STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

COMMUNITY TRANSIT, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 1576, Respondent.	CASE 22100-U-08-5632 DECISION 10267-B - PECB MODIFIED DECISION OF COMMISSION

Frank Freed Subit & Thomas, LLP, by *Michael C. Subit*, Attorney at Law, for the union.

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

On February 12, 2013, the Washington State Court of Appeals, Division II, issued a decision in the employer's appeal of *Community Transit*, Decision 10267-A (PECB, 2009). *Snohomish County Public Transportation Benefit Area, d/b/a Community Transit v. Public Employment Relations Commission*, No. 42435-5-II (Wash. Ct. App. February 12, 2013). The Court remanded to the Commission with instructions to strike the portion of the Commission's "order that purports to apply only prospectively. . .". *Id.* at page 15.

In Decision 10267-A, the Commission affirmed the Order of Dismissal issued by the Unfair Labor Practice Manager. In the text of Decision 10267-A, the Commission held that "a grievance arbitration clause is a term and condition of employment for interest arbitration eligible employees that must be maintained upon expiration of a collective bargaining agreement until a new agreement is reached, unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement" and applied the

standard prospectively. Therefore, in conformity with the Court's order, the portion of Decision 10267-A applying the standard prospectively is stricken.

MODIFIED DECISION AND ORDER

The Amalgamated Transit Union, Local 1576 (union) represents a bargaining unit of coach operators, dispatchers, instructors, customer information specialists, customer assistant specialists, and facility maintenance employees who work for Community Transit (employer). The employer is a public passenger transportation system that operates in Snohomish County. The bargaining unit employees at issue in this case are eligible for interest arbitration under the provisions of RCW 41.56.430 through 41.56.452, 41.56.470, 41.56.480, and 41.56.490. *See* RCW 41.56.492.

On November 10, 2008, the union filed an unfair labor practice complaint alleging that the employer unlawfully changed the existing status quo by refusing to arbitrate certain grievances that had arisen during the life of the existing collective bargaining agreement, and by refusing to process certain grievances that arose after the agreement expired. At the time this case was filed, the parties were engaged in negotiations for a successor collective bargaining agreement to the agreement that expired on December 31, 2007.

Unfair Labor Practice Manager David I. Gedrose issued a deficiency notice on November 19, 2008, noting that the union's allegations that the employer failed to arbitrate grievances that may have arisen while the parties' collective bargaining agreement was in effect failed to specifically include times, dates, places, and participants as required by WAC 391-45-050(2). With respect to the union's allegations that the employer failed to arbitrate grievances that arose after the expiration of the parties' collective bargaining agreement, the Unfair Labor Practice Manager noted that, as a matter of law, the union's complaint was defective because existing precedents state that a union may not enforce the arbitration provisions of an expired collective bargaining agreement.

The union filed an amended complaint that provided specific instances where the employer failed to arbitrate grievances that arose after the parties' collective bargaining agreement expired, but failed to provide specific instances where the employer failed to arbitrate grievances that arose during the life of the previous contract. The Unfair Labor Practice Manager dismissed the union's amended complaint relying upon previous agency and Washington State Court of Appeals decisions, each holding that arbitration clauses do not survive expiration of the collective bargaining agreement.[1] The union now appeals that decision.

ISSUE PRESENTED

The issue to be decided in this appeal is whether the longstanding National Labor Relations Act (NLRA) rule that arbitration clauses do not survive expiration of a collective bargaining agreement should be applicable to collective bargaining agreements negotiated under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, between employers and their represented employees who are eligible for interest arbitration.

For the reasons set forth below, previous agency decisions holding that grievance arbitration clauses do not survive the expiration of collective bargaining agreements are inapplicable to employees eligible for interest arbitration. The unique statutory framework governing interest arbitration eligible employees leads to a conclusion that the arbitration clauses found in the grievance provisions of collective bargaining agreements do in fact survive the expiration of a collective bargaining agreement unless the parties mutually agree that the arbitration clause will expire on the date that the collective bargaining agreement expires.

