

NO. 71019-2

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

EVERETT COMMUNITY COLLEGE (COMMUNITY COLLEGE
DISTRICT NO. 5),

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSIONS and
AMERICAN FEDERATION of TEACHERS WASHINGTON, LOCAL
1873,

Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT1

 A. Substantial Evidence Does Not Support PERC’s
 Conclusion That The College Committed An Alleged
 Unfair Labor Practice.....1

 B. RCW 49.48.030 Does Not Support An Award Of
 Attorney’s Fees In Judicial Review Proceedings Under
 The Administrative Procedures Act.....6

III. CONCLUSION8

TABLE OF AUTHORITIES

Cases

<i>Heinmiller v. Dep't of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1995)	2
<i>Trachtenberg v. Dep't of Corrections</i> , 122 Wn. App. 491, 93 P.3d 217 (2004)	7

Statutes

Chapter 41.64 RCW	7
RCW 34.05.574(3)	6
RCW 49.48.030	1, 6, 7, 8

I. INTRODUCTION

The evidence in the record does not support PERC's findings that educational planners at Everett Community College perform work exclusively reserved to the faculty bargaining unit. Many of PERC's findings contradict themselves, or are based on inferences that are not supported by logic or the evidence, or are defeated by the evidence cited to support them. No unfair labor practice has occurred, and PERC's decision should be reversed. Further the superior court's order awarding attorney's fees must be reversed. There is no legal authority that supports the application of RCW 49.48.030 to judicial review proceedings pursuant to the Administrative Procedures Act.

II. ARGUMENT

A. **Substantial Evidence Does Not Support PERC's Conclusion That The College Committed An Alleged Unfair Labor Practice.**

Notwithstanding the Union's complaint that the College's recitation of the standard of review is "superficial" and "incomplete", the College and the Union agree that, to sustain its burden, the College must show that the findings made by PERC to support its order are not supported by evidence that is substantial when viewed in light of the record as a whole.

Citing to cases that do not interpret the Administrative Procedures Act, the Union characterizes substantial evidence as more than a “mere scintilla.” Brief of Respondent (Br.) at 7. The more accurate interpretation is that set forth by the Washington Supreme Court when it noted that substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). Regardless of the deference to be accorded to an administrative tribunal such as PERC, its decision must still be grounded in an objective assessment of the entire record and all of the facts before it. That did not happen in this case.

Instead, as detailed more fully in the College’s opening brief, PERC focused on bits and pieces of evidence taken out of context, and relied on assumptions and inferences—not evidence—to conclude the College committed a skimming violation. The Union does much the same in its response. For example, the Union cites to an e-mail announcing the hiring of educational planner, Jennifer Melbo, who will work with students of color, returning women, and LGBTQ students in the Diversity and Equity Center. Br. at 15-16. The Union complains, without citation to the record, that Ms. Melbo is therefore doing the work of former counselor Janice Lovelace. *Id.* This is not substantial evidence. Indeed, the record shows

that Ms. Melbo performed work previously done by classified employees and that it was not work exclusive to the bargaining unit, facts acknowledged by PERC and Dr. Lovelace. CP at 123 (Finding No. 3(e)), 124 (Finding No. 4(e)), 568, 572-74, 684.

Similarly, the Union cites to an e-mail exchange between Dr. Lovelace and Ms. Melbo regarding the College Success Foundation which the Union characterizes as “describes of the counseling work which was assigned to her [Ms. Melbo].” Br. at 16. There is no evidence in the record, however, to show that being the contact for the College Success Foundation program was ever “counseling work” or exclusive bargaining unit work. Dr. Lovelace never testified it was exclusive bargaining unit work; the only testimony on the subject was that, prior to Dr. Lovelace, the program was the responsibility of administrators and not bargaining unit employees. CP at 683-85.

The Union obfuscates and misrepresents the record when it quotes the testimony of Dean Castorena and claims that she “acknowledges that the planners were hired to replace the terminated counselors and to perform work historically performed by the counselors.” Br. at 16-20. Nowhere in the quoted testimony is there such an acknowledgement. CP at 697-703. Rather, Dean Castorena emphasized that educational planners had not assumed counselor duties and responsibilities, and did not perform

personal counseling or academic advising. CP at 698, 703. She emphasized that to the extent counselors performed any duty listed on the educational planner job description, such work was also performed by many other nonacademic employees and was not exclusive to the bargaining unit.¹ CP at 701.

Substantial evidence requires more than inferences of alleged facts extrapolated from bits and pieces of testimony and exhibits. Yet, that is precisely what occurred below. For example, substantial evidence might be testimony setting forth specific instances where educational planners were performing work which was exclusive to the faculty bargaining unit. Instead, the Union argues it was reasonable for PERC to infer educational planners performed bargaining unit work because counselors and educational planners worked in the same location (as did other employees), or because the demand for counseling services increased when the number of counselors was reduced. Br. at 23-24. To borrow the Union's analogy and apply it to the Union's argument, because the surgeon and the nurse both work in the same operating room they must be doing the same work. *See* Br. at 27. This is not substantial evidence.

