University of Washington, Decision 6659 (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
CLASSIFIED STAFF ASSOCIATION, DISTRICT 925, SEIU	)	CASE 12762-C-96-797
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 6659 - PECB
	)	
UNIVERSITY OF WASHINGTON	)	ORDER OF REMAND
	)	
	)	

Theiler Douglas Drachler & McKee, by Martha Barron, Attorney at Law, appeared on behalf of the union.

Christine Gregoire, Attorney General, by Diana E. Moeller, Assistant Attorney General, and Otto G. Klein III, Special Assistant Attorney General, appeared on behalf of the employer.

The Classified Staff Association, District 925, SEIU, AFL-CIO (CSA or union), filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking a ruling concerning the propriety of actions by the University of Washington (employer) to exclude certain employees from bargaining units represented by the union. A hearing was held on July 20, 21, 22 and 23, 1998, before Hearing Officer Kenneth J. Latsch. During that hearing, 120 exhibits were identified. The parties submitted a stipulated issue on September 8, 1998, and they each then filed a brief and reply brief.

The Executive Director rules that none of the positions purportedly transferred to "exempt" status under the state civil service law since the bargaining unit(s) involved came under the coverage of

Chapter 41.56 RCW have been, or are, excluded from the bargaining unit(s) on that basis, because RCW 41.56.201 and 28B.16.015 expressly provide that the civil service law has had, and has, no further application to those employees or bargaining unit(s).

BACKGROUND

As of 1982, this employer and its classified employees were covered by a state Higher Education Personnel Law, Chapter 28B.16 RCW, administered by a state Higher Education Personnel Board (HEPB). That statute then provided:

> 28B.16.030 APPLICATION. The provisions of this chapter shall apply to all personnel of the institutions of higher education ... except those exempted under the provisions of RCW 28B.16.040.
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> 28B.16.040 EXEMPTED PERSONNEL--RIGHT OF REVERSION TO CIVIL SERVICE STATUS. The following classifications, positions, and employees of higher education ... boards are hereby exempted from coverage of this chapter:
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> (1) Members of the governing board of each institution ..., all presidents, vice-presidents and their confidential secretaries, administrative and personal assistants; deans, directors, and chairmen; academic personnel; and executive heads of major administrative or academic divisions employed by institutions of higher education; ...
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> ...
>
> (5) The governing board of each institution, ... may also exempt from this chapter, subject to the employees right of appeal to the higher education personnel board, classifications involving research activities, counseling of students, extension or continuing education activities, graphic arts or publications activities requiring prescribed academic preparation or special training, and principal assistants to executive heads of major administrative or

> academic divisions, as determined by the higher education personnel board: PROVIDED, That no nonacademic employee engaged in office, clerical, maintenance, or food and trade services may be exempted by the higher education personnel board under this provision. ...

None of the positions at issue in this proceeding were exempted from the coverage of Chapter 28B.16 RCW.

The employer's classified employees had some collective bargaining rights under Chapter 28B.16 RCW, but merely as a sub-set of their rights under the civil service system. The statute included:

> 28B.16.100 RULES--SCOPE. **The higher education personnel board shall adopt rules**, consistent with the purposes and provisions of this chapter and with the best standards of personnel administration, **regarding the basis and procedures to be followed for:**
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> (1) The dismissal, suspension, or demotion of an employee, and appeals therefrom;
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> (2) Certification of names for vacancies ...;
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> (3) Examination of all positions ...;
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> (4) Appointments;
>
> (5) Probationary periods ...;
>
> (6) Transfers;
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> (7) Sick leaves and vacations;
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> (8) Hours of work;
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> (9) Layoffs when necessary and subsequent reemployment, both according to seniority;
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> (10) **Determination of appropriate bargaining units within any institution** ..., PROVIDED, That in making such determination the board shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by the employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees;
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> (11) **Certification and decertification of exclusive bargaining representatives**: PROVIDED, That after certification of an exclusive bargaining representative and upon the representatives's

> request, the director shall hold **an election among employees in a bargaining unit to determine by a majority whether to require as a condition of employment membership in the certified exclusive bargaining representative on or after the thirtieth day following the beginning of employment or the date of such election, whichever is the later, and the failure of an employee to comply with such condition of employment constitutes cause for dismissal:** PROVIDED, FURTHER, That no more often than once in each twelve-month period after expiration of twelve months following the date of the original election in a bargaining unit and upon petition of thirty percent of the members of a bargaining unit the director shall hold **an election to determine whether a majority wish to rescind such condition of employment: ...**
>
> (12) Agreements between institutions ... and certified exclusive bargaining representatives providing for grievance procedures and **collective negotiations on all personnel matters over which the institution ... may lawfully exercise discretion;**
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> (13) Written agreements may contain provisions for payroll deductions of employee organization dues ...: PROVIDED, That nothing contained herein permits or grants any employee the right to strike or refuse to perform his official duties;
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> (14) Adoption and revision of comprehensive classification plans ...;
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> (15) Allocation ... of positions ...;
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> (16) Adoption ... of salary schedules ...;
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> (17) Training programs ...;
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> (18) Increment increases ...;
>
> (19) Providing ... veteran's preference ...;
>
> (20) Assuring that persons who are or have been employed in classified positions under Chapter 41.06 RCW will be eligible ...; and
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> (21) Affirmative action ....
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> [Emphasis by **bold** supplied.]

The State Civil Service Law, Chapter 41.06 RCW, administered by the State Personnel Board (SPB) and Department of Personnel (DOP)

established similar civil service and limited-scope collective bargaining for most employees of state general government agencies.

The scope of bargaining under Chapters 28B.16 and 41.06 RCW was very limited: Wages were controlled by legislative appropriations and HEPB/SPB salary schedules, and were not matters over which the employer could lawfully exercise discretion; normally-bargainable subjects were controlled by civil service rules; union security obligations were imposed or removed by vote of the employees, rather than through negotiation.

On April 14, 1982, the HEPB certified the union as exclusive bargaining representative of a "clerical campuswide nonsupervisory" bargaining unit within the employer's workforce. Codes and titles for 129 specific classifications were listed in the certification. There were approximately 2185 employees eligible to vote, and the union received a majority of the ballots cast. In subsequent transactions, the HEPB certified the union as exclusive bargaining representative of various additional bargaining units within this employer's workforce. Positions at issue in this proceeding were included by the HEPB in those bargaining units. The parties negotiated collective bargaining agreements in the context of Chapter 28B.16 RCW, but the union security provisions of that statute were not implemented.

On July 1, 1993, state institutions of higher education and the unions representing their employees were given the,

> [O]ption to have their relationship and corresponding obligations **governed entirely** by [Chapter 41.56 RCW] by complying with [specified notice and bargaining procedures] ....

Chapter 379, Laws of 1993, § 304(1) [emphasis by **bold** supplied].

On August 23, 1993, this employer and union filed notices with the DOP and with the Commission under that legislation, and thereupon commenced negotiating their first collective bargaining agreements under Chapter 41.56 RCW.[1]

The parties later filed notices with the DOP and the Commission, announcing they had completed negotiations on their initial collective bargaining agreements under Chapter 41.56 RCW.[2] The evidence includes copies of written and signed contracts that were effective on April 1, 1994 and July 1, 1994. All of the positions at issue in this proceeding were included in those bargaining unit(s) at that time.

Claiming authority for its actions under the civil service law, the employer declared on various subsequent dates that employees who had been included in the bargaining unit(s) were "exempt". The union initiated this proceeding to challenge those changes, and it argues that the civil service law has no further application to the employees or bargaining unit(s).

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[1] Notice is taken of the Commission's docket records for representation cases used to preserve permanent records of the transactions. Case 10652-E-93-1757 was docketed immediately. Cases 11114-E-93-1831, 11115-E-93-1832 and 11116-E-93-1833 were docketed later with the August 23, 1993 filing date, once the original request was understood to affect four separate bargaining units. Notices filed later for other bargaining units were handled in the same manner, and this docketing procedure was later codified in WAC 391-25-011.

[2] Notice is further taken of docket records showing those representation cases were closed on May 10 and June 27, 1994. Final dispositions of "voluntary recognition" reflect the parties' agreement to the relationship.