Because this employer relied upon what was valid precedent when it declined to arbitrate the union's post-expiration grievances, the Unfair Labor Practice Manager's decision to dismiss the union's complaint is affirmed.

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1 *Community Transit*, Decision 10267 (PECB, 2009).

DISCUSSION

The Duty to Bargain and Maintain the Status Quo

A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); RCW 41.56.150(1) and (4).

It is well settled under the NLRA and Chapter 41.56 RCW that grievance procedures are a mandatory subject of bargaining. *United Electrical, Radio, and Machine Workers of America v. NLRB*, 409 F.2d 150 (D.C. cir. 1969); *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504 (1992). As provided for in RCW 41.56.122(2), collective bargaining agreements may contain provisions providing for final and binding arbitration of grievances arising under the terms of the collective bargaining agreement. *See also Litton Financial and Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). A clause providing for binding arbitration as a means to settle contractual grievances is also a term or condition of employment, and a mandatory subject of bargaining. *Taft Broadcasting Co., WDAF AM-FM-TV v. NLRB*, 441 F.2d 1382 (8th Cir. 1971); *Pierce County*, Decision 2693 (PECB, 1987).

The Expiration of Grievance Arbitration Provisions Under the NLRA

NLRA precedents establish that during the period that follows the expiration of a collective bargaining agreement, an employer may not make unilateral changes to mandatory subjects of bargaining without first satisfying its collective bargaining obligations. *See, e.g., NLRB v. Katz*, 369 U.S. 736 (1962). This obligation is rooted not in the parties' contract obligations, but rather in the statutory obligation to preserve the existing terms and conditions of employment. *Litton Financial and Printing Division v. NLRB*, 501 U.S. at 206-7.

Although grievance arbitration is considered a mandatory subject of bargaining, the federal courts have held that the NLRA does not, as a matter of law, require parties to arbitrate their disputes. Rather, parties can only be compelled to arbitrate grievances by contract. *Litton Financial and Printing Division v. NLRB*, 501 U.S. at 200, *citing Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974). Furthermore, because the federal courts consider arbitration clauses to be a "creature of the collective bargaining agreement," no obligation exists to arbitrate any dispute that arises after the expiration of the agreement. *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 250-1 (1977).[2]

Because the federal courts hold that an arbitration clause is a creature of the collective bargaining agreement that expires with that agreement, the courts have declined to hold that arbitration clauses are provisions that are within *Katz's* prohibition on unilateral changes following the expiration of the agreement. *Litton Financial and Printing Division v. NLRB*, 501 U.S. at 200. By taking arbitration clauses outside of *Katz's* scope, a party cannot successfully allege through the NLRA's unfair labor practice provisions that an employer's failure to arbitrate a grievance arising after the expiration of the collective bargaining agreement is a unilateral change in violation of the act.

The Expiration of Grievance Arbitration Provisions Under Chapter 41.56 RCW

Commission precedent also prevents employers from making changes to mandatory subjects of bargaining for their interest arbitration eligible employees while the parties are negotiating a successor collective bargaining agreement. *See, e.g., City of Mukilteo*, Decision 9452-A (PECB, 2008).

Previous decisions issued by agency examiners have followed a path similar to the federal courts when ruling upon the arbitrability of grievances after the expiration of a collective bargaining agreement. In *Pierce County*, Decision 2693 (PECB, 1987), an examiner held that grievance

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[2] Whether a grievance actually arises under a collective bargaining agreement is often in question. "A post-expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before the expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Litton Financial and Printing Division v. NLRB*, 501 U.S. at 205-6.

arbitration clauses are a type of mandatory subject that establish a relationship between an employer and exclusive bargaining representative through the collective bargaining agreement itself, and grievance arbitration "is, by its very nature, dependent upon the existence of a valid contract to be interpreted." *Pierce County*, Decision 2693. In reaching this conclusion, the examiner noted that certain "clauses establish the manner and the means whereby the employer will satisfy its statutory obligation to deal with the union as the exclusive bargaining representative during the life of the agreement and the way in which the union may enjoy its statutory privilege of representing the employees." The examiner also stated that allowing parties to arbitrate grievances beyond the expiration of the collective agreement would violate the intent of RCW 41.56.070, which precludes agreements from containing automatic renewal clauses and limited agreements to a term of three years. A different examiner relied upon *Pierce County* when making a similar ruling. *Clark County*, Decision 3451 (PECB, 1990).