¹ As detailed in the College's opening brief, the work educational planners perform with special student populations is historically the work of classified staff and is not work that is exclusive to the faculty bargaining unit. *See* Appellant's Opening Brief at 30-34.

The College agrees that the standard of review applied in this case is highly deferential to the agency fact-finder, however such deference is neither blind nor slavish. Nor does it diminish the fundamental requirement that the agency's findings of fact be supported by substantial evidence. The College and the Union appear to agree that such evidence must be viewed in light of the whole record before this Court, and must be viewed in its context. PERC is not permitted to pick and choose a bit of evidence here and a sliver of testimony there and string it together to achieve an intended result. Yet, that is precisely what occurred in the proceedings below.

When viewed as a whole, the evidence and the record here shows that educational planners performed two functions. First, they provided entry and general information about college processes, procedures, and services to new and continuing students. There is no evidence in the record to show such work is reserved to the faculty bargaining unit either under the collective bargaining agreement or past practice. There is no evidence that educational planners perform other work reserved to faculty. Second, educational planners work with special student populations performing work previously performed by classified or exempt employees. Educational planners do not perform work exclusive to the faculty bargaining unit.

Substantial evidence does not support PERC's conclusion that the Union met its threshold burden of showing that educational planners perform bargaining unit work. The evidence cited by PERC to support its conclusion does not support the findings it made, and several of the findings made by PERC are contradictory and inconsistent or based on inferences that cannot be supported by the record. *See* Appellant's Opening Brief at 22-34. There can be no finding that an unfair labor practice has occurred, and PERC's decision should be reversed.

B. RCW 49.48.030 Does Not Support An Award Of Attorney's Fees In Judicial Review Proceedings Under The Administrative Procedures Act.

The Union claims it is entitled to attorney's fees pursuant to RCW 49.48.030 because it represented its members, obtained a back pay award, and secured that relief in superior court. Br. at 36. However, the statute does not expressly authorize an attorney fee award in judicial review proceedings as required by RCW 34.05.574(3). Further, the cases relied upon by the Union are factually and procedurally distinguishable from the proceedings in this case. In each case cited by the Union, the claimant initiated the action for relief that included back wages. Here, the action was not filed by the Union. It was an action filed by the College seeking judicial review of an administrative order that concluded an unfair labor practice occurred. But for the petition for judicial review filed by the

College, there would be no “action.” Also, the superior court did not award judgment for back wages. It only entered an order affirming the decision by PERC.

The Union further argues that *Trachtenberg v. Dep’t of Corrections*, 122 Wn. App. 491, 93 P.3d 217 (2004), cited by the College in its opening brief, is limited in its application to appeals before the state Personnel Appeals Board. Br. at 39-41. It also claims that the case is further undercut because Chapter 41.64 RCW, the statute relied upon in *Trachtenberg*, has since been repealed. Br. at 41. These arguments are without merit.

First, *Trachtenberg* remains relevant as it is one of only a few cases that discuss the applicability of RCW 49.48.030 to administrative appeals. Administrative appeals are not substitutes for independent legal action. *Trachtenberg* 122 Wn. App. at 496-97. The proceeding here was not an “action” filed by the Union for a “judgment of wages” within the meaning of RCW 49.48.030. Instead, it was an action filed by the College to seek judicial review of an administrative decision. Second, *Trachtenberg* relied primarily on an analysis of RCW 49.48.030 itself in reaching its decision. The fact that Chapter 41.64 RCW has been repealed is not relevant to its holding.

The superior court misinterpreted and misapplied RCW 49.48.030 when it made an attorney fee award here, and its order awarding attorney's fees should be reversed.

III. CONCLUSION

For the reason stated herein, Everett Community College requests that the Court find that no unfair labor practice has occurred, reverse the decision of the Public Employment Commission, and reverse the order of the superior court awarding the Union attorney's fees.

RESPECTFULLY SUBMITTED this 29th day of April, 2014.

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DECLARATION OF
SERVICE

I affirm under penalty of perjury of the laws of the State of Washington that the following is true and correct to my best knowledge and belief:

1. My name is Julie Billett and I am employed as a Paralegal for counsel for appellant.

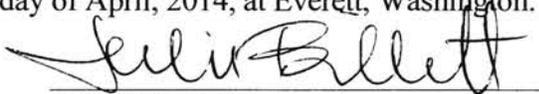
2. On April 29th, 2014, I sent via legal messenger and/or U.S. Mail a true and accurate copy of **REPLY BRIEF OF APPELLANT** to the following persons:

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