DISCUSSION

The Applicable Statute

The option for coverage under Chapter 41.56 RCW was among several provisions enacted in Chapter 379, Laws of 1993, under a title of, "AN ACT Relating to increasing flexibility of institutions of higher education to manage personnel, construction, purchasing, printing, and tuition; amending ..." (House Bill 1509).[3] Part III: Broadened a list of covered employers in RCW 41.58.020; added a definition of "institutions of higher education" to RCW 41.56.030; added RCW 41.56.023, conditionally making those institutions employers under Chapter 41.56 RCW; and then added the following operative text now codified as RCW 41.56.201 and 28B.16.015:

> 41.56.201 EMPLOYEES OF INSTITUTIONS OF HIGHER EDUCATION--OPTION TO HAVE RELATIONSHIP AND OBLIGATIONS GOVERNED BY CHAPTER. (1) At any time after July 1, 1993, an institution of higher education and the exclusive bargaining representative of a bargaining unit of employees classified under chapter 28B.16 or 41.06 RCW as appropriate may exercise their **option to have their relationship and corresponding obligations governed entirely by the provisions of this chapter** by complying with the following:
>
> (a) The parties will file notice of the parties' intent to be so governed, subject to the mutual adoption of a collective bargaining agreement permitted by this section recognizing the notice of intent. The parties shall provide the notice to the higher education personnel board or its successor and the commission;
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> (b) During the negotiation of an initial contract between the parties under this chapter, the parties' scope of bargaining shall be gov-

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[3] The title is set forth as it appears on the Certification of Enrollment filed with the Secretary of State on May 15, 1993, and in the text of the Session Laws.

erned by this chapter and any disputes arising out of the collective bargaining rights and obligations under this subsection shall be determined by the commission. If the commission finds that the parties are at impasse, the notice filed under (a) of this subsection shall be void and have no effect; and

(c) On the first day of the month following the month during which the institution of higher education and the exclusive bargaining representative provide notice to the higher education personnel board or its successor and the commission that they have executed an initial collective bargaining agreement recognizing the notice of intent filed under (a) of this subsection, **chapter 28B.16 or 41.06 RCW as appropriate shall cease to apply to all employees in the bargaining unit covered by the agreement.**

(2) **All collective bargaining rights and obligations concerning relations between an institution of higher education and the exclusive bargaining representative of its employees who have agreed to exercise the option permitted by this section shall be determined under this chapter**, subject to the following:

(a) The commission shall recognize, in its current form, the bargaining unit as certified by the higher education personnel board or its successor and the limitations on collective bargaining contained in RCW 41.56.100 shall not apply to that bargaining unit.

(b) If, on the date of filing the notice under subsection (1)(a) of this section, there is a union shop authorized for the bargaining unit under rules adopted by the higher education personnel board or its successor, the union shop requirement shall continue in effect for the bargaining unit and shall be deemed incorporated into the collective bargaining agreement applicable to the bargaining unit.

(c) Salary increases negotiated for the employees in the bargaining unit shall be subject to the following:

(i) Salary increases shall continue to be appropriated by the legislature. The exclusive bargaining representative shall meet before a legislative session with the governor or governor's designee and the representative of the

institution of higher education concerning the total dollar amount for salary increases and health care contributions that will be contained in the appropriations proposed by the governor under RCW 43.88.060;

(ii) The collective bargaining agreements may provide for salary increases from local efficiency savings that are different from or that exceed the amount or percentage for salary increases provided by the legislature in the omnibus appropriations act for the institution of higher education or allocated to the board of trustees by the state board for community and technical colleges, but the base for salary increases provided by the legislature under (c)(i) of this subsection shall include only those amounts appropriated by the legislature, and the base shall not include any additional salary increases provided under this subsection (2)(c)(ii);

(iii) Any provisions of the collective bargaining agreements pertaining to salary increases provided under (c)(i) of this subsection shall be subject to modification by the legislature. If any provision of a salary increase provided under (c)(i) of this subsection is changed by subsequent modification of the appropriations act by the legislature, both parties shall immediately enter into collective bargaining for the sole purpose of arriving at a mutually agreed upon replacement for the modified provision.

(3) Nothing in this section may be construed to permit an institution of higher education to bargain collectively with an exclusive bargaining representative concerning any matter covered by: (a) Chapter 41.05 RCW, except for the related cost or dollar contributions or additional or supplemental benefits as permitted by chapter 492, Laws of 1993; or (b) chapter 41.32 or 41.40 RCW. [1993 c 379 § 304.]

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28B.16.015 OPTION TO HAVE RELATIONSHIP AND OBLIGATIONS GOVERNED BY CHAPTER 41.56 RCW. At any time after July 1, 1993, an institution of higher education and the exclusive bargaining representative of a bargaining unit of employees classified under this chapter or chapter 41.06

> RCW as appropriate may exercise their **option to have their relationship and corresponding obligations governed entirely by the provisions of chapter 41.56 RCW,** by filing notice of the parties' intent to be so governed, subject to the mutual adoption of a collective bargaining agreement recognizing the notice of intent. The parties shall provide notice to the board or its successor and the public employment relations commission. On the first day of the month following the month during which the institution of higher education and the exclusive bargaining representative provide notice to the board or its successor and the public employment relations commission that they have executed an initial collective bargaining agreement recognizing the notice of intent, **this chapter shall cease to apply to all employees in the bargaining unit covered by the agreement, and all labor relations functions of the board or its successor with respect to these employees shall be transferred to the public employment relations commission.** [1993 c 379 § 310.]
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> [Emphasis by **bold** supplied.]

Importantly, no route back to civil service was provided by Chapter 379, Laws of 1993 for any "option-exercised" bargaining unit or employees, either at the behest of: The employer alone, the union alone, the employer and union together, or even the employees themselves.[4]

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[4] Conversely, nothing in Chapter 41.56 RCW precludes ongoing Commission jurisdiction over "option" employees who later change or decertify their union. RCW 41.56.040 guarantees covered employees a right to representatives ***of their own choosing***, which includes the right to choose no representation, and RCW 41.56.070 permits employees to change or decertify exclusive bargaining representatives, subject only to the "certification bar" for one year and the "contract bar" for up to three years. Employees who choose "no representation" at one point in time have the right to choose an exclusive bargaining representative later, subject only to the "certification bar".

Chapter 41.56 RCW and its Administration

The parties to this case knew or should have known what they were getting into when they exercised the option made available to them by Chapter 379, Laws of 1993, so it is appropriate to review the legal context for their collective bargaining relationship in their adopted environment under Chapter 41.56 RCW. Their rights and obligations under Chapter 41.56 RCW differ markedly from their rights and obligations under the civil service system.

When the Public Employees' Collective Bargaining Act originated, as Chapter 108, Laws of 1967 ex. sess., it only covered units of local government and their employees. RCW 41.56.020. The statute was administered by the Department of Labor and Industries from its enactment through December 31, 1975.

The administration of Chapter 41.56 RCW was transferred to the Public Employment Relations Commission on January 1, 1976:

> RCW 41.58.005 INTENT--CONSTRUCTION. (1) It is the intent of the legislature by the adoption of this 1975 amendatory act to provide, in the area of public employment, for the **more uniform and impartial** (a) adjustment and settlement of complaints, grievances, and disputes arising out of employer-employee relations and, (b) selection and certification of bargaining representatives by transferring jurisdiction of such matters to the public employment relations commission from other boards and commissions. It is further the intent of the legislature, by such transfer, to achieve **more efficient and expert administration of public labor relations** administration and to thereby ensure the public of quality public services.
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> (2) Nothing contained in this 1975 amendatory act shall be construed to alter any existing collective bargaining unit or the provisions of any existing bargaining agreement.

> (3) Nothing contained in this 1975 amendatory act shall be construed to alter any power or authority regarding the scope of collective bargaining in the employment areas affected by this 1975 amendatory act, but this amendatory act shall be construed as transferring existing jurisdiction and authority to the public employment relations commission.
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> (4) Nothing contained in this 1975 amendatory act shall be construed to prohibit the consideration or adjustment of complaints or grievances by the public employer.

[Emphasis by **bold** supplied.]

The Commission took the "more uniform and impartial ... more efficient and expert" intent as warranting a fresh look at various issues, and did not consider itself bound by the practices of its predecessor agencies.[5] RCW 41.59.110(2) also requires the Commission to consider the rules, practices and precedents of the National Labor Relations Board (NLRB). The Commission implemented those directives by adopting consolidated rules which are as uniform as possible in light of differences among the statutes.[6] Additionally, the Commission and the Washington courts rely, in their interpretation of state collective bargaining laws, upon NLRB

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[5] On January 1, 1976, the Commission took over administration of: Chapters 41.56 RCW (local government), 49.08 RCW (private sector), and 53.18 RCW (port districts), which had been administered by L&I; Chapter 28B.52 RCW (community college faculty), which had been administered by the State Board for Community College Education; Chapter 47.64 RCW (Washington State Ferries), which had been administered by a Marine Employees Commission; and Chapter 41.59 RCW (K-12 teachers), which replaced a repealed law (Chapter 28A.72 RCW) which had been administered by the Superintendent of Public Instruction.

