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No. 384471

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

WASHINGTON STATE COUNCIL OF COUNTY & CITY EMPLOYEES, AFSCME COUNCIL 2, and LOCAL 270,

Respondents,

v.

CITY OF SPOKANE, a Washington municipal corporation,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Washington State Council of County and City Employees, AFSCME Council 2, and Local 270 (collectively the "Union") has failed to establish that it was injured by the adoption of Section 40 of the City Charter. Undisputedly, the City of Spokane (the "City") acquiesced to the Union's demand that the parties negotiate in private. To show injury, the Union relies solely on speculation that the City might, at some time in the future, demand the Union agree to bargain in public as a condition of negotiating mandatory subjects of bargaining in violation of the Public Employees Collective Bargaining Act ("PECBA"). Such speculation is insufficient to establish a justiciable controversy, warranting dismissal of the Union's claim.

The Union also fails to meet its heavy burden of establishing that Section 40 is unconstitutional beyond a reasonable doubt. Contrary to the Union's assertions, state law does not mandate bargaining in private. *See* Resp. Br. at 43.

Rather, the law is clear that public bargaining is a permissive topic of bargaining. Parties are free to negotiate over whether bargaining of mandatory topics will take place in public or in private—*i.e.*, there is no uniform approach imposed by the PECBA as to **how** bargaining will take place.

Section 40 addresses only permissive topics of bargaining. The Union has failed to establish field preemption of permissive topics. Neither has the Union established that Section 40, as implemented by the City, conflicts with any state law. In deference to Section 40's purpose, the City proposed transparent bargaining to the Union. When the Union refused, the City agreed to bargain in private in compliance with the PECBA. Because the Court can harmonize Section 40 with state law exactly as the City did, it should reverse the trial court's order on summary judgment and instead grant summary judgment in favor of the City.

II. ARGUMENT

A. The Union Misrepresents the Record.

As a preliminary matter, the City must address the Union's mischaracterization of the record and its reliance on evidence crafted out of whole cloth.

First, the Union summarily asserts that Section 40 "comes from an organized effort by right wing advocates who are fundamentally opposed to public employee unions and public employee collective bargaining." Resp. Br. at 4-5. The Union's inflammatory characterization of the Charter amendment—approved by the citizens of Spokane—is entirely unsupported by any citation to the record. Instead, the Union goes beyond the record, relying on three news articles concerning a non-party advocacy group. Aside from the fact that **none** of these articles concern or even mention the Charter amendment at issue, the Union's attempted reliance on evidence outside of the record is improper. *State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982); RAP 9.11. The Court

should strike the Union's baseless allegation and the entirety of footnote five in its brief.

When the Union does cite to the record, it cannot help but mischaracterize the evidence it relies upon. Contrary to the Union's assertions, the City did not "insist" on or "mandate" compliance with Section 40 by sharing a "What If" package that included a **proposal** to share the package with the public. Resp. Br. at 8; CP 57. The Union rejected that proposal, and the parties subsequently engaged in further negotiations over the ground rules. CP 52, 55, 60, 63-64.

When the parties could not reach agreement as to the ground rules, the City took the "position that the parties proceed to negotiating the successor agreement without Ground Rules" and agreed to "meet with Local 270 to bargain the successor agreement **in private**." CP 68 (emphasis added). Agreeing to bargain in private is the **opposite** of "insist[ing] on open bargaining sessions." Resp. Br. at 10. As discussed further below, the Union's mischaracterization of these basic facts is a

disingenuous attempt to establish that it has somehow been harmed by the mere proposal that the parties engage in transparent bargaining.[1]

B. The Union Fails to Identify a Justiciable Controversy.

The Union concedes that, to establish a justiciable controversy, it must have suffered an injury in fact. Resp. Br. at 16. The Union must establish:

> (1) … an actual, present and existing dispute, or the mature seeds of one, **as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement**, (2) between parties having genuine and opposing interests, (3) which involves

[1] The Union also asserts that the City "omitted" from its factual recitation a recent decision by PERC that concerns Spokane County. Resp. Br. at 20 n.9 (citing *Wash. State Council of County and City Employees v. Spokane Cnty.*, 2021 WL 5570236 (PECB 2021). As the Union's attorneys should realize, the City is not Spokane County. The facts in *Spokane County* are materially different from the facts here and therefore have no relevance to either party's statement of the case. *Spokane County* concerned an employer that "clearly conditioned bargaining on a permissive subject of bargaining," thereby committing an unfair labor practice. *Id.* at *9. Here, the City did not condition bargaining of the contract on the Union's agreement to a permissive subject (open bargaining). Indeed, there is no allegation from the Union that the City committed an unfair labor practice.