It is important to stress that because the *Pierce County* and *Clark County* decisions were not appealed to the Commission, the Commission was not granted the opportunity to engage in a comprehensive review of the policies announced in those decisions. Furthermore, neither of these cases involved employees who were eligible for interest arbitration.

Although the *Pierce County* and *Clark County* decisions were not appealed, the Commission, in its appellate function, has commented on the arbitrability of contractual grievances after the expiration of a collective bargaining agreement for interest arbitration eligible employees. In *City of Yakima*, Decision 3880 (PECB, 1991), a union filed a contractual grievance regarding a skimming allegation after the parties' collective bargaining agreement expired. The union subsequently filed an unfair labor practice complaint over the same claim. The employer moved to dismiss the unfair labor practice complaint arguing that it was improper for the union to file a complaint after it already filed a grievance. The Commission declined to dismiss the union's unfair labor practice complaint and held that the expired collective bargaining agreement precluded the parties from arbitrating the grievance, and therefore precluded application of the

"deferral to arbitration" policy, the agency nevertheless had jurisdiction to hear the union's unfair labor practice complaint.[3]

The *Maple Valley Fire Fighters* Decision

In addition to the existing agency precedent on this subject, the Washington courts have commented on the arbitrability of grievances following the expiration of a collective bargaining agreement. In *Maple Valley Professional Fire Fighters, Local 1032 v. King County Fire Protection District No. 43*, 135 Wn. App. 749 (2006), *review denied,* 161 Wn.2d 1011 (2007)(*Maple Valley*), the Court of Appeals of Washington, Division 1, embraced and relied upon the rationale announced in both *Litton Financial* and *Pierce County* when it held that grievance arbitration was not a condition of employment that survived the expiration of a collective bargaining agreement.[4] Although the union urged the *Maple Valley* court to reconsider and overrule existing agency precedent, the Court declined to do so noting that the Court gives great deference to this Commission's decisions, and because this agency's decisions had settled the matter, the Court was not in a position to overturn the existing precedent. *Maple Valley*, 135 Wn.2d at 758-760.

Federal Grievance Arbitration Precedent is Inapplicable in this Case

Having explained the basic law that the federal courts, this agency, and the state courts have previously applied to this issue, we now explain why reliance upon the existing precedent is misplaced as it is applied to Chapter 41.56 RCW interest arbitration eligible employees.

The Supreme Court of the State of Washington has ruled that decisions construing the NLRA are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984). For example, Section 2(3) of the NLRA precludes supervisory employees from exercising collective bargaining rights. No

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[3] The issue in the *City of Yakima* was not the arbitrability of a grievance that arose after the expiration of a collective bargaining agreement, rather the case was about application of this agency's "deferral to arbitration" policy. The deferral to arbitration policy provides that a complaint alleging that an employer's conduct in a "unilateral change" case is arguably protected or prohibited by a contract may be "deferred" to arbitration, as opposed to having this agency make a determination through a hearing. Because the *City of Yakima* case was not about the arbitration of post-expiration grievances, the comments in that case regarding the arbitrability of grievances after the expiration of a contract are, at best, non-binding dicta.

[4] The *Maple Valley* litigation originated in the Superior Court, and not before this agency.

such counterpart exists in Chapter 41.56 RCW. Therefore, the federal precedents precluding supervisors from exercising collective bargaining rights are not applicable to public sector employees in the State of Washington. *Municipality of Metropolitan Seattle v. Department of Labor and Industries*, 88 Wn.2d 925 (1977).

However, even where there is no direct statutory conflict between the NLRA and Chapter 41.56 RCW, the Commission has, at times, rejected NLRA precedent because the policy announced by the NLRB is not the policy that the Commission has adopted for the state act. *See, e.g., Mason General Hospital*, Decision 3374 (PECB, 1989)(declining to follow *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982)). Accordingly, while NLRA precedents are persuasive for cases decided under Chapter 41.56 RCW, those precedents are not binding and, after careful consideration, the Commission may decline to adopt a previously announced federal standard.

