Community Transit, Decision 10647 (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALAGMATED TRANSIT UNION LOCAL 1576, Complainant, vs. COMMUNITY TRANSIT, Respondent.	CASE 22253-U-09-5678 DECISION 10647 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Frank Freed Subit & Thomas, by *Cliff Freed*, for the union.

Summit Law Group, by *Shannon E. Phillips*, for the employer.

On February 5, 2009, Amalgamated Transit Union Local 1576 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission or agency). The union's complaint named Community Transit (employer) as respondent. Commission staff issued a preliminary ruling that the union's complaint stated a cause of action against the employer for interference with employee rights in violation of RCW 41.56.140(1) and for refusal to bargain in violation of RCW 41.56.140(4). The employer filed an answer to the complaint. Examiner Joel Greene held a hearing on June 8, 2009. Each party filed a post-hearing brief.

ISSUE

The issue is whether the employer committed an unfair labor practice by insisting to impasse and seeking interest arbitration of its proposal to retain Article 18.2 from the expired collective bargaining agreement (CBA), which authorized the employer without bargaining to make mid-

term changes to employer policy manuals impacting hours of work and other mandatory terms and conditions of employment.

I find Article 18.2 is a waiver clause, a permissive subject of bargaining. I find the employer committed an unfair labor practice when it insisted to impasse and sought interest arbitration of a contract provision requiring the union to surrender its statutory rights to bargain mid-term changes to employer policy manuals impacting mandatory subjects of bargaining.

LEGAL STANDARDS

Washington law distinguishes between mandatory subjects of bargaining and permissive or non-mandatory subjects of bargaining. Mandatory subjects include wages, hours, and working conditions. An employer or union that fails to bargain in good faith over a mandatory subject commits an unfair labor practice. Permissive subjects include management and union prerogatives, including procedures for bargaining mandatory subjects. An employer or union may negotiate a permissive subject but each party is free to bargain or not bargain, or agree or not agree. *City of Seattle,* Decision 9957-A (PECB, 2009); *Whatcom County,* Decision 7244-B (PECB, 2004).

The Commission determines whether an issue is a mandatory or permissive subject of bargaining on a case by case basis depending upon the facts and circumstances of each specific case. *City of Seattle*; *Whatcom County*; WAC 391-45-550. A party can bargain to impasse and seek interest arbitration of a mandatory subject of bargaining. A party commits an unfair labor practice when it bargains to impasse and seeks interest arbitration of a permissive subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342, 728 P.2d 1044, 1047 (1986); *Whatcom County*. The complaining party carries the burden of proving the opposing party committed an unfair labor practice. *Whatcom County*; WAC 391-45-270(1)(a).

Waivers are permissive subjects of bargaining. A waiver must be "clear and unmistakable," which requires the contract language to be specific and to clearly indicate the party consciously

waived its rights and yielded its interests. A party cannot insist to impasse and seek interest arbitration of a waiver provision. *Whatcom County.*

ANALYSIS

Facts

The present case involves a disagreement about Article 18.2 in the most recent, and currently expired, CBA between the parties.[1] Article 18.2 authorizes the employer without bargaining to make mid-term contract changes to provisions in employer policy manuals impacting hours of work and other mandatory terms and conditions of employment and reads as follows:

> 18.2 The Employer agrees to notify the Union of any changes in the Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except as to Employer administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor Agreement.

Before issuing new or changed policies in final form, Article 18.3 (Article 19.3 in some older CBAs) authorizes the union to submit written comments for consideration by the employer.

The union and the employer have had a collective bargaining relationship for over 30 years. Since 1979, the parties' CBAs have included provisions similar to Article 18.2 – provisions authorizing the employer without bargaining to make changes to rules and regulations affecting employees in the bargaining unit. The parties agree these employer policy manuals contain provisions addressing numerous mandatory subjects of bargaining, for example hours of work, work rules, attendance, accident policies, and discipline.

During current negotiations for a successor contract, the employer proposed that Article 18.2 continue into the new contract without alteration. The union proposed alternative language preserving the union's ability to bargain mid-term changes impacting mandatory subjects of

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[1] In some older CBAs, this provision was numbered as Article 19.2.

bargaining. The parties reached impasse and disagreed about whether this issue could be certified for resolution in interest arbitration. The union represents a bargaining unit of bus drivers and other transit workers who can request interest arbitration to resolve impasses reached during negotiation of a CBA (see RCW 41.56.492).