> interests that must be direct and substantial, **rather than potential, theoretical, abstract or academic**, and (4) a judicial determination of which will be final and conclusive."

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (emphasis added).

Undisputedly, the City and the Union have been bargaining in private, just as the Union demanded. Resp. Br. at 10. According to the Union, this "will result in a fair contract for the Union's members." Resp. Br. at 17. Plainly, the Union has not been injured by the City's acquiescence to the Union's demand to bargain in private.

Despite getting exactly what it demanded, the Union attempts to establish injury in fact through speculation and sleight of hand. First, the Union argues that the City's "assurances of privacy" "could be revoked at any time in the future." Resp. Br. at 18. This is the exact sort of "dormant, hypothetical, [and] speculative" disagreement that does **not** establish a justiciable controversy. *Diversified Indus. Dev.*

Corp., 82 Wn.2d at 815. The Union cannot rely on speculation as to future actions to establish a present injury.

Second, the Union complains that its "bargaining proposals … will be publicly disclosed by the City" pursuant to Section 40(C). Resp. Br. at 17. But existing law already allows the City to publish bargaining proposals once they have been shared with the Union—a fact that the Union does not dispute. *See Lincoln Cnty. v. Pub. Employ. Relations Comm'n*, 15 Wn. App. 2d 143, 155 n.4, 475 P.3d 252 (2020) ("After each bargaining session, the County can provide the public regular updates of what topics were discussed and the progress of negotiations."); *Bellevue Educ. Assn. v. Bellevue School District*, 2008 WL 5369792 (EDUC 2008) (employer's publication of union's bargaining proposals not unlawful). Section 40(C) simply requires the City to engage in an activity that is already permitted under existing law.

Third, the Union argues that it has been injured because the "Union believes that the 'open' bargaining upon which the

City insists is illegal." Resp. Br. at 17. As discussed *supra*, the City does not "insist" on open bargaining, as evidenced by the fact that the parties are bargaining in private.[2] The City's **proposal** that the parties engage in transparent bargaining is plainly legal, as both PERC and this Court have recognized, notwithstanding the Union's "belief" to the contrary.[3]

Finally, the Union contends that, though its claim is "technically not 'justiciable,'" it is nevertheless a significant public controversy warranting resolution by the Court. Resp. Br. at 18. The Union warns that the "issue of 'open bargaining' is a recurring one." *Id.*

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[2] Tellingly, the Union never filed an unfair labor practice complaint with PERC. This undisputed fact undermines its assertions on appeal that it was harmed by the mere proposal to bargain in public.

[3] *See Lincoln County.*, 15 Wn. App. 2d at 150; *Spokane Cnty.*, 2021 WL 5570236 at *9 (acknowledging the "long-held precedent that bargaining procedures, such as open or private meetings, are permissive subjects of bargaining.").

It is well established that open bargaining is a permissive topic over which parties may negotiate. It is only the decision to "hold collective bargaining hostage to unilaterally imposed preconditions to bargaining" that results in an unfair labor practice—an action that did not occur here. *Lincoln Cnty.*, 15 Wn. App. 2d at 157 (quotations omitted). The Union's request for court intervention thus turns on speculation that the City might act differently in the future. But courts are 'not authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act." *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 164-65, 80 P.2d 403 (1938). The "recurring" issue identified by the Union is one that did not occur here.

The Union has failed to establish that it was injured by any part of Section 40. To the contrary, the Union concedes that the private bargaining currently taking place "will result in a fair contract for the Union's members." Resp. Br. at 17. There is no justiciable controversy for the Court to resolve.

C. The PECBA Does Not Preempt Section 40.

The broad delegation of local lawmaking power by the Washington Constitution imbues Section 40 with a presumption of validity. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001). The Union "bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt." *Pierce Cnty. v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003). The Union has failed to carry its burden.[4]

1. The PECBA Does Not Occupy the Field of Permissive Subjects of Bargaining.

The PECBA obligates parties to bargain and execute a written agreement "with respect to grievance procedures … and collective negotiations on personnel matters, including wages, hours, and working conditions." RCW 41.56.030(4). "With regard to the topics about which the employer and the union representative bargain, issues that address wages, hours and

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[4] Despite dancing around the subject on appeal, the Union has already conceded that the PECBA does not expressly preempt local law. CP 37.

other terms and conditions of employment are mandatory subjects about which the parties *must* bargain." *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 460, 938 P.2d 827 (1997) (quotation marks & citations omitted).