The Right to Strike and the Arbitration of Grievances Under the NLRA

Under the common law, the labor strike was viewed as "a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital." *American Steel Foundries v. Tri-City C.T. Council*, 257 U.S. 184 (1921). When Congress passed the NLRA, it guaranteed private sector employees the right to strike. Specifically, Section 13 of the NLRA states:

> Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitation or qualifications on that right.

Although private sector employees possess the right to strike, "no–strike" clauses in agreements are mandatory subjects of bargaining, and either an employer or union may bargain for one to the point of impasse. "The chief advantage an employer can reasonably expect from a collective bargaining agreement is uninterrupted operation during the term of the agreement." *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), *quoting* S.Rep. No. 105, 80th Cong., 1st Sess. P. 15. From the employees' viewpoint, "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances." *United Electrical, Radio, and Machine Workers of America v. NLRB*, 409 F.2d at 156. "Complete

effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition on strikes, the arbitration agreement being the 'quid pro quo' for the agreement not to strike." *United Electrical, Radio, and Machine Workers of America v. NLRB*, 409 F.2d at 156; *see also Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 454-5 (1957).[5] "Where arbitration is accepted, the parties have voluntarily and mutually agreed to surrender their use of economic weapons in favor of third party determination of unresolved issues." *Hilton Davis Chemical Co.*, 185 NLRB 241 (1970).

Thus, when a private sector collective bargaining agreement expires, the employees typically lose the right to arbitrate post-expiration contractual grievances, but regain the right to utilize the strike as an alternative means to resolve disputes. *See Goya Foods*, 238 NLRB 1465 (1978).

Interest Arbitration Employees Specifically Precluded From Striking

The statutory scheme for interest arbitration eligible employees under Chapter 41.56 RCW is significantly different from federal statutes. Although uniformed employees bargain terms and conditions of employment like any other group of employees who choose to collectively bargain under Chapter 41.56 RCW, RCW 41.56.490 specifically prohibits uniformed employees from engaging in any "strike, work slowdown, or stoppage." RCW 41.56.490 also provides that, should uniformed employees disobey a lawful court order to return to work, they are automatically in contempt of that court order. Because RCW 41.56.490 specifically precludes uniformed employees from the right to strike, and Section 13 of the NLRA specifically grants private sector employees the right to strike, the argument under the federal precedent that a no-strike clause in the collective bargaining agreement is the quid pro quo for grievance arbitration cannot be applied to public sector employees because public employees could not give up a right they did not have.

Accordingly, the statutory framework of the two laws is significantly different, and NLRA precedents holding that grievance arbitration provisions expire with the collective bargaining

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[5] The *Textile Workers* decision provides a comprehensive legislative history of the reasons the Taft Hartley Act gives the federal courts jurisdiction over controversies involving labor contracts, as well as the reasons behind the conclusion that no-strike agreements are quid pro quo for grievance arbitration provisions.

agreement should never have been applied to Chapter 41.56 RCW interest arbitration eligible employees. The result of this conclusion is that the decisions that relied upon the federal precedent are not appropriately applied to the particular situation of interest arbitration eligible employees.[6]

Grievance Arbitration Clauses are a Condition of Employment that Must be Maintained

We now hold that under Chapter 41.56 RCW, a grievance arbitration clause is a term and condition of employment for interest arbitration eligible employees that must be maintained upon expiration of a collective bargaining agreement until a new agreement is reached, unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement. Our reasons for reaching such a conclusion are as follows.

The state courts recognize that "there is a strong presumption that all disputes arising under a collective bargaining agreement are subject to arbitration; that presumption holds unless negated expressly or by clear implication." *Olympia Police Guild v. City of Olympia*, 60 Wn. App. 556, 559 (1991), *citing United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). Similarly, when the Legislature enacted the interest arbitration provisions for uniformed employees in 1973, it declared that the purpose of the provision was to:

> recognize that there exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes.

