

Received
Washington State Supreme Court

JUL 02 2015

No. 91697-7

SUPREME COURT
OF THE STATE OF WASHINGTON

Ronald R. Carpenter
Clerk

Kitsap Transit,

Petitioner-Appellant,

vs.

State of Washington Public Employment Relations Commission,

Respondent-Appellee,

and

Amalgamated Transit Union, Local 1384,

Respondent-Appellee.

Filed 
Washington State Supreme Court

JUL 14 2015

Ronald R. Carpenter
Clerk 

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS

Tim Donaldson
WSBA #17128
15 N. 3rd Ave.
Walla Walla, WA 99362
(509) 522-2843
tdonaldson@wallawallawa.gov

Daniel Heid
WSBA #8217
25 W. Main St.
Auburn, WA 98001-4998
(253) 931-3030
dheid@auburnwa.gov

1. Table of Contents

CONTENTS

1.	Table of Contents	i
2.	Table of Authorities	ii
3.	Identity and Interest of Amicus	1
4.	Statement of the Case	1
5.	Argument.	3
6.	Conclusion	10

2. Table of Authorities

AUTHORITIES

Cases

Amalgamated Transit Union, Local 1384 v. Kitsap Transit, ___ Wn.App. ___, 349 P.3d 1 (2015) 3, 4, 6, 9, 10

Arnett v. Seattle General Hospital, 65 Wn.2d 22, 395 P.2d 503 (1964) 8, 9

Bagel Bakers Council of Greater New York v. N.L.R.B., 555 F.2d 304 (2nd Cir. 1977) 7

Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966) 10

Fallbrook Hospital Corp. v. N.L.R.B., 785 F.3d 729 (D.C. Cir. 2015) ... 7

Fibreboard Paper Prod. Corp. v. N.L.R.B., 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964) 8

International Ass'n of Machinists, Tool and Die Makers, Lodge No. 35 v. N.L.R.B., 311 U.S. 72, 61 S.Ct. 83, 85 L.Ed. 50 (1940) 8

Metro Seattle v. PERC, 118 Wn.2d 621, 826 P.2d 158 (1992) 4-6

N.L.R.B. v. Gissell Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969) 8

N.L.R.B. v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969) 8

Pasco Housing Authority v. PERC, 98 Wn.App. 809, 991 P.2d 1177 (2000) 4

Pasco Police Ass'n v. City of Pasco, 132 Wn.2d 450, 938 P.2d 827 (1997) 4

<i>Phelps Dodge Corp. v. N.L.R.B.</i> , 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941)	8
<i>Sever v. N.L.R.B.</i> , 231 F.3d 1156 (9th Cir. 2000)	8
<i>State ex rel. Washington Fed'n of State Employees v. Board of Trustees</i> , 93 Wn.2d 60, 605 P.2d 1252 (1980)	4-7
<i>Sure-Tan, Inc. v. N.L.R.B.</i> , 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984)	8
<i>Virginia Electric & Power Co. v. N.L.R.B.</i> , 319 U.S. 533, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943)	8

Statutes

29 United States Code § 160	7
Revised Code of Washington § 34.05.570	4
Revised Code of Washington § 41.56.160	5, 6

Rules

Rule of Appellate Procedure 13.4	4
--	---

3. Identity and Interest of Amicus

Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation organized primarily for educational purposes and the advancement of knowledge in the area of municipal law. WSAMA has no direct interest in this matter. It has an interest in the impact that this case has upon how remedies adopted by the State of Washington Public Employment Relations Commission (PERC) in unfair labor practice cases are judicially reviewed.

4. Statement of the Case

Amalgamated Transit Union #1384 (Union) filed an unfair labor practice complaint with PERC against Kitsap Transit for violating "status quo" obligations by taking certain unilateral actions that ultimately resulted in Premera Blue Cross not renewing preferred provider organization (PPO) health insurance that had been available under the most recently expired labor agreements between the parties. AR 42-46; AR 62-66; *see also* AR 825-26, art. 17, § 1; AR 885, art. 18, § 1; AR 951-52, art. 19, § 1; AR 1001-02, art. 20, § 1 (labor contract provisions re: medical insurance benefits). The non-renewal of the Premera option left Union members with only health maintenance organization (HMO) medical coverage through Group Health.