"On the other hand, the parties need not bargain on other matters which are referred to as permissive or nonmandatory issues including those that address the procedures by which wages, hours and the other terms and conditions of employment are established." *Id.* (quotation marks & citation omitted). The PECBA does not regulate the issue of public collective bargaining because "public collective bargaining has no relationship to wages, hours, or working conditions." *Lincoln Cnty.*, 15 Wn. App. 2d at 155. Indeed, PERC has acknowledged the "long-held precedent that bargaining procedures, such as open or private meetings, are permissive subjects of bargaining." *Wash. State Council of County and City Employees v. Spokane Cnty.*, 2021 WL 5570236 at *9 (PECB 2021).

The Union does not contest the City's "recitation of these general principles," "thereby conceding them." Resp. Br. at 20 n.10. Indeed, the Union completely ignores the central issue on appeal: whether the PECBA preempts local ordinances concerning permissive topics of bargaining. Instead, the Union wrongly states that "the City essentially asserts that PERC has no jurisdiction over bargaining on permissible topics of negotiation." Resp. Br. at 36. The Union's argument is a strawman to which it devotes six pages of its briefing.[5]

The City did **not** argue that PERC lacks jurisdiction to address unfair labor practices related to permissive topics of bargaining. To the contrary, the City's authorities plainly acknowledge that parties may not "bargain[] to impasse over a permissive subject of bargaining," as doing so results in an

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[5] The Union goes so far as to fabricate quotes that it attributes to the City. *See* Resp. Br. at 39 ("*Nowhere* did PERC assert it had 'no authority' over collective bargaining on permissible topics like the City has claimed."). This quotation was invented by the Union—the City said no such thing.

unfair labor practice. *Lincoln Cnty.*, 15 Wn. App. 2d at 152. By focusing on its strawman, the Union conveniently ignores that the parties here did **not** bargain to impasse and there was **no** unfair labor practice. Rather, in compliance with state law, the City proposed transparent bargaining as a ground rule. In light of the Union's refusal to conduct transparent bargaining and the legal obligation to proceed to bargaining on mandatory topics, the City agreed to bargain in private.

Failing to address the City's analysis of permissive topics of bargaining, the Union focuses instead on the alleged "policy of uniformity in public employee labor negotiations." Resp. Br. at 27. The City does not dispute that the PECBA provides a "uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers." RCW 41.56.010. The uniform basis for implementing the rights of public employees manifests itself in the mutual obligation to

bargain "with respect to grievance procedures … and collective negotiations on personnel matters, including wages, hours, and working conditions." RCW 41.56.030(4). These are mandatory topics of bargaining. *Pasco Police Officers' Ass'n*, 132 Wn.2d at 460.

The PECBA does **not** implement a "uniform" set of ground rules for bargaining. To the contrary, "the question of meeting privately or publicly is a permissive subject" that the parties may or may not negotiate. *Spokane Cnty.*, 2021 WL 5570236 at *10. Indeed, PERC has recognized the complete **absence** of uniformity in ground rules negotiations:

> Through discussion and negotiations, parties can come to agreement on procedures for bargaining. Some parties use an interest-based model, while others choose a more traditional approach. Some parties find ground rules useful, while others do not. Some parties agree not to discuss their negotiations in the media. Some parties, especially those we have observed in strike situations, post their formal proposals on their websites immediately after a negotiation session has ended. Parties are only limited by their lack of resourcefulness when creating a bargaining procedure.

> …
>
> We see no reason to treat the question of whether negotiations should be held in open public meetings differently than other procedures for how bargaining will be conducted.

Lincoln County, Decision 128814-A (PECB 2018), 2018 WL 4292910 at *6-*7.

The Union's insistence that the PECBA mandates complete uniformity in all aspects of bargaining is belied by the very existence of permissive topics, which obliterate any sense of uniformity in the procedures by which parties choose to negotiate. Section 40, which concerns only permissive topics of bargaining, does nothing to impact the uniformity proscribed by the PECBA.

The Union has failed to establish that state law occupies the field of permissive subjects of bargaining.

2. Section 40 can be Harmonized with State Law.

The Union next contends that Section 40 conflicts with state law because it "purports to prohibit what state [sic] authorizes." Resp. Br. at 42. The Union offers no explanation

as to what Section 40 "prohibits" that is expressly "authorized" by state law.