RCW 41.56.430. Although RCW 41.56.430 was enacted in conjunction with the interest arbitration provisions as an alternative means for setting the terms and conditions of employment should the parties disagree about them, the Legislature nevertheless recognized that, at least for

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[6] The *Maple Valley* court stated that it would defer to this agency's judgment on matters of labor law and that it was unwilling to overturn our precedent based upon the union's policy arguments. *Maple Valley*, 135 Wn. App. at 759. Because we are overruling existing precedent on this matter on which the *Maple Valley* court relied, we respectfully decline to be bound by that decision.

uniformed personnel, there must be a method in place to promote "the dedicated and uninterrupted public service" of those employees.

Our conclusion holding an arbitration clause as a term and condition of employment, as opposed to a creature of the contract, ensures that interest arbitration eligible employees will have a continuous method for resolving labor disputes during the interim period between collective bargaining agreements, including the resolution of grievances that private sector employees would otherwise go on strike over, should the parties agree. The dissent argues that the announced policy should come from the Legislature, and points to the 1989 enactment of RCW 41.56.123. That statute, which is applicable only to non-interest arbitration eligible employees, specifically provides that arbitration clauses will survive the expiration of a collective bargaining agreement for up to one year. The dissent also notes that had the Legislature wanted to provide the same rights to interest arbitration eligible employees, it would have done so.

The dissent overlooks the fact that at the time RCW 41.56.123 was passed, RCW 41.56.470 already prohibited employers from altering the existing terms and conditions of employment of interest arbitration eligible employees during the pendency of the interest arbitration proceedings.[7] If RCW 41.56.123 had been applied to interest arbitration eligible employees, the protected period that precludes employers from unilaterally implementing a term and condition of employment after a lawful impasse would have been reduced.

Thus, there was no need for RCW 41.56.123 to address how the terms and conditions of employment for interest arbitration eligible employees would be handled after the expiration of a collective bargaining agreement. Because the Legislature has demonstrated an intent to preserve the terms and conditions of employment for interest arbitration eligible employees throughout the period between collective bargaining agreements, we believe the policy announced in this decision better effectuates the purposes of RCW 41.56.430 and .490.[8]

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[7] The delay between collective bargaining agreements for interest arbitration eligible employees can, at times, be quite long. We take administrative notice of case 21183-I-07-498, and note that on December 23, 2008, Arbitrator Michael H. Beck issued an opinion and award for a 2005-2007 collective bargaining agreement between King County and the Technical Employees Association. Because of the timing involved, the collective bargaining agreement expired the instant that it was awarded by the arbitrator.

[8] In *Public Utility District v. Public Employment Relations Commission*, 110 Wn.2d 114 (1988), the Supreme Court held that the Commission has jurisdiction over labor disputes between public utility

NOW, THEREFORE, it is

ORDERED

The Order of Dismissal issued by Unfair Labor Practice Manager David I. Gedrose is AFFIRMED.

ISSUED at Olympia, Washington, this 23rd day of April, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

COMMISSIONER McLANE, Dissenting

For the reasons set forth below, I respectfully dissent from the Majority Opinion.

The majority incorrectly assumes that the explicit prohibition on the right to strike by uniformed personnel is the reason for the unsurprising proposition that the grievance arbitration procedure does not survive the expiration of a collective bargaining agreement. The opportunity to utilize the interest arbitration process to determine the terms and conditions of a labor agreement if the parties are unable to reach an agreement is in many ways a more powerful tool than the right to strike. A strike may never result in an agreement or may result in the hiring of permanent replacements. However, the certification of issues for interest arbitration means there will be a resolution of certified issues.

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districts and their employees, except where Chapter 41.56 RCW conflicts with RCW 54.04.170 or .180. *Chelan County PUD*, Decision 8496-B (PECB, 2006). Therefore, this decision cannot apply to employees of public utility districts.

Previous PERC decisions, both those by examiners and the Commission itself have consistently followed this well settled principle. *See, e.g., Pierce County*, Decision 2693 (PECB 1987); *City of Yakima*, Decision 3880 (PECB, 1991); *City of Enumclaw*, Decision 4897 (PECB 1994). The discussion of this issue in *City of Yakima* was not, in effect, a passing comment. In relevant part, the opinion states: "The agreement to arbitrate survives the expiration of a collective bargaining agreement **only** with respect to causes of action which arose while the contract was in effect." (emphasis in original).