AR 46; AR 66.

A PERC hearing examiner concluded that the actions of Kitsap Transit leading to the elimination of the Premera PPO health insurance option for union members constituted unfair labor practices under RCW 41.56.140. AR 1874-93; AR 1904, ¶¶ 2-3. Among other relief, the hearing examiner ordered that Kitsap Transit "[r]estore *status quo ante* by reinstating a health insurance plan with benefit levels substantially equivalent to the December 31, 2010 Premera PPO plan or implementing another plan option as agreed upon by the union." AR 1905, ¶ 2(a). In addition, the hearing examiner ordered that Kitsap Transit pay to impacted employees any of the premium savings experienced by switching them from the Premera PPO health insurance option over to the Group Health HMO. AR 1905-06, ¶ 2(b).

Kitsap Transit appealed the hearing examiner decision to the Commission. AR 1911-12. PERC affirmed the hearing examiner's determination that the actions of Kitsap Transit constituted unfair labor practices. AR 1973-81. However, PERC determined that "the Examiner's remedy appears to be punitive." AR 1984. PERC explained that it is instead "the Commission's role to fashion remedial orders that attempt to make the aggrieved party whole." AR 1984. It rejected the hearing examiner's restoration order and the requirement that Kitsap Transit pay over any

premium savings to affected employees, and instead ordered that Kitsap Transit "reimburse the employees the difference between what would have been paid under the Premera PPO plan less any payments made under the HMO plan for all medical expenses." AR 1986.

The Union filed a petition for review of the PERC decision with the Thurston County Superior Court. CP 5-25. The Superior Court affirmed PERC. CP 410-13.

The Union appealed, and the Court of Appeals held that the "Commission's remedial order was an erroneous application of governing statutes." *Amalgamated Transit Union, Local 1384 v. Kitsap Transit*, ___ Wn.App. ___, 349 P.3d 1, 6, ¶ 29 (2015). The Court of Appeals instead agreed with the hearing examiner's order that Kitsap Transit pay over premium savings. *Kitsap Transit*, 349 P.3d 1, 7-8, ¶ 34 (2015). The Court of Appeals additionally remanded the matter to PERC to consider additional evidence upon whether restoration of health insurance benefits comparable to the Premera PPO plan should be ordered. *Amalgamated Transit Union, Local 1384 v. Kitsap Transit*, 349 P.3d 1, 6, ¶ 27 (2015).

5. Argument.

Amicus respectfully submits that the Court of Appeals reached its decision by inventing a standard of review that conflicts with this Court's

opinions in *Metro Seattle v. PERC*, 118 Wn.2d 621, 826 P.2d 158 (1992) and *State v. Board of Trustees*, 93 Wn.2d 60, 605 P.2d 1252 (1980). This Court should therefore grant Kitsap Transit's petition for review in accordance with RAP 13.4(b)(1).

The PERC decision in this matter is reviewed in accordance with standards set forth in the Administrative Procedure Act (APA). *Pasco Police Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997). The APA lists a variety of review standards that apply depending on the situation. RCW 34.05.570(3). They include an error of law standard and an arbitrary and capricious standard. RCW 34.05.570(3)(d) & (i). The Court of Appeals applied an error of law standard. *See Kitsap Transit*, 349 P.3d 1, 6, ¶ 29, 10-11, ¶ 48 (2015). Amicus submits that an arbitrary and capricious standard applies when evaluating a remedy chosen by PERC in an unfair labor practice case unless the remedy is actually unlawful (*ie* exceeds PERC's statutory authority). It further submits that the party aggrieved by a PERC remedial order bears the burden of demonstrating that order's invalidity. RCW 34.05.570(1)(a).

