLE, WA 98105-6207
Ph1: 206-616-3564 Ph2: 206-841-2872

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REP BY: MARTHA BARRON
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ATTN:

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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THOMAS W. McLANE, COMMISSIONER
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RECORD OF SERVICE - ISSUED 08/13/2013

The attached document identified as: **DECISION 11836 - PSRA** has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS
COMMISSION

EM/ S/ ROBBIE DUFFIELD

CASE NUMBER: 24402-C-11-01472 FILED: 11/16/2011 FILED BY: PARTY 2
DISPUTE: MISC CLARIF
BAR UNIT: ALL EMPLOYEES
DETAILS: -
COMMENTS:

EMPLOYER: UNIVERSITY OF WASHINGTON
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Ph1: 206-616-3564 Ph2: 206-841-2872

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REP BY: MARTHA BARRON
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1904 3RD AVE STE 1030
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Ph1: 206-623-0900

PARTY 3:
ATTN:

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