[6] Chapters 391-08 WAC (Practice and Procedure); 391-25 WAC (Representation Cases); 391-35 WAC (Unit Clarification Cases); 391-45 WAC (Unfair Labor Practice Cases); 391-55 WAC (Impasse Resolution); 391-65 WAC (Grievance Arbitration); and 391-95 WAC (Union Security Dispute).

and federal court precedents interpreting similar provisions of the National Labor Relations Act (NLRA). Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1984).

The Scope of Bargaining -

Collective bargaining under Chapter 41.56 RCW covers substantially broader subjects than the "matters over which [employers] may lawfully exercise discretion" scope under the civil service laws:

> RCW 41.56.030 DEFINITIONS. As used in this chapter:
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> ...
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> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to **grievance procedures and** collective negotiations on **personnel matters, including wages, hours and working conditions,** which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ....

[Emphasis by **bold** supplied.]

The scope of bargaining under Chapter 41.56 RCW is very similar to that which exists under the NLRA.[7] Even where civil service rules

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[7] Chapter 41.56 RCW is applicable in port districts, under RCW 53.18.015, except as provided otherwise in Chapter 53.18 RCW. Chapter 41.56 RCW is applicable in public utility districts under Public Utility District 1 of Clark County v. PERC, 110 Wn.2d 114 (1988), except as provided otherwise in RCW 54.04.170 and 54.04.180. Chapters 41.59 and 28B.52 RCW use "wages, hours and other terms and conditions of employment" language virtually identical to the NLRA.

are in place, matters within "wages, hours and working conditions" can be mandatory subjects of bargaining. City of Yakima, Decision 3503-A (PECB, 1990); affirmed 117 Wn.2d 655 (1991).[8]

Grievance Procedures -

Different from the situation under the civil service laws, where the HEPB and SPB adopted rules establishing themselves as the exclusive forums for resolving grievances, procedures for the resolution of day-to-day workplace issues are a mandatory subject of collective bargaining under Chapter 41.56 RCW. In addition to the specific mention of grievance procedures within the definition of "collective bargaining", Chapter 41.56 RCW includes:

> RCW 41.56.122 COLLECTIVE BARGAINING AGREEMENTS--AUTHORIZED PROVISIONS. **A collective bargaining agreement may:**
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> ...
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> (2) **Provide for binding arbitration** of a labor dispute arising from the application or the interpretation of the matters contained in a collective bargaining agreement.
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> ***
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> RCW 41.56.125 ARBITRATORS--SELECTION--ADDITIONAL METHOD. In addition to any other method for selecting arbitrators, **the parties may request the public employment relations commission to, and the commission shall, appoint** a qualified person who may be an employee of the commission to act as an arbitrator to assist in the resolution of a labor dispute between such public employer and such bargaining representative arising from the application of the matters contained in a collective bargaining agreement.

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[8] RCW 41.56.100 excludes matters from bargaining in local government, if they are delegated to a civil service system similar in scope, structure and authority to the board created by Chapter 41.06 RCW. Local civil service systems rarely rise to that level.

> The arbitrator shall conduct such arbitration of such dispute in a manner as provided for in the collective bargaining agreement: PROVIDED, That the commission shall not collect any fees or charges from such public employer or such bargaining representative for services performed by the commission under the provisions of this chapter: PROVIDED FURTHER, That the provisions of chapter 49.08 RCW shall have no application to this chapter.

[Emphasis by **bold** supplied.]

RCW 41.58.020(4), which applies to all of the statutes administered by the Commission, also replicates Section 203(d) of the federal Labor-Management Relations Act of 1947 (Taft-Hartley Act), saying:

> (4) Final **adjustment by a method agreed upon by the parties** is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. ....

The Commission thus provides lists of arbitrators from its Dispute Resolution Panel under WAC 391-55-110 and 391-65-090, and makes its staff available under RCW 41.56.125 and WAC 391-65-070, but the Commission itself does not become involved in the resolution of grievances or appeals from arbitration awards. Seattle School District, Decision 4917 (EDUC, 1994), citing Vancouver School District, Decision 197 (PECB, 1977).

Union Security -

Different from the "by employee vote" approach of the civil service laws, union security is bargained for under Chapter 41.56 RCW:

> 41.56.122 COLLECTIVE BARGAINING AGREEMENTS -- AUTHORIZED PROVISIONS. **A collective bargaining agreement may:**

> **(1) Contain union security provisions: PROVIDED, That nothing in this section shall authorize a closed shop provision:** PROVIDED FURTHER, That agreements involving union security provisions must safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member. Such public employee shall pay an amount of money equivalent to regular union dues and initiation fee to a nonreligious charity or to another charitable organization mutually agreed upon by the public employee affected and the bargaining representative to which such public employee would otherwise pay the dues and initiation fee. The public employee shall furnish written proof that such payment has been made. If the public employee and the bargaining representative do not reach agreement on such matter, the commission shall designate the charitable organization. When there is a conflict between any collective bargaining agreement reached by a public employer and a bargaining representative on a union security provision and any charter, ordinance, rule, or regulation adopted by the public employer or its agents, including but not limited to, a civil service commission, the terms of the collective bargaining agreement shall prevail.
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> [Emphasis by **bold** supplied.]

There is no authority in the statute for imposition or removal of union security obligations by other means. Early in its history, the Commission dismissed a petition for an election to de-authorize a negotiated union security provision, noting that Chapter 41.56 RCW does not contain any language comparable to Section 9(e) of the NLRA.[9] North Olympic Library System, Decision 117 (PECB, 1976). While the Commission adopted or amended rules on many subsequent

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[9] The NLRA permits employees to "de-authorize" a negotiated union security clause, but does not permit them to implement such a clause by election, absent a negotiated agreement.

occasions, it has never adopted any rules for either implementing or deauthorizing union security by employee vote.[10]

Unit Determination -

The determination of appropriate bargaining units is a function delegated by the Legislature to the Commission in RCW 41.56.060. While parties may agree on units, unit determination is not a subject for bargaining in the mandatory/permissive/illegal sense, and parties' agreements are not binding on the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

When grouping employees for bargaining, the Commission first applies the "duties, skills and working conditions", "history of bargaining", and "extent of organization" criteria. Individual employees do not have the right to opt into or out of bargaining units. Under WAC 391-25-530(1) and Commission precedent,[11] secret-ballot unit determination elections are used, when appropriate, to assess the "desires of employees" on a unit-wide basis. Chapter

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[10] Union constitutions/bylaws may require ratification of negotiated agreements by bargaining unit members, but the collective bargaining statutes themselves do not impose such requirements. Naches School District, Decision 2516 (EDUC, 1987).

[11] Port of Seattle, Decision 3937 (PECB, 1991) included:

> Neither the showing of interest ... nor the testimony of individual employees is relied upon to assess the "desires of employees" for purposes of RCW 41.56.060. City of Seattle, Decision 781 (PECB, 1979). Rather, the confidentially of employee views on such sensitive matters will be protected by conducting a unit determination election when it is necessary to make an assessment of employee preference. Oak Harbor School District, Decision 1319 (PECB, 1981).

391-35 WAC permits employers and exclusive bargaining representatives to obtain "clarification" of existing bargaining units, but individual employees (including those who do not like the representative chosen by majority vote in their bargaining unit, or who seek to avoid union security obligations) cannot invoke that procedure to have themselves removed from a bargaining unit. Port of Seattle, Decision 3247 (PECB, 1989).

Preservation of "Unit Work" -

A recurring theme in precedents dating back to South Kitsap School District, Decision 472 (PECB, 1978) is that the description of an appropriate bargaining unit also defines a body of "unit work". An employer cannot transfer unit work to its own employees outside of that bargaining unit (termed "skimming") or to employees of another employer (termed "contracting out"), unless it has satisfied its notice and bargaining obligations. The same obligations apply whether the work is at the entry level,[12] at the highest level in the bargaining unit,[13] involves an entire operation,[14] or involves new work.[15] Important for purposes of this case, these precedents reinforce the principle that employers are not at liberty to alter the scope of a bargaining unit under Chapter 41.56 RCW.

Exclusions from Coverage -

The Commission charted a new course for administrative interpretation of Chapter 41.56 RCW. Writing in a case where an employer sought to exclude all members of a separate bargaining unit of

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[12] See, City of Kennewick, Decision 482-B (PECB, 1980).