The Court's "primary function is to give effect to the underlying intent of the law … deducing it from the charter's language if possible." *City of Seattle v. Auto Sheet Metal Workers Local 387*, 27 Wn. App. 669, 679, 620 P.2s 119 (1980) (internal citations omitted), *overruled on non-relevant grounds by City of Pasco v. Public Employ. Relations Comm'n*, 19 Wn.2d 504, 833 P.2d 381 (1992). "If a charter is fairly susceptible of two or more reasonable interpretations, one of which will render it constitutional, that interpretation consistent with the charter's constitutionality will be adopted." *Id.*

The only actual "conflicts" identified by the Union are that Section 40(A) & (B) state that "all" bargaining will be transparent and that "all negotiations be posted online." Resp. Br. at 43. As discussed *supra*, state law already allows the City to propose transparent bargaining as a ground rule and post bargaining proposals online after they have been shared with

the parties. *See, e.g., Lincoln Cnty.*, 15 Wn. App. 2d at 155 n.4 ("After each bargaining session, the County can provide the public regular updates of what topics were discussed and the progress of negotiations."); *Educ. Assn.*, 2008 WL 5369792 (employer's publication of union's bargaining proposals not unlawful). Section 40's requirement that the City engage in these already-permitted actions does not present a "conflict" between Section 40 and state law.[6]

To the extent there is an apparent conflict, Section 40 can—and must—be harmonized. Unaddressed by the Union is the highly persuasive authority relied on by the City: *Auto Sheet*

[6] The Union does not dispute that the trial court's analysis of this issue was deeply flawed. Resp. Br. at 12 n.7. The trial court concluded that the phrase "exclusive bargaining representative" evidenced a legislative intent to "exclude" everyone other than the employees' bargaining representative from every aspect of the bargaining process. CP 275-76. The trial court's misunderstanding of the term resulted in its determination that Section 40 had an irreconcilable conflict with the PECBA. CP 282-83 (Section 40 is "in conflict with state law … as it requires all aspects of collective bargaining to be **non-exclusive.**") (emphasis added).

Metal Workers Local 387, 27 Wn. App. 669. The charter amendment at issue in *Auto Sheet Metal Workers Local 387* imposed uniform procedures on personnel matters and prohibited the City of Seattle from ratifying collective bargaining contracts inconsistent with the charter amendment, which the court acknowledged was "[f]acially at odds with" the right of collective bargaining under state law. *Id.* at 680. Notwithstanding this facial conflict, the court recognized the purpose behind the charter amendment and read the amendment to apply to represented employees "only to the extent that the uniform procedures do not involve personnel matters that are appropriate subjects of collective bargaining." *Id.* at 680.

Here, the City attempted to bargain in a manner that was transparent to the public in deference to Section 40's purpose. The City lacked the authority to unilaterally require transparent bargaining and, accordingly, it agreed to proceed to private bargaining of mandatory subjects after the Union refused to

consider public bargaining. The City demonstrated compliance with state law and the intent behind Section 40.

The Union also contends that Section 40 conflicts with "general" state law because the Open Public Meetings Act ("OPMA") and the Public Records Act ("PRA") both evidence a legislative intent that bargaining be done in private. Resp. Br. at 45-48. The Union's argument is self-defeating.

The PRA expressly excludes from disclosure "[p]reliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended…" RCW 42.56.280. Absent this exemption, the parties would gain access to the other side's bargaining strategies and draft proposals before they are officially presented during bargaining. The harm that RCW 42.56.280 seeks to prevent is not present where, as relevant to Section 40, such proposals have already been shared with the other side.

Likewise, the OPMA expressly exempts "[c]ollective bargaining sessions with employee organizations, including contract negotiations." RCW 42.30.140(4)(a). Construing this exemption and the purpose of the OPMA in the context of a county resolution requiring collective bargaining to be conducted in public, this Court concluded that the OPMA does **not** preempt the field of open meetings and that the collective bargaining exemption to the OPMA does **not** preempt the county's transparent bargaining resolution.

Rather than conflicting with the OPMA, the county's transparent bargaining resolution actually sought to **enlarge** the OPMA's requirements and create greater transparency. *Id.* at 154.

As evidenced by the PRA and OPMA, the legislature understands how to address the issue of open public bargaining. Yet, the PECBA says nothing at all about this permissive subject. Contrary to the Union's assertions, this fact supports

the understanding that public bargaining is an issue left to the parties' discretion to negotiate.