Thus, the *City of Yakima* case followed what was until today well settled law. Not surprisingly, parties to collective bargaining agreements and at least one court decision have relied on this rule of law. Now, the Commission has determined that existing PERC precedents should be overruled. The majority's decision fails to take into account statutory authority as well as court precedents.

The Majority errs in asserting that the right to strike is the reason for federal precedents refusing to require that a party arbitrate a grievance that arises after the expiration of the existing collective bargaining agreement. Rather, as was stated in *Litton Financial and Printing Division v. NLRB*, 501 U.S. 190, 200 (1991), it is based upon the concept of "consensual, not compulsory arbitration."

Reviewing Washington courts have also endorsed the now overruled precedent. *Maple Valley Professional Firefighters Local 3062 v. King County Fire Protection Dist. No. 43*, 145 P.3d 1247 (2006) Division I of the Court of Appeals did not simply defer to the expertise of the Commission; it engaged in a comprehensive analysis of the issue in concluding that an arbitration clause did not survive the expiration of the collective bargaining agreement. That Washington courts look to "federal case law for guidance in labor law cases" was recently reiterated by the Washington Supreme Court. *Kitsap County Deputy Sheriffs Guild v. Kitsap County*, 167 Wn. 2d 428 (October 29, 2009) (slip op. at p. 8), *citing Clark County Public Utility District No. 1 v. IBEW*, Local 125, 150 Wn. 2d 237, 246 n.2. (2003) .

The Majority Opinion seemingly believes that interest arbitration eligible employees are without a remedy if the Commission does not overrule a long line of authority and the applicable statutory distinction created by the Legislature. Not so. The parties could agree to process grievances that arise during the hiatus between collective bargaining agreements, which would avoid potentially large back pay obligations. Alternatively, retroactivity will undoubtedly be sought at interest arbitration. In that case, the teachings of *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 148 Wn. App. 907 (2009), *review denied*, 166 Wn.2d 1020 (2009) are applicable.

The Majority Opinion suggests that because interest arbitration eligible employees have no right to strike, the analysis should be different. This argument is based upon a faulty premise. The only Washington public employees with the right to strike are public utility employees, and there the right to strike exists because of federal preemption. RCW 54.04.170.

More disconcerting to statutory construction is the conflict between the Majority Opinion and RCW 41.56.123. This statute provides that after the expiration of a collective bargaining agreement all terms in the agreement continue until the effective date of the new contract, not to exceed one year beyond the contract's termination date. However, this provision does not apply to uniformed personnel. Rather, interest arbitration eligible employees are governed by RCW 41.56.470, which was enacted in 1973. It does not contain similar language to that contained in RCW 41.56.123, which was enacted some twenty years later. Simply put, the Legislature could have harmonized the provisions, but did not. "[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *City of Kent v. Beigh*, 145 Wn. 2d 33, 45, 32 P.3d 258 (2001), *quoting State v. Enstone*, 137 Wn. 2d 675, 680-81, 974 P.2d 828 (1999).

The Legislature could have easily made a similar provision for uniformed employees, but chose not to. In light of this intentional legislative omission, I do not believe that it is the role of the Commission to provide by decision that which the Legislature chose not to adopt.

The Majority Opinion's suggestion that the Legislature did not have to amend RCW 41.56.470 because the statute already provided for what the Majority Opinion now pronounces is the proper result is a creative legal argument. Though ingenious, it is an argument that is bound to fail when this matter is considered by the appellate courts.

CONCLUSION

Public employers and unions rely on this Commission's long-standing precedents. Practitioners who advise public employers and unions provide advice based upon these precedents. The Majority's basis for overturning twenty years of agency precedent and practice ignores existing statutes, principles of statutory construction, and is ill advised in light of the reliance that parties have placed upon that precedent. Relief should be sought in the form of legislation addressed to the Washington Legislature.

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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BY /S/ ROBBIE DUFFIELD

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