[13] See, City of Mercer Island, Decision 1026, 1026-B (PECB, 1982).

[14] See, City of Vancouver, Decision 808 (PECB, 1980).

[15] See, Community Transit, Decision 3069 (PECB, 1988).

supervisors from the coverage of the statute, the Commission stated:

> **None of these employees were elected by popular vote. None were appointed to office** pursuant to statute, ordinance or resolution for a specified term by the executive head or body of the public employer, in this case the City of Tacoma. **None performs duties as deputy, administrative assistant or secretary necessarily implying a confidential relationship** to the executive head or body of the applicable bargaining unit, or to any person elected by popular vote or appointed to office for a specified term by the executive head or body of the City of Tacoma.
>
> **When Chapter 41.56 was enacted, the Legislature** had before it the National Labor Relations Act with years of interpretation and application. It chose to reject these precedents and **enacted very narrow exclusions from the term "public employee". The statutory language is not ambiguous.**
>
> While the Department of Labor and Industries administered this chapter, it saw fit to recognize a classification of managerial employees. We see no statutory basis for such identification.

City of Tacoma, Decision 95-A (PECB, 1977) [emphasis by **bold** supplied].

The Supreme Court of the State of Washington was then considering an appeal from a Department of Labor and Industries decision in another case involving a separate unit of supervisors, and the Commission informed the Supreme Court of the change of administrative interpretation. A unanimous Supreme Court thereafter wrote:

> The pertinent section of RCW 41.56.030 provides:
>
> (2) "Public employee" means any employee of a public employer except any person (a) elected by popular vote, or (b) appointed to office pursuant to

> statute . ... or (c) *whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit*, or any person elected by popular vote or appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer.
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> (Italics ours.)

It is conceded that the head of the bargaining unit is the director of Metro Transit, ... **None of the positions involved carries the title "deputy", "administrative assistant", or "secretary".**

Unless the positions involved fall within one of these categories, the persons holding them are not excluded from the definition of "public employee" under the act. Furthermore, even if they fit one or more of the categories named in the statute, the persons holding them are nevertheless public employees if their duties do not necessarily imply a confidential relationship with the director of Metro Transit.

...

The legislative purpose is not achieved by engrafting upon the statute an exception which is not contained within its terms and by perpetuating that error under the banner of stare decisis.

The director's decision to exclude supervisors, as well as deputies, administrative assistants, and secretaries, appears to have had its genesis in the notion that a supervisor is more like an employer than an employee because he exercises authority over other employees. He found a legislative intent to exclude such employees in the language of RCW 41.56.030(1), ... Since a supervisor acts on behalf of the employer, the director reasoned, he must be an employer within the definition. This theory was presented to the United States Supreme Court when it was called upon to interpret the National Labor Relations Act as it existed in 1935, in Packard Motor Car Co. v. National Labor Relations Bd., 330 U.S. 485, 91 L. Ed. 1040, 67 S. Ct. 789

> (1947). That act listed no exceptions to the definition of "employee", and the court was asked to declare that a foreman was excepted because he came within the statutory definition of "employer". 49 Stat. SS 2(2), at 450 (1935) read: "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly ..."
>
> Reading the provision in the context of the act, **the court found no room for a construction which would deny the organizational privilege to employees because they act in the interest of the employer.** Every employee, the court said, from the very fact of employment in the master's business, is required to act in his interest. The purpose of the act, the court said, was obviously to render employers responsible for any unfair labor practices of any persons performed in their interests.
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> The Public Employees' Collective Bargaining Act is of the same import. RCW 41.56.100 requires a public employer to engage in collective bargaining with the exclusive bargaining representative.

Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977) [emphasis by *italics* in original; emphasis by **bold** supplied].

The next year, the Supreme Court reinforced a restrictive reading of the exclusions from Chapter 41.56 RCW. Responding to an attempt to characterize fire department battalion chiefs (who clearly were supervisors) as "confidential" employees, the Supreme Court wrote:

> **When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employee's potential misuse of confidential employer labor relations policy and a conflict of interest.**
>
> This concern is clearly expressed in the Educational Employment Relations Act, RCW 41.59. Although not controlling here, it contains an instructive definition of the confidential employee. ... RCW 41.59.020(4)(c)(i) and (ii).

> Were we to significantly alter this definition in interpreting RCW 41.56.030(2), an anomalous result would occur. RCW 41.59 applies only to certificated personnel. RCW 1.59.020(4). And, noncertificated school district secretaries or administrative assistants are conceivably covered by RCW 41.56.030(2). Thus, unless RCW 41.56.030(2) is interpreted consistently with RCW 41.59.020(4)(c), noncertificated personnel who participate in formulation of labor relations policy would be granted the right to collectively bargain. By a consistent interpretation of the two statutes this result would be avoided. Indeed, this has been recent administrative practice. [Edmonds School District, Decision 231 (PECB, 1977)].
>
> Finally, while dissimilarities between public and private employees led to Washington's failure to adopt Labor Management Relations Act standards, **over the years the term confidential, when used with reference to employees, has become something of a term of art in the law** which developed from that act. The meaning it has acquired in labor law, including public employment law, accords both with that given it by Washington's legislature in RCW 41.59.020(4)(c) and the interpretation we give to RCW 41.56.030-(2). ....
>
> **We hold that in order for an employee to come within the exception of RCW 41.56.030(2), the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit** or public official. The nature of this close association must concern the official and policy responsibilities of the public officer or executive head of the bargaining unit, **including formulation of labor relations policy.** General supervisory responsibility is insufficient to place an employee within the exclusion.

IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978) [emphasis by **bold** supplied].

In City of Richland, supra, and numerous subsequent cases, the Commission has: (1) Implemented the reference to Packard Motor Car

in METRO, supra, by excluding supervisors from the bargaining units containing their subordinates; (2) has created separate units of supervisors; and (3) has applied a "labor nexus" test to evaluate claims of confidential status. Important for purposes of the case at hand, those terms of art and precedents stand entirely separate from any exemptions from civil service in former RCW 28B.16.040(1) and in RCW 41.06.070.

Nor is there room in Chapter 41.56 RCW for exemptions at the option of the employer. Chapter 41.56 RCW contains no provisions comparable to former RCW 28B.16.040(5) or to RCW 41.06.070(2).

Expansions of Commission Jurisdiction

The parties to this case also knew, or should have known, that the Commission's established practices and precedents would be applied to them if they exercised the option made available by Chapter 379, Laws of 1993. The Legislature had chosen to amend the collective bargaining laws administered by the Commission on several occasions since 1976 (including one directly involving this employer), and the Commission honored the "uniform" intent of RCW 41.58.005 in each such instance. The examples include:

- When legislation enacted in 1983 dove-tailed Chapters 41.56 and 53.18 RCW,[16] the principles applied to that clientele segment were the same as those applied to other clientele. See, Port of Seattle, Decision 4042 (PECB, 1992), citing City of Olympia, Decision 1208-A (PECB, 1982) and Clallam County vs. PERC, 43 Wn.App. 589, 599 (1986).

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[16] Chapter 287, Laws of 1983, codified as RCW 53.18.015. Chapter 53.18 was enacted in 1967 as a separate law covering port districts and their employees, and was administered by the Commission after January 1, 1976.

- When legislation enacted in 1984 extended interest arbitration to law enforcement officers employed by counties with populations of 70,000 to 499,999,[17] proceedings were conducted under the same rules historically applicable to other clientele.[18]

- When legislation enacted in 1987 added the Washington State Patrol and its troopers to the coverage of Chapter 41.56 RCW,[19] separate rules were adopted for a unique fact-finding process,[20] but other rules and principles applied to that clientele segment were the same as those applied to other clientele. See, Washington State Patrol, Decision 4040 (PECB, 1992), citing Okanogan County, Decision 2252 (PECB, 1986) and City of Seattle, Decision 3593-A (PECB, 1991).

- When legislation enacted in 1987 increased the collective bargaining rights of community college faculty,[21] the principles applied to that clientele segment were the same as those applied to other clientele. See, Green River Community College, Decision 4008 (PECB, 1992), citing Spokane School

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[17] Chapter 150, Laws of 1984.

[18] The history information printed by the Code Reviser at the end of each Washington Administrative Code rule reveals no changes to pertinent rules (e.g., WAC 391-55-200) from 1980 until 1996.

[19] Chapter 135, Laws of 1987.