During contract negotiations, the union expressed to the employer the union's position that Article 18.2 was a waiver of the union's right to negotiate mandatory subjects of bargaining, which is a permissive subject that is not subject to interest arbitration. The union also expressed its position that Article 18.2 expired when the contract expired. The employer expressed to the union the employer's position that Article 18.2 is a management rights clause, a mandatory subject of bargaining that can be submitted to interest arbitration. The employer asked agency staff to certify Article 18.2 for interest arbitration. In response, the union filed a complaint alleging the employer committed an unfair labor practice when it insisted to impasse and sought interest arbitration of Article 18.2. Agency staff suspended Article 18.2 from the list of issues certified to interest arbitration pending resolution of the present unfair labor practice case.[2]

Case Law Precedent

Two decisions, *Whatcom County,* Decision 7244-B (PECB, 2004), and *Community Transit*, Decision 6375 (PECB, 1998), require I rule in favor of the union.

Whatcom County involved a situation that is very similar to the present case. The employer, Whatcom County, proposed contract language authorizing the county to adopt rules making mid-term changes to employee work rules. The county's proposal gave the Whatcom County Deputy

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[2] Article 18.2 was suspended from the list of issues certified for interest arbitration but several related articles were certified. The record reflects the union made proposals for new Articles 18.3, 18.4, and 18.5. Exhibit 8. It appears as if the union's proposals on Articles 18.3, 18.4, and 18.5 were presented to the arbitrator for decision. I take administrative notice of the interest arbitration case, Commission case number 22293-I-09-0526. In that case, the February 25, 2009 letter from the agency mediator certifying 61 issues for interest arbitration includes the following two entries: "29. Article 18.3 – Employer Rules and Regulation Changes – Input from Union" and "30. Article 18.X – new section on union demand to bargain and alternative options." The interest arbitration hearing was scheduled for September 22 to 25, 2009 before Arbitrator Herman Torosian.

Sheriff's Guild the right to object and to submit the rule change to interest arbitration to determine whether the change adopted by the county was "reasonable." The Commission found the county's proposal substantially altered the statutory system for collective bargaining by weakening the independence of the union chosen by the employees:

> The proposed waivers do not directly involve the employees' day-to-day responsibilities, or even the relationship between the employer and employees. Rather, they would only affect the relationship between the employer and union, by enabling the employer to change work rules without having to deal with the union.

The Commission held the county's proposal authorizing the employer to make mid-term changes to mandatory subjects of bargaining by adopting or amending a rule was a waiver of the union's statutory right to bargain those mandatory subjects; the Commission held the county's proposal was a waiver, a bargaining procedure that was a permissive subject of bargaining, and that "an employer cannot insist to impasse on a broad waiver of statutory rights." *Whatcom County.*

The present case is analogous to *Whatcom County.* Through Article 18.2 in the expired CBA, the union made a "clear and unmistakable" (*Whatcom County; Community Transit*) surrender to the employer of the authority to make mid-term changes to employee work rules without negotiating those changes with the union. Article 18.2 would "affect the relationship between the employer and union, by enabling the employer to change work rules without having to deal with the union." *Whatcom County.* Article 18.2 is a bargaining procedure that extinguishes the union's statutory right to negotiate mid-term changes to employer policy manuals impacting mandatory subjects of bargaining. Article 18.2 in the present case is a waiver clause, just like the county's rule making proposal in *Whatcom County.*

Community Transit further supports the conclusion in *Whatcom County. Community Transit* involves the exact same contract language at issue in the present case, which was found in Article 19.2 of the then-effective CBA. In *Community Transit,* the employer made mid-term changes to the disciplinary procedures in its Standard Operating Procedures manual. The union filed an unfair labor practice complaint alleging the employer made unilateral changes to

mandatory subjects of bargaining without bargaining those changes with the union. The employer argued (opposite to its position in the present case) that Article 19.2 "clearly and unmistakably waived" the union's right to bargain, and the examiner agreed: "By the language of Article 19 of the parties' 1994-1997 collective bargaining agreement, Amalgamated Transit Union, Local 1576, has waived its right to bargain concerning mandatory subjects of bargaining incorporated into the employer's standard operating procedures or performance code." *Community Transit.*

Community Transit holds the same language at issue in Article 18.2 of the present case is a waiver of the union's statutory right to negotiate mid-term changes to mandatory subjects of bargaining. *Whatcom County* holds that waiver clauses are permissive subjects of bargaining, and a party may not negotiate to impasse and insist to interest arbitration on a permissive subject of bargaining. *Community Transit* and *Whatcom County* require I rule in favor of the union.