The state's collective bargaining statutes do not dictate that PERC adopt particular remedial measures in unfair labor practice cases. *Pasco Housing Authority v. PERC*, 98 Wn.App. 809, 814-15, 991 P.2d 1177 (2000).

They instead empower the Commission "to issue appropriate remedial orders." RCW 41.56.160(1). They designate and vest the Commission with authority "to take such affirmative action as will effectuate the purposes and policy of this chapter." RCW 41.56.160(2). This Court recognized in *State v. Board of Trustees* that "[t]he relation of remedy to policy is peculiarly a matter of administrative competence." *Board of Trustees*, 93 Wn.2d at 69. It further recognized that a determination as to remedies made by an agency legislatively designated to enforce unfair labor practice provisions "should be accorded considerable judicial deference." *Board of Trustees*, 93 Wn.2d at 68-69.

This Court further explained in *Metro Seattle v. PERC* that:

Agencies enjoy substantial freedom in developing remedies. This court in *In re Case E-368*, 65 Wash.2d 22, 29, 395 P.2d 503 (1964) (quoting 2 Am. Jur. 2d *Administrative Law* § 672 (1962)) held:

"Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, especially where a statute expressly authorizes the agency to require that such action be taken as will effectuate the purposes of the act being administered. The relation of remedy to policy is peculiarly one for the administrative agency and its special competence, at least the agency has the primary function in this regard. . . ."

PERC thus has authority to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful.

Metro Seattle, 118 Wn.2d at 634-35.

The Court of Appeals in this case acknowledged that precedent requires deference to PERC, but it then created a standard that required it to give none. The Court of Appeals reasoned that "while we owe deference to the *means* the Commission employs to accomplish its statutory duties, we owe no deference in determining whether the Commission's remedial choices accomplish the *ends* the legislature required the Commission's remedial powers to serve." *Kitsap Transit*, 349 P.3d 1, 7, ¶ 32 (2015) (emphasis in original). Amicus submits that the Court of Appeals' reasoning renders the deferential standard adopted by this Court in *Board of Trustees* and *Metro Seattle* meaningless. As this Court recognized in *Board of Trustees*, the relation of remedy to policy is not only peculiarly a matter of administrative competence, but the statutes themselves designate the agency as the entity charged with responsibility for making such determinations. *See Board of Trustees*, 93 Wn.2d at 68-69. Amicus submits that determinations made by the Commission that certain remedial measures best accomplish the ends of the collective bargaining statutes in a particular case are exactly what must be given deference.

This Court in *Board of Trustees* noticed the similarity between the remedial provisions of RCW 41.56.160 and those contained in the National

Labor Relations Act (NLRA) which vests the National Labor Relations Board (NLRB) with authority "to take such affirmative action . . . as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c); *see Board of Trustees*, 93 Wn.2d at 67-68. It further recognized that "[i]n construing state labor acts which appear to be based upon or are similar to the NLRA, decisions under that act, while not controlling, are persuasive." *Board of Trustees*, 93 Wn.2d at 67-68.

The D.C. Circuit Court of Appeals recently summarized the settled federal authority regarding the standard of review for remedial orders made by the NLRB in unfair labor practice cases:

It is well understood that "the choice of remedies is primarily within the province of the Board." "[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives." The Board's order of remedies "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." In other words, there must be "so gross an abuse of power as to be arbitrary."