[20] In 1988, a subchapter of rules (WAC 391-55-400 et seq.) which had been adopted to regulate a repealed fact finding procedure under Chapter 28B.16 RCW (see next item) was amended to instead regulate fact-finding for Washington State Patrol troopers. Those rules were repealed in 1996, when the fact-finding procedure was replaced by a statutory amendment extending interest arbitration to the same clientele segment.

[21] Chapter 314, Laws of 1987.

District, Decision 310-B (EDUC, 1978) and Fort Vancouver Regional Library, Decision 2350-A (PECB, 1986).

- When legislation enacted in 1987 added the University of Washington and its printing craft employees to the coverage of Chapter 41.56 RCW,[22] the principles applied to that clientele segment were the same as those applied to other clientele. See, University of Washington, Decision 3499 (PECB, 1990), citing Grant v. Spellman, 99 Wn.2d 815 (1983).

- When legislation was enacted in 1989 to add district courts to the coverage of Chapter 41.56 RCW,[23] and again in 1992 to add superior courts to the coverage of Chapter 41.56 RCW,[24] the judges were treated as separate employers per the specific terms of that legislation, but the principles applied to that clientele segment were otherwise the same as those applied to other clientele. See, Yakima County, Decision 4105 (PECB, 1992), citing City of Tacoma, Decision 95-A (PECB, 1977); METRO, supra; City of Richland, supra; and City of Yakima v. IAFF, 91 Wn.2d 101 (1978).

- When legislation enacted in 1991 transferred five vocational-technical institutes to the state higher education system (as technical colleges),[25] the principles applied to that clientele segment were the same as those applied to other clientele. See, Clover Park Technical College, Decision 4070 (CCOL, 1992), citing Chapter 41.56 RCW and Grant v. Spellman, supra.

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[22] Chapter 484, Laws of 1987. Those employees had been excluded, historically, from the coverage of Chapter 28B.16 RCW.

[23] Chapter 275, Laws of 1989.

[24] Chapter 36, Laws of 1992.

[25] Chapter 238, Laws of 1991.

Thus, exceptions were made only where some deviation from uniformity was specifically required by the legislation.

The Environmental Context of 1993 HB 1509

The Executive Director is not persuaded by the employer's characterization of the history, intent and effect of the legislation under which these bargaining units came to be subject to Chapter 41.56 RCW. The employer's opening brief includes,

> The University has multiple funding sources and receives less than a quarter of its funding from state appropriations. With so much of its funding subject to grants, the UW is constantly having to reallocate and change positions, depending on funding constraints and requirements. For all of these reasons, issues of local autonomy and local flexibility are extremely important to the University as a whole.

While that provides insight into the employer's desire to escape from the strictures of the civil service system, it does not negate that Chapter 41.56 RCW imposes other limitations on employers.

A Long History of Legislative Debate -

Concepts such as limiting or ending civil service coverage for employees of this employer, or granting them full-scope collective bargaining rights, did not spring forth fully-developed in the halls of the Legislature in 1993. Several bills that were before the Legislature in prior years would have modified the civil service and/or collective bargaining rights of state general government and higher education employees. For example:

- 1978 SB 3040 would have deleted the authority of the HEPB and SPB to adopt rules on collective bargaining, and would have

added employees covered by Chapters 28B.16 and 41.06 RCW to the coverage of Chapter 41.56 RCW.

- 1979 HB 853 was similar to 1978 SB 3040.
- 1980 SB 3547 would have provided legislative ratification of an "interest arbitration" process adopted in HEPB and SPB rules without specific legislative authority.[26]
- 1981 SB 3166 would have merged the two civil service systems into one, under the SPB.
- 1982 SB 4954 was similar to 1978 SB 3040.
- 1983 HB 128 would have directed higher education institutions and state agencies to negotiate wages and benefits with unions representing their employees, subject to ratification of a proposed constitutional amendment requiring the Legislature to appropriate funds to enforce negotiated agreements.
- 1983 HB 651 would have replaced the HEPB, SPB, DOP and Personnel Appeals Board (PAB) with a new agency to administer civil service, and would have created a separate labor relations board to administer a new collective bargaining process for state employees.
- 1983 HB 778 would have merged the two civil service systems into one, under the SPB.
- 1983 HB 792 was similar to 1978 SB 3040.
- 1983 SB 3200 was similar to 1983 HB 128.
- 1983 SB 4143 was similar to 1978 HB 3040.

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[26] See, Green River Community College v. HEPB, 95 Wn.2d 108 (1980), where the Supreme Court overruled the objections of an institution of higher education covered by Chapter 28B.16 RCW, and affirmed the validity of those rules.

- 1984 HB 1553 was similar to 1983 HB 651.
- 1985 HB 125 was similar to 1983 HB 778.
- 1985 HB 913 was similar to 1983 HB 651.
- 1985 HB 1163 would have created an office of employee relations in the Governor's office; would have abolished the HEPB, SPB, and PAB; and would have made the Public Employment Relations Commission responsible for both personnel appeals and administration of an expanded scope of collective bargaining for state employees.
- 1985 SB 3190 was similar to 1983 HB 778.
- 1987 HB 1211 would have created a state human resources board to replace the HEPB, SPB, and PAB, and to administer the limited-scope collective bargaining process.
- 1989 HB 1557 and 1989 SB 5718 would each have created a State Employees' Relations Board to administer a full-scope collective bargaining process for state employees; would have abolished the PAB and HEPB; and would have merged the civil service systems under the SPB. HB 1557 was extensively debated in the Legislature. A striking amendment considered in the Senate Economic Development and Labor Committee would have substituted the Public Employment Relations Commission for the new State Employees' Relations Board.
- 1989 SB 5140 would have abolished the SPB, transferred its rulemaking authority to a director appointed by the Governor, and transferred its other authority to the PAB.
- 1989 SB 6084 would have placed state employees under Chapter 41.56 RCW, while simultaneously deleting the authority of the HEPB and SPB to adopt rules on collective bargaining processes and several normally-bargainable subjects.

- 1991 HB 1655 and 1991 SB 5545 would have created a separate state employee collective bargaining law administered by a new State Employees' Relations Commission; would have merged the civil service systems under the SPB; and would have abolished the PAB. HB 1655 was extensively debated in the Legislature.

While none of those bills became law, even casual observers should have known that state employee collective bargaining was by no means a resolved or closed subject. There is substantial basis for an inference that this employer knew there was a strong possibility it could be swept into a merged system that it would like even less than the civil service system which had existed to that time under the HEPB and Chapter 28B.16 RCW.

The Parties' Actions Preceding 1993 HB 1509 -

The Commission's decision in an earlier case involving this employer and union described the origins of 1993 HB 1509:

> The primary initiators behind HB 1509 were the very employer and union participating in this proceeding. ... The employer viewed some state laws as burdensome, expensive to comply with, and although originally designed to assist it with various problems, instead causing more difficulties. The employer felt that it could become more efficient by increasing its flexibility under certain state laws. During the summer and fall of 1992, Representative Gary Locke visited the employer's campus soliciting ideas on how to create more flexibility for institutions of higher education. Locke later would become the prime sponsor of HB 1509.
>
> The employer and union held their first face-to-face meeting to discuss HEPB issues on November 25, 1992. The meeting was more in the nature of a "brainstorming" format, and included the sharing of common problems and a search for shared solutions. Included among the problems identified were the cumbersome nature of HEPB rules and process, the limited nature of collec-

tive bargaining under the HEPB, and the parties' mutual frustrations with not being able to find local solutions to local problems.

On December 10, 1992, the parties met again to discuss conceptual ideas for draft legislation under a decentralized collective bargaining model. Those ideas reflected the type of structure that is provided for in the K-12 system. [footnote omitted] The parties' developing ideas had two significant parts: 1) Collective bargaining and labor relations functions would be moved from the HEPB to the Commission. 2) Parties would be provided with an option to change from civil service to full-scope bargaining under the Commission. ...

...

... The employer sought to achieve several objectives through the "Employment Relations" portion of HB 1509. First, it wanted to improve its labor management relations. As [the employer's director of government relations, Robert] Edie stated:

> We had been becoming frustrated over time with the constraints of the civil service system and a severely constrained bargaining structure which left little room for the parties to negotiate and often led to a very unproductive type of bargaining, which is the union asking for changes that we considered to be management rights, the management of the University digging in its heels because it didn't have anything else to negotiate and becoming a very dysfunctional process between the two parties.
>
> Transcript, at page 153.