Klauder v. San Juan County Deputy Sheriffs' Guild, 107 Wn.2d 338, 728 P.2d 1044 (1986), confirms the above analysis and a supports a ruling in favor of the union. The CBA in *Klauder* contained a provision authorizing the parties to submit to interest arbitration disputes about new contract provisions that the parties could not settle through negotiations. During the negotiation of a new CBA, the county disagreed with the union's proposal that the interest arbitration provision be carried forward into the new CBA. The interest arbitration provision was submitted to arbitration. The arbitrator ruled the interest arbitration provision should be included in the new CBA. The county sought judicial review.

The Washington Supreme Court invalidated the arbitrator's decision retaining the interest arbitration provision. The *Klauder* court reasoned the interest arbitration provision was a permissive subject of bargaining because it represented a procedure, a methodology the parties chose to use to determine wages and other terms and conditions of employment:

> Interest arbitration is a methodology which parties may agree to use, absent a negotiated settlement . . . It is a means to an end rather than a benefit or a condition. . . . As a nonmandatory subject, the interest arbitration proposal was

> extrinsic to the applicable duty to bargain. It is an unfair labor practice to bargain to impasse over a nonmandatory subject.

Klauder, 107 Wn.2d a 342.

Article 18.2 in the present case is analogous to the interest arbitration provision in *Klauder.* Both are procedures and methodologies used to make mid-term changes to the CBA. Both are permissive subjects of bargaining. The employer in the present case can not insist Article 18.2 to impasse and interest arbitration just as the union in *Klauder* could not insist the interest arbitration provision to impasse and interest arbitration.

The Employer's Positions

I find none of the employer's numerous arguments are persuasive. The employer mischaracterizes the union's position and states the union is arguing "that employer proposals for management rights language that result in any waiver of the obligation to bargain during the contract term should be categorically treated as permissive subjects of bargaining." Consistent with *Community Transit*, the union has argued that Article 18.2 is a waiver – not a management rights clause that results in a waiver – of its statutory right to negotiate mid-term contract changes to mandatory subjects, and that waivers are permissive subjects of bargaining.

Community Transit's entire brief and many footnotes, including the opening introductory pages of its brief, make a policy argument that employers need "flexibility": "without contract language providing the employer with the flexibility to make some unilateral changes in hours or working conditions, managing the day-to-day operations of a public agency becomes a practical impossibility." In essence, the employer argues that a holding finding waiver clauses are permissive subjects of bargaining would deny the employer's need for flexibility to make mid-term changes to mandatory subjects of bargaining. Unfortunately for the employer, *Whatcom County* explicitly addressed and rejected the employer's flexibility argument:

> The employer argues that its proposals on rules of operation and management rights are mandatory subjects of bargaining that it could lawfully pursue to impasse. The employer contends that the Examiner's rationale would, applied

> broadly, deny employers the ability to bargain for flexibility. . . . We . . . reject the employer's contention that finding a violation here will prevent employers from seeking flexibility at the bargaining table. An employer is free to ask for, and a union is free to accept, any permissive proposal waiving statutory bargaining rights. As the employer notes, collective bargaining agreements often incorporate terms that are designed to give either the management or the union a degree of freedom to act within a particular area. . . . All we are saying here is that an employer cannot insist to impasse on a broad waiver of statutory rights.

Since the decision and reasoning in *Whatcom County* consistently negate the employer's arguments, the employer's brief constantly and repeatedly attacks *Whatcom County*; the employer's brief does everything but explicitly request *Whatcom County* be overruled. In very brief summary, the employer states *Whatcom County* contains "tortured reasoning," is an "abrupt departure from settled law," and "fails to reflect extensive, well-reasoned precedent and ignores compelling practical and policy considerations."

Whatcom County is a well-reasoned and recent decision issued by the Commission in 2004. The facts and law in *Whatcom County* are analogous to the present case and refute the employer's arguments. I understand the employer's desire to distinguish or reverse *Whatcom County*, but I find no factual or legal basis to do so.

