STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMERICAN FEDERATION OF TEACHERS, LOCAL 1950, Complainant, vs. SHORELINE COMMUNITY COLLEGE, Respondent.	CASE 129773-U-17 DECISION 12973-A - CCOL DECISION OF COMMISSION

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John D. Clark, Assistant Attorney General, Attorney General Robert W. Ferguson, for Shoreline Community College.

Shoreline Community College (employer) and the American Federation of Teachers, Local 1950, (union) were parties to a collective bargaining agreement effective June 1, 2017, through June 30, 2019.[1] The agreement includes an Appendix A, which sets out the agreed compensation for full-time academic employees and associate academic employees.[2] The agreement includes a grievance and arbitration procedure and defines a "grievance" as a complaint or claim "arising out of the interpretation or the application of or any alleged violation by the Employer of the terms of this Agreement."[3] Grievances may be pursued