The employer desired to improve the bargaining process by freeing itself up from the constraints of civil service. Second, the employer wanted to remove the administration of labor relations and collective bargaining matters from the HEPB to the Commission. The employer reasoned that the Commission was more experienced and better equipped to deal with collective bargaining issues than a personnel board like the HEPB. Third, the employer wanted a complete reform of

> the civil service system. The employer felt that the parties to a collective bargaining agreement could better decide the personnel rules under which they should live.
>
> University of Washington, Decision 4668-A (PECB, 1994).

Proponents of 1993 HB 1509 spoke before the Legislature in terms of "jumping into the deep end of the pool" and leaving civil service behind entirely, while entering "a brave new world" of collective bargaining under the auspices of the Commission.

Competing Approach Considered in 1993 -

In view of the foregoing, there can be little doubt that this employer would not have been enthusiastic about the other alternative actively considered by the Legislature in 1993. Governor Lowry advanced 1993 HB 2054 as executive request legislation. In one early draft,[27] the Washington Management Service was to be created, and court precedents precluding contracting out of work historically done by state civil service employees were to be overruled,[28] but: The civil service systems were to be merged; a new Department of Human Resources was to replace the HEPB, SPB, DOP and PAB; authority to adopt civil service rules was to be vested in a director appointed by the Governor; and an entirely new and unified collective bargaining process for state general government and higher education employees was to be administered by the Public Employment Relations Commission. Significant features of the new collective bargaining process included:

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[27] Code Reviser document Z-0819.2/93 2nd Rough Draft.

[28] In Washington Federation of State Employees v. Spokane Community College, 90 Wn.2d 698 (1978), the Supreme Court ruled that contracting out of work historically done by state civil service employees was unlawful, as an infringement upon the rights conferred by the civil service laws.

- A scope of bargaining similar to the "wages, hours and other terms and conditions of employment" language found in most state and federal collective bargaining laws;[29]
- Division of the entire state workforce (including the classified employees of the institutions of higher education) into 10 occupationally-based state-wide bargaining units;
- Union security as a bargainable subject;
- A right to strike for many state employees; and
- Creation of an office of collective bargaining within the office of the governor, and making it responsible for negotiating all collective bargaining agreements under the law.

The "option for coverage under Chapter 41.56 RCW" provisions of 1993 HB 1509 were also made available to institutions of higher education and unions representing their classified employees.

Although filed later, the executive request legislation initially moved through the legislative process faster. As passed by the House of Representatives on March 8, 1993, Engrossed Substitute House Bill 2054 increased the number of state-wide bargaining units from 10 to 18, added a freeze on the status quo during bargaining and mediation for "essential services" personnel, and replaced the "office of collective bargaining" with a statement of employer responsibilities. House Bill 1509 was not passed out of its committee of origin until March 6, 1993 (as Substitute House Bill 1509), and was not passed by the House of Representatives (with further amendments) until March 11, 1993.

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[29] See, Section 8(d) of the National Labor Relations Act (1935), as amended; RCW 28B.52.020(8); RCW 41.56.030(4); and RCW 41.59.020(2).

Final Passage -

Each of the collective bargaining measures actively considered in 1993 encountered problems after their initial acceptance by the House of Representatives. The executive request legislation was stripped of its collective bargaining provisions, but the merger of the civil service systems under a new Washington Personnel Resources Board (WPRB), and the creation of the Washington Management Service went forward, and were eventually enacted into law. Substitute House Bill 1509 was passed out of the Senate Higher Education Committee and Ways and Means Committee, but the full Senate did not adopt committee amendments. The bill bounced back and forth between second reading and third reading before being passed by the Senate, but the House then refused to concur in the Senate amendments. The bill was passed by both houses after a conference committee report, but one section concerning a transfer of operating fees was then vetoed by Governor Lowry.

The Enlarged Exemptions from Civil Service

The Executive Director is not persuaded by the employer's claim that ongoing applicability of the civil service exemptions fulfills one of its objectives in seeking passage of 1993 HB 1509. The union aptly cites University of Washington, Decision 4668-A (1994); Human Rights Commission v. Cheney School District, 97 Wn.2d 118 (1982); and PUD of Clark County v. PERC, 110 Wn.2d 114 (1988), in support of its argument that the bottom line of statutory construction is that where the plain language of a statute is clear and unambiguous, construction is made on the basis of those plain terms on the face of the statute, without resort to outside sources.

The employer correctly argues that the Legislature gave it the authority to develop and administer an exempt staff personnel

program, and that the Legislature has listed the categories of employees who must be exempted from civil service coverage (known as "mandatory exemptions") and who could be exempted (known as permissive exemptions. The employer is also correct that 1993 HB 1509 did amend RCW 28B.16.040, as follows:

> The following classifications, positions, and employees of higher education ... boards are hereby exempted from coverage of this chapter:
>
> (1) Members of the governing board of each institution ..., all presidents, vice-presidents and their confidential secretaries, administrative and personal assistants; deans, directors, and ((~~chairmen~~)) chairpersons; academic personnel; and executive heads of major administrative or academic divisions employed by institutions of higher education; principal assistants to executive heads of major administrative or academic divisions; other managerial or professional employees in an institution ... having substantial responsibility for directing or controlling program operations and accountable for allocation of resources and program results, or for the formulation of institutional policy, or for carrying out personnel administration or labor relations functions, legislative relations, public information, development, senior computer systems and network programming, or internal audits and investigations ...
>
> ...
>
> (5) The governing board of each institution, ... may also exempt from this chapter, subject to the employees right of appeal to the higher education personnel board, classifications involving research activities, counseling of students, extension or continuing education activities, graphic arts or publications activities requiring prescribed academic preparation or special training, ((~~and principal assistants to executive heads of major administrative or academic divisions,~~)) as determined by the higher education personnel board: PROVIDED, That no nonacademic employee engaged in office, clerical, maintenance, or food and trade services may be

> exempted by the higher education personnel board under this provision. ...
>
> [Strikeouts ((~~within double parenthesis~~)) show deletions from, and underline shows additions to, the previous statute.]

Section 306 of 1993 HB 1509 also added a similar set of exemptions to the counterpart provision of the state civil service law, RCW 41.06.070. However, the amendments to RCW 28B.16.040 and 41.06.070 cannot be read in isolation from the facts and other provisions of the same legislation.

The statutes speak for themselves, and terms used elsewhere in Chapter 379, Laws of 1993 include,

> ... have their relationship and obligations **governed entirely by this chapter** ...
>
> 1993 c 379 s 304(1), codified as RCW 41.56.201(1) [emphasis by **bold** supplied].

> ... **chapter 28B.16 or 41.06 RCW** as appropriate **shall cease to apply** to all employees in the bargaining unit ...
>
> 1993 c 379 s 304(1)(c), codified as RCW 41.56.201(1)(c) [emphasis by **bold** supplied].

> ... **this chapter shall cease to apply** to all employees in the bargaining unit covered by the agreement ...
>
> 1993 c 379 s 310, codified as RCW 28B.16.015 [emphasis by **bold** supplied].

The statute could hardly be any clearer.

Nevertheless, the employer seeks a "harmonization" which would keep the exemption provisions of the civil service law in effect for option-exercised bargaining units. The employer's brief states,

> At no point in the legislative process did the University understand that the "opt-out" provision would in any way serve to eliminate the exemptions that were contained in the former system, and reinforced by H.B. 1509.

The "harmonization" called for by the employer does not justify an interpretation that wipes out the clear and unambiguous language of portions of the statute which it does not like.[30] The complete failure of the employer to acknowledge, address, or explain away the "***governed entirely***" and "***cease to apply***" language of RCW 41.56.201 and 28B.16.015 discredits the employer's argument.[31]

A Missed Opportunity

The employer had an opportunity to effect additional exclusions under the civil service law, but it has been lost. The fatal flaw with the employer's argument is that it did not take action to implement the now-disputed exemptions under the new language in RCW 28B.16.040 and/or RCW 41.06.070 ***before*** it implemented the option for coverage under Chapter 41.56 RCW:

- If the employer had completed a valid implementation of the broadened exemptions from civil service, the WPRB (as the successor to the HEPB and SPB under the portions of 1993 HB

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[30] The employer's brief includes: "All provisions of the act must be considered in relation to each other and, whenever possible, harmoniously construed to insure proper construction of each provision and to effect the Act's overall purpose."

[31] A computer-assisted search of both of the briefs filed by the employer in this case confirms that the phrases "**governed entirely**" and "**cease to apply**" do not appear anywhere in those documents.

2054 which were enacted into law) would properly have excluded the now-disputed positions from these bargaining units.[32]

- If additional exemptions under the civil service law had satisfied the employer's objectives, it could have declined to implement the option for coverage under Chapter 41.56 RCW.