The employer places heavy if not exclusive reliance on *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 938 P.2d 827 (1997). In *City of Pasco*, the employer insisted to impasse and sought interest arbitration of an extensive management rights clause proposed by the employer during negotiations for a successor CBA. The supreme court's decision, the commission's decision, and the examiner's decision all framed the issue in terms of whether management rights clauses are mandatory subjects of bargaining that could be pursued to impasse and interest arbitration. *City of Pasco* described the management rights clause at issue in that case as addressing mandatory subjects of bargaining: "practically every item listed in the clause addresses either wages, hours or working conditions, i.e., mandatory subjects of bargaining." *City of Pasco*, 132 Wn.2d at 468. The court affirmed the commission's decision and held that management rights clauses are mandatory subjects of bargaining, which may be pursued to impasse and interest arbitration. *City of Pasco*, 132 Wn.2d at 454, 468.

In the present case, the employer relies on *City of Pasco* to argue it can insist Article 18.2 to impasse and interest arbitration. The employer's reliance on *City of Pasco* fails for the following five reasons: (1) As analyzed above, Article 18.2 is a waiver clause, not a management rights clause. *City of Pasco* explicitly states that it does not address waiver clauses: "We need not determine whether a waiver of collective bargaining rights is a mandatory or permissive subject of bargaining, however, because this is a not a waiver case." *City of Pasco*, 132 Wn.2d at 463. (2) Article 18.2 does not contain a list of mandatory subjects the employer can modify as does the management rights clause in *City of Pasco*. (3) Article 18.2 is a procedure allowing the employer to make changes to various mandatory subjects without the union being able to exercise its statutory right to negotiate those modifications, not an explicit reservation of management's right to change specific mandatory subjects. (4) *Community Transit*, Decision 6375 (PECB, 1998) holds Article 18.2 is a waiver clause. (5) Counsel for the employer has frequently described Article 18.2 as a waiver clause. In the 1998 *Community Transit* decision, the employer successfully argued Article 18.2 was a waiver clause. The record in the present case also indicates counsel for the employer continued to characterize Article 18.2 as a waiver clause. See exhibit 9 ("the propriety of submitting waiver language to interest arbitration was upheld by the Washington Supreme Court in *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997); exhibit 6 at 2 ("ATU has waived by contract the right to bargain regarding subjects that are incorporated into Community Transit's SOPs"); exhibit 6 at 3 ("ATU has waived the right to bargain regarding these issues for the term of the new contract").

Last, *Whatcom County,* Decision 7244-B (PECB, 2004), explicitly addressed and rejected the employer's argument that *City of Pasco* requires a ruling in its favor:

> The employer argues that . . . the Examiner's decision is inconsistent with the holding of the Supreme Court of the State of Washington in *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997).
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> . . . .
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> Our conclusion here is in harmony with *Pasco Police Officers Association v. City of Pasco*, 132 Wn.2d 450 (1997). In that case, the Commission ruled that contract clauses concerning management rights and hours of work were mandatory subjects of bargaining directly related to terms and conditions of employment. The Supreme Court of the State of Washington affirmed those general characterizations, but nonetheless recognized that management rights

> clauses, "[C]an go only so far. . . . [S]uch clauses cannot invade a union's statutory right and duty to be the exclusive representative of the relevant employees." 132 Wn.2d 450 at 466. Indeed, the court in *Pasco* acknowledged that the employer's obligation to bargain in good faith "insures that management rights proposals do not overreach and are enforceable under the statute." 132 Wn.2d 450 at 467. We thus reject any suggestion that *Pasco* gives employers an absolute right to insist to impasse (and obtain interest arbitration) on waivers of bargaining rights.

CONCLUSION

I find the union carried its burden of proving the employer committed an unfair labor practice when the employer insisted to impasse and interest arbitration a permissive subject of bargaining – a waiver clause requiring the union to surrender its statutory rights to bargain mid-term changes to employer policy manuals impacting mandatory subjects of bargain.

FINDINGS OF FACT

1. Community Transit (employer) is a public employer within the meaning of RCW 41.56.030(1).

2. Amalgamated Transit Union Local 1576 (union) is a bargaining representative within the meaning of RCW 41.56.030(3) and is the exclusive bargaining representative of a bargaining unit of bus drivers and other transit workers.