Fallbrook Hospital Corp. v. N.L.R.B., 785 F.3d 729, 735 (D.C. Cir. 2015) (citations omitted); *see also Bagel Bakers Council of Greater New York v. N.L.R.B.*, 555 F.2d 304, 305 (2nd Cir. 1977) ("[T]he Board has wide discretion, subject to limited judicial scrutiny. We can reverse only if we find

that the method chosen was so irrational as to amount to an abuse of discretion . . .") (citation omitted); *accord Sever v. N.L.R.B.*, 231 F.3d 1156, 1165 (9th Cir. 2000). The D.C. Circuit Court's summary follows a long line of Supreme Court cases that explain that the statutory creation of a remedy for unfair labor practices and specific delegation of oversight for administration of that remedy to a particular agency severely limits the role of the courts when reviewing the agency's "exercise of its informed discretion" when arriving at an appropriate remedial order. *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943); *see also Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 898-99, 104 S.Ct. 2803, 2812, 81 L.Ed.2d 732 (1984); *N.L.R.B. v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63, 90 S.Ct. 417, 419-20, 24 L.Ed.2d 405 (1969); *N.L.R.B. v. Gissell Packing Co.*, 395 U.S. 575, 612-13, n.32, 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969); *Fibreboard Paper Prod. Corp. v. N.L.R.B.*, 379 U.S. 203, 216, 85 S.Ct. 398, 405-06, 13 L.Ed.2d 233 (1964); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 193-95, 61 S.Ct. 845, 852-53, 85 L.Ed. 1271 (1941); *International Ass'n of Machinists, Tool and Die Makers, Lodge No. 35 v. N.L.R.B.*, 311 U.S. 72, 82, 61 S.Ct. 83, 89, 85 L.Ed. 50 (1940).

Amicus respectfully submits that the Court of Appeals in this case did exactly what the Court in *Arnett v. Seattle General Hospital (a/k/a In re Case*

E-368) said that courts *cannot* do when reviewing remedial measures adopted by agencies in their areas of special competence:

The reasoning of the trial judge in his oral opinion modifying the tribunal order was not based on the ground that the tribunal exceeded its statutory power, or that the board's action was arbitrary or capricious, but the order was modified solely because the trial judge disagreed with the judgment exercised by the tribunal as to the necessary action to be taken in this case to effectuate the policy against further discrimination. The trial judge substituted his judgment for that of the tribunal and, in so doing, acted beyond his power.

Arnett v. Seattle General Hospital, 65 Wn.2d 22, 30, 395 P.2d 503 (1964).

The Court of Appeals admitted that it gave no deference to the judgment exercised by PERC as to the necessary action to be taken in this case to effectuate the policies of the collective bargaining statutes. *Kitsap Transit*, 349 P.3d 1,7, ¶ 32 (2015). It then proceeded to substitute the court's judgment for PERC's as to how the "ends" of the statutes should be achieved.

Kitsap Transit, 349 P.3d 1, 7-9, ¶¶ 33-40 (2015).

Amicus submits that the review standard created by the Court of Appeals invites courts to substitute their judgment for PERC's with respect to remedies. It encourages and enables anyone who disagrees with a PERC remedial order, to wholly avoid the deferential standard of review adopted by this Court in *Board of Trustees* and *Metro Seattle* by simply styling its attack as an argument that the remedy chosen by PERC does not "accomplish

the ends the legislature required the Commission's remedial powers to serve." *Kitsap Transit*, 349 P.3d 1, 7, ¶ 32 (2015). Amicus submits that the cautionary advice given by the Supreme Court in *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621, 86 S.Ct. 1018, 1027, 16 L.Ed.2d 131 (1966) is particularly applicable here:

By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency. These policies would be damaged by the standard of review articulated by the court below.

6. Conclusion

Amicus curiae requests that this court accept discretionary review, reverse the Court of Appeals, and reinstate the remedial order made by PERC below at AR 1981-86.

DATED June 26, 2015



TIM DONALDSON, WSBA
#17128
On behalf of WSAMA
Walla Walla City Attorney
15 N. Third Ave.
Walla Walla, WA 99362
(509) 522-2843
tdonaldson@wallawallawa.gov

DATED June 26, 2015



DANIEL HEID, WSBA #8217
On behalf of WSAMA
Auburn City Attorney
25 W. Main St.
Auburn, WA 98001-4998
(253) 931-3030
dheid@auburnwa.gov