- If the employer still desired to entirely escape from the strictures of the civil service system, it could have withheld exercise of the option for coverage under Chapter 41.56 RCW until after it had obtained all of the exemptions it desired under the 1993 amendments to the civil service law, so that the now-disputed positions would not have been within these bargaining units when the final notices were filed, and would never have come under the coverage of Chapter 41.56 RCW.

But those are not the facts. The actual facts are that the employees at issue here were included in the bargaining unit(s) when the employer and union filed their final notices to implement their option for coverage under Chapter 41.56 RCW. When that option was exercised, RCW 41.56.201 and 28B.16.015 expressly state that Chapters 28B.16 and 41.06 RCW ***shall cease to apply*** to all of the employees in those bargaining units.

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[32] Further support for the conclusion reached in this case is found in Section 307 of 1993 HB 1509, which eliminated the employer's liability (as to employees in option-exercised bargaining units) for payments to the revolving fund used to administer the civil service system. Since employees transferred to exempt status have a right of appeal to the WPRB under RCW 41.06.170(3), the interpretation supported by the employer would create a significant anomaly by eliminating the funding source for ongoing WPRB processing of such appeals. The better view is that the Legislature discontinued the funding source because it intended that RCW 41.06.070 and 41.06.170 would ***cease to apply*** to employees in any bargaining units transferred to Chapter 41.56 RCW.

Rescue Attempts

Employer Dissatisfaction with HEPB Exemptions -
The employer provided testimony that its officials were dissatisfied with the exclusions available under Chapter 28B.16 RCW. The employer's brief includes,

> [Vice-president] Pettit testified that each of the new mandatory exemptions had been identified through the Central Services Review process as an area in which University administrators were not satisfied with the existing law.

While that may be the case, an exhibit identified by that witness evidences a fundamental misconception of labor law terms, saying:

> Exemption criteria should be expanded. Current HEPB criteria **do not follow traditional labor law concepts** in a number of ways (e.g., **confidential secretaries**, personnel staff, and other persons handling **confidential or sensitive matters should be exempt.**

Exhibit 19, page 4, item III.A.1. [emphasis by **bold** supplied.]

The City of Yakima decision issued by the Supreme Court in 1978 labeled "confidential" as a term of art in labor law, and as implying a "labor nexus" which is not advanced by this employer as the basis for the exclusions it has sought to make under authority of the civil service law.

Wages -
The Executive Director is not persuaded by the employer's claim based on the scope of bargaining for the transferred bargaining units transferred still being limited. Citing RCW 41.56.201(2)(c), the employer asserts:

> [S]ection 304 states that salary increases for the CSA bargaining units at issue in this case shall continue to be appropriated by the Legislature rather than negotiated by the parties".

That mis-states the terms of the statute, by omission. RCW 41.56.201(2)(c)(ii) explicitly allows the employer to negotiate salary increases "... that are different from or that exceed the amount or percentage for salary increases provided by the legislature". To the extent the vague words "local efficiency savings" impose some condition on the negotiation of any different or greater salary increases, interpretation of that undefined phrase is completely left to the discretion of the parties. Moreover, the employer does not cite any statutory language, or even any legislative history, to support its claim that continued applicability of the civil service law exemptions must somehow be inferred from a limitation on the scope of bargaining.

Retirement Benefits -

Neither is the Executive Director persuaded by the employer's argument that continued applicability of the civil service law is to be inferred from the fact that the employees in the option bargaining units continue to be covered by the "state civil service retirement system". This is another mis-characterization of a statute, by attaching "civil service" in reference to the Washington Public Employees' Retirement System. In fact, Chapter 41.40 RCW clearly covers most of the local government public employees covered by Chapter 41.56 RCW. See, RCW 41.40.010(4).

Health Benefits -

The fact that the employees in the affected bargaining units are covered by the same health benefits made available to state civil service employees does not support a conclusion that they somehow remain under the coverage of Chapter 41.06 RCW. Under Chapter

41.05 RCW, the Washington State Health Care Authority administers plans that are made available not only to employees covered by Chapter 41.06 RCW, but also to: State employees exempt from civil service (including elected officials, members of boards and commissions, agency heads, confidential secretaries, various senior managers, and others exempt from civil service); community college faculty who have bargaining rights under Chapter 28B.52 RCW; four-year college and university faculty who have no collective bargaining rights; retired and disabled persons who are no longer "employees"; and to local government, school district, and educational service district employees who are clearly both covered by Chapter 41.56 RCW and excluded from Chapter 41.06 RCW. See, RCW 41.05.011(6).

Speculation -

In support of an argument that the new exemption criteria "must continue to be applicable" after exercise of the option for coverage under Chapter 41.56 RCW, the employer advances speculation that,

> If they do not, an employee excluded by the WPRB as exempt under RCW 41.06.070 would be able to turn around and use the PERC's unit clarification procedure, and community of interest standard, to be accreted into an opted-out bargaining unit.

Again, the employer does not cite any statute or rule as a basis for setting up a straw man and then knocking it down. RCW 41.56.201(2)(a) clearly directs the Commission to honor the unit structures previously created by the HEPB and WPRB, and the employer's brief acknowledges that has been done. As noted above, it is well established that individual employees have no legal standing to file or process unit clarification petitions under Chapter 391-35 WAC, and that the Commission does not make unit

determinations on the basis of either the petitions or desires of individual employees.

In the same light, the extensive testimony of employer witnesses about how these bargaining units were created is irrelevant. The employer claims that,

> [O]f critical importance to this proceeding, the bargaining unit creation process recognizes the exemption criteria in RCW 41.06 (and its predecessor statutes) and excludes employees who work in exempt positions ...,

and

> The Legislature did not intend for the legal standards for bargaining unit formation traditionally applied by the PERC to apply to these CSA-represented bargaining units because they were not formed or structured in accordance with those standards in the first place.

Completion of the unit determination process under the civil service law is a necessary pre-condition to exercise of the option for coverage under Chapter 41.56 RCW. An institution of higher education would have to take whatever steps were necessary to assure that the WPRB excludes from any such bargaining unit any employees exempt from the coverage of the civil service law. With the exception of this employer's Department of Printing (whose printing craft employees were unconditionally placed under the coverage of Chapter 41.56 RCW in 1987) and the five technical colleges (whose employees were covered by Chapter 41.56 RCW before the state took over those programs), nothing in Chapter 41.56 RCW or Chapter 379, Laws of 1993 would permit a union to directly petition the Commission for certification as exclusive bargaining representative of civil service employees of a state institution of higher education.

When the joint notices required by RCW 41.56.201(1)(a) and (c) are filed, RCW 41.56.201(2)(a) requires the Commission to honor the unit structures previously created by the HEPB or WPRB. That may be a basis for argument in some future case that the Commission lacks authority to restructure an option-exercised bargaining unit under the "community of interest" criteria, but that is not the issue here. This case concerns the employer's effort to completely exclude employees from the coverage of Chapter 41.56 RCW. In the absence of any language in Chapter 41.56 RCW which refers back to the exemption criteria in the civil service law, any requests for exclusions from these bargaining units made after they became covered by Chapter 41.56 RCW must be evaluated and ruled upon under the terms of Chapter 41.56 RCW and controlling precedents such as METRO, supra. That includes evaluating claims of confidential status under the "labor nexus" test of City of Yakima, supra, and evaluating potential conflicts of interest warranting moving supervisors from a non-supervisory bargaining units to a supervisory unit under City of Richland, supra.

Apologia -

Having offered evidence and argument pointing to its fingerprints on 1993 HB 1509, the employer asks forgiveness for failing to write language saying what it now wants the law to say:

> **Admittedly, the language used in H.B. 1509 is not a model of clarity; the legislation could have been written slightly differently** in order to achieve its objectives more smoothly.
>
> [Emphasis by **bold** supplied.]

It is not the place of a party regulated by a statute, or of the agency charged with administration of a statute, or of the courts, to even slightly re-write an adopted statute to improve its "clarity".

Nevertheless, the employer's brief returned to the same one-sided "harmonization" analysis rejected above, saying,

> The only way that this legislation can make sense is if the exemptions contained in H.B. 1509 continue to apply.
>
> The importance of harmonizing and giving effect to the Legislature's intent is demonstrated by the **disparate, unfair, and even nonsensical results that would arise if the University were no longer able to exempt people in accordance with the criteria stated in RCW 41.06.**

[Emphasis by **bold** supplied.]

The undersigned would hesitate to label any statute passed by the Legislature and signed by the Governor as "nonsensical", even if admitting authorship of language that was "not a model of clarity". Of far greater significance than the employer's use of pejoratives, the law is capable of other interpretations that do make sense.