3. The employer and the union were parties to a collective bargaining agreement for the time period from January 1, 2005, though December 31, 2007. Article 18.2 of that collective bargaining agreement contained the following provision:

> 18.2 The Employer agrees to notify the Union of any changes in the Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except as to Employer administration of such

provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor Agreement.

4. The documents described in Article 18.2 – "Employee's Rules and Regulations, including Standard Operating Procedures (SOP's) and Performance Code" – address numerous mandatory subjects of bargaining, for example hours of work, work rules, attendance, accident policies, and discipline.

5. The employer and the union have had a collective bargaining relationship for over 30 years. Since 1979, the parties' collective bargaining agreements (CBAs) have included provisions similar to Article 18.2.

6. After expiration of the collective bargaining agreement described above in Finding of Fact 3, the parties engaged in negotiations for a successor contract. During those negotiations, the employer proposed that Article 18.2 continue into the new contract without alteration, and the union rejected the employer's proposal. The union proposed alternative language, which the employer rejected. The parties reached impasse.

7. RCW 41.56.492 authorizes members of the union's bargaining unit, which is described above in Finding of Fact 2, to request interest arbitration to resolve impasses reached during negotiation of a collective bargaining agreement.

8. The parties disagreed and reached impasse about whether Article 18.2 could be certified for resolution in interest arbitration. The union argued Article 18.2 was a permissive (or non-mandatory) subject of bargaining

9. Agency staff suspended Article 18.2 from the list of issues the agency certified to interest arbitration pending resolution of the present unfair labor practice case.

CONCLUSIONS OF LAW

1. The Public Employment Commission has jurisdiction in the present case under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Article 18.2 is a waiver clause, a permissive subject of bargaining, which waives the union's statutory right to negotiate mandatory subjects of bargaining and authorizes the employer to make mid-term contract changes to employer policy manuals impacting mandatory terms and conditions of employment without bargaining those changes with the union. By insisting to impasse and seeking interest arbitration on its proposal to retain Article 18.2 from the expired CBA, Community Transit interfered with employee rights in violation of RCW 41.56.140(1) and refused to bargain in violation of RCW 41.56.140(4).

ORDER

COMMUNITY TRANSIT, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to bargain in good faith with Amalgamated Transit Union Local 1576 by proposing and insisting to impasse and interest arbitration that the union waive its statutory rights to bargain mid-term changes to Employee's Rules and Regulations, including Standard Operating Procedures (SOPs) and Performance Codes.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Withdraw its proposals that the union agree to waive its right to negotiate mid-term changes to Employee's Rules and Regulations, including Standard Operating Procedures (SOPs) and Performance Codes, made during collective bargaining negotiations

b. Give notice to and, upon request, negotiate in good faith with Amalgamated Transit Union Local 1576, before making changes to Employee's Rules and Regulations, including Standard Operating Procedures (SOPs) and Performance Codes.

c. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the Community Transit's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of Community Transit, and shall remain posted for 60 consecutive days from the date of initial posting. Community Transit shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice provided by the Compliance Officer of the Public Employment Relations Commission into the record at a regular public meeting of Community Transit's Board of Directors, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

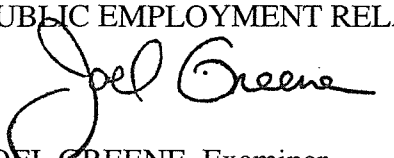
e. Notify the Amalgamated Transit Union Local 1576, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with

this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

f. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 15th day of January, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JOEL GREENE, Examiner

This order will be the final order of the agency unless a party files a notice of appeal with the Commission under WAC 391-45-350.

CASE 22253-U-09-5678
DECISION 10647 – PECB

COLLECTIVE BARGAINING

PERC

STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT *COMMUNITY TRANSIT* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to bargain in good faith with Amalgamated Transit Union Local 1576 by proposing and insisting to impasse and interest arbitration that the union waive its statutory rights to bargain mid-term changes to Employee's Rules and Regulations, including Standard Operating Procedures (SOPs) and Performance Codes.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL withdraw our proposal that the union agree to waive its right to negotiate mid-term changes to Employee's Rules and Regulations, including Standard Operating Procedures (SOPs) and Performance Codes, made during collective bargaining negotiations.

WE WILL give notice to and, upon request, negotiate in good faith with Amalgamated Transit Union Local 1576, before making changes to Employee's Rules and Regulations, including Standard Operating Procedures (SOPs) and Performance Codes.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.