The Court should harmonize Section 40 with the PECBA as the City has done and conclude that there is no irreconcilable conflict.

3. Section 40 is Not Unreasonable.

For the first time on appeal, the Union asserts that Section 40 is also invalid because it is unreasonable. The Union brought this lawsuit pleading only that Section 40 "conflicts with general law" and "is preempted under article XI § 11 of the Washington Constitution." CP 5. The Union never once argued to the trial court that Section 40 is invalid because it is otherwise unreasonable. *See* CP 81-93, 223-32, 244-50. An "argument that was neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996). By failing to raise this argument below, the Union has forfeited it.

In the event the Court considers the Union's new argument, it should conclude that Section 40 is not unreasonable. "An ordinance to be void for unreasonableness must be clearly and plainly unreasonable." *City of Tacoma v. Vance*, 6 Wn. App. 785, 789, 496 P.2d 534 (1972). "The burden on establishing the invalidity of an ordinance rests heavily upon the party challenging its constitutionality. Every presumption will be in favor of constitutionality, and, if a state of facts justifying the ordinance can reasonably be conceived to exist, such facts must be presumed to exist and the ordinance passed in conformity therewith." *Id.* at 789-90.

The Union contends that Section 40 is unreasonable and therefore invalid for two reasons. First, the Union asserts that Section 40 is "the brainchild of anti-union advocates whose interest is to disrupt public employee unions and collective bargaining." Resp. Br. at 13. As discussed *supra*, the Union's assertion is borne of fantasy, unsupported by anything in the record. Notably, the Union offers no legal analysis whatsoever

supporting its novel argument that an ordinance can be invalidated simply because the Union does not agree with the intentions of the voters who approved the amendment.

Second, the Union asserts that Section 40 is unreasonable because the proposition presented to the voters asked whether the City should notify the public about public bargaining sessions "as required by the Washington State Open Public Meeting Act." CP 106; Resp. Br. at 50-51. This argument "was not raised by the parties" but was nevertheless adopted by the trial court as an alternative basis for granting summary judgment. CP 283-84.

The Union relies entirely on the trial court's determination that Section 40 is unreasonable, offering virtually no analysis on the subject. *See* Resp. Br. at 49-52. The Union offers no legal authority supporting its contention that an ordinance is unreasonable because the proposition behind the ordinance asked whether, as the trial court put it, "the voters should require what's already required by law." CP 285. "In

the absence of argument and citation to authority, an issue raised on appeal will not be considered." *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). The Court should decline to consider the Union's new argument.[7]

III. CONCLUSION

The Union has failed to establish that it was injured by the adoption of Section 40 of the City Charter. To the contrary, the Union concedes that the private bargaining currently taking place will "result in a fair contract for the Union's members."

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[7] Should the Court consider the Union's new argument, it should reject it. Section 40(B) requires notice of collective bargaining negotiations "in accordance" with the OPMA. CP 4. As discussed *supra*, the OPMA is inapplicable to labor negotiations. RCW 42.30.140. This fact does not render the entire charter amendment unreasonable and invalid. In fact, the purpose of the amendment is in line with the purposes of the OPMA. *See Lincoln Cnty.*, 15 Wn. App. 2d at 154 ("The declared intent of the OPMA is to advance government transparency."). There is no current conflict and no authority supporting the Union's contention that a local ordinance requiring compliance with existing law is somehow unreasonable.

Resp. Br. at 17. The Union's complete reliance on speculation that the City will act differently in the future is plainly insufficient to establish a present injury. There is no justiciable controversy for the Court to resolve.

To the extent the Court reaches the merits, it should conclude that the Union has failed to meet its heavy burden of establishing that Section 40 is unconstitutional beyond a reasonable doubt. The Union has not established that state law occupies the field of permissive topics of bargaining, nor that Section 40 conflicts with any state law. Neither has the Union established that, to the extent there is some facial conflict, Section 40 cannot be harmonized with state law. The Court should reverse the trial court's order granting summary judgment and instead grant summary judgment in favor of the City, dismissing the Union's claim.

This document contains 4,198 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 2nd day of February 2022.

Respectfully submitted,

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The undersigned certifies under penalty of perjury, according to the laws of the State of Washington, that on this date she served a true and accurate copy of the foregoing Appellant's Reply Brief in the Court of Appeals, Division III, Cause No. 384771-III, ***via electronic service*** on the following:

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