The clear language of Chapter 379, Laws of 1993 requires rejection of the employer's claim that the Legislature did not intend to create two separate systems. RCW 41.56.201(2)(c)(ii) expressly contemplates employees in transferred bargaining units negotiating different wages under Chapter 41.56 RCW than employees who remain under civil service. The entire concept of making coverage under Chapter 41.56 RCW an "option" to be exercised on a unit-by-unit basis (rather than a universal transfer to Chapter 41.56 RCW, as was proposed in several previous bills),[33] inherently created the potential for this employer to have its employees divided between the civil service and collective bargaining systems.

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[33] At least 1978 SB 3040, 1979 HB 853, 1983 HB 792, 1983 SB 4143 and 1989 SB 6084 would simply have placed all classified employees of state institutions of higher education under the coverage of Chapter 41.56 RCW.

The employer argues, "The point of entering the opt-out relationship with CSA was to gain flexibility, not to lose it." If this employer supported language that was "not a model of clarity", shame on it; if this employer failed to exercise its mutually-exclusive options in a sequence which would provide it the maximum favorable results, double-shame on it. The fact remains that this employer has not been left empty-handed: Chapter 379, Laws of 1993, as interpreted in this decision, has permitted the employer to entirely escape the strictures of the civil service system with regard to the bargaining units transferred to Chapter 41.56 RCW.

Agreement -

Testimony that the union accepted or agreed to the employer's interpretation at some earlier time is irrelevant. As noted above, the Commission is not bound by the agreements of parties on unit determination matters. City of Richland, supra. In this case, any such agreement would deprive individual employees of their rights under Chapter 41.56 RCW, without any explicit statutory authority for such an agreement. That is vastly different from the agreement of this union and employer, made under specific statutory authority conferred by RCW 28B.16.015 and 41.56.201, to swap individual employees' civil service rights for full-scope collective bargaining rights. The unanimous decision of the state Supreme Court in METRO, supra, cited the Packard decision as finding "no room for a construction which would deny the organizational privilege" to persons who were not expressly excluded from the coverage of the NLRA, and stated that Chapter 41.56 RCW "is of the same import".

Osmosis -

The employer's brief contains a number of assertions about what it claims the intent of the Legislature was (or at least what the employer would like it to have been), including,

> The Legislature did not pass the additional mandatory exemption categories alongside the opting out legislation in order to create a system of double standards.
>
> ***
>
> If the Legislature had intended to use the traditional PERC [unit determination] standards, it would have.
>
> ***
>
> [T]he Legislature recognized that there will be dual systems in place, and it must be assumed the Legislature intended that those systems be harmonized.
>
> ***
>
> The CSA's effort to obliterate the exemptions ignores the explicit legislative intent to retain and strengthen the University's professional staff program. In enacting H.B. 1509, the Legislature did not in any way intend to diminish the exemption criteria.

In making those arguments, the employer relies heavily on testimony of an employer official who, according to the union's brief, was not involved in supporting 1993 HB 1509 before the Legislature.[34] The union also points out a lack of testimony that the official told anybody else of his belief that the new exemption language

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[34] The employer's reply brief does not even mention its witness by name, let alone rebut the union's claim. Although it is abundantly clear that Pettit was actively involved in the early discussions held with union representatives on the employer's campus, and that he was involved in initial contacts with the staff of then-Representative (now-Governor) Gary Locke, his involvement appears to have ended there. His testimony certainly stopped short of detailing any testimony before the committees of the legislature, or any lobbying of members of the Legislature. Pettit was thus only a competent witness as to the employer's intentions. Had a motion been made at the hearing, the Hearing Officer could properly have stricken all of Pettit's testimony as to legislative intent.

would apply to bargaining units exempted from civil service. The union's point is well-taken: Legislators cannot learn intent by osmosis. The union's claim that Chapter 41.06 RCW no longer applies to these bargaining units is supported by the clear language of the statute.

FINDINGS OF FACT

1. The University of Washington is an employer within the meaning of RCW 41.56.030(1).

2. The Classified Staff Association, District 925, SEIU, AFL-CIO (union), is a bargaining representative within the meaning of RCW 41.56.030(3).

3. The Washington Personnel Resources Board (WPRB) has authority, under Chapter 41.06 RCW, to adopt and administer civil service rules for classified employees of state institutions of higher education. Prior to 1993, a Higher Education Personnel Board (HEPB) had authority, under Chapter 28B.16 RCW, to adopt and administer civil service rules for classified employees of state institutions of higher education. Since at least 1982, those civil service systems have provided for certification of exclusive bargaining representatives of such employees.

4. On various dates during and after 1982, the HEPB and WPRB certified the union as exclusive bargaining representative, under the civil service system, of certain of the employer's non-supervisory and supervisory classified employees.

5. RCW 41.56.201 was added to Chapter 41.56 RCW in 1993, and took effect on July 1, 1993. That provision and companion language

in RCW 28B.16.015 give state institutions of higher education and the exclusive bargaining representatives of their classified employees an option to have their relationship and corresponding obligations governed entirely by Chapter 41.56 RCW. Those provisions specify that, upon filing of certain notices, the provisions of Chapters 28B.16 and 41.06 RCW cease to apply to all employees in the bargaining units covered under Chapter 41.56 RCW.

6. The employer and union notices of intent with the Commission and the WPRB on various dates, pursuant to RCW 41.56.201(1)(a) and 28B.16.015, indicating their intent to exercise the option provided to them by RCW 41.56.201.

7. The employer and union filed final notices with the Commission and WPRB on various dates, pursuant to RCW 41.56.201(1)(c) and 28B.16.015, indicating that they had executed initial collective bargaining agreements recognizing notices of intent described in paragraph six of these Findings of Fact. Their initial written and signed collective bargaining agreements negotiated under Chapter 41.56 RCW took effect on April 1, 1994 and July 1, 1994.

8. On various dates subsequent to the effective dates of the collective bargaining agreements described in paragraph seven of these Findings of Fact, the employer purported to exempt various employees from the bargaining units covered by those collective bargaining agreements.

9. In making the claims of "exempt" status described in paragraph eight of these Findings of Fact, the employer claimed authority for its actions under Chapter 41.06 RCW.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.

2. By operation of RCW 28B.16.015 and 41.56.201(1)(c), all of the provisions of Chapters 28B.16 and 41.06 RCW (including all standards for exemption set forth in RCW 41.06.070 or which were formerly set forth in RCW 28B.16.040) permanently and irrevocably ceased to apply, on the effective dates of the collective bargaining agreements described in paragraph seven of the foregoing Finding of Fact, to all of the employees in the bargaining units covered by those collective bargaining agreements.

3. By operation of RCW 41.56.201(2), the parties' relationship and corresponding obligations since the effective date of the collective bargaining agreements described in paragraph seven of the forgoing Findings of Fact have been, and continue to be, governed entirely by Chapter 41.56 RCW.

4. RCW 41.56.030(2) provides the exclusive basis for exclusion of any of the individuals at issue in this proceeding from the bargaining units described in paragraph seven of the foregoing Findings of Fact.

ORDER

This case is remanded to the Hearing Officer for further proceedings consistent with this order, consistent with the following:

1. Testimony and other evidence shall be admissible to show that an individual proposed for exclusion from the bargaining

unit(s) is appointed to office for a fixed term of office so as to be excluded under RCW 41.56.030(2)(b).

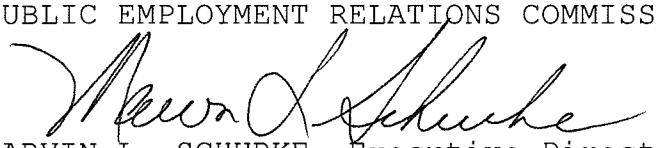
2. Testimony and other evidence shall be admissible if offered to show that an individual proposed for exclusion from a bargaining unit of non-supervisory employees is a supervisor, whose continued inclusion in that unit creates a potential for conflicts of interest warranting their re-allocation to a separate bargaining unit of supervisors.

3. Testimony and other evidence offered to show that an individual proposed for exclusion from a bargaining unit is a confidential employee shall be excluded, as irrelevant, unless it goes to the existence of a "labor nexus" under precedents interpreting RCW 41.56.020(2)(c).

4. Testimony and other evidence offered to show that an individual proposed for exclusion from a bargaining unit would qualify as an exempt employee under any basis set forth in Chapter 41.06 RCW shall be excluded, as irrelevant.

Issued at Olympia, Washington, on the 15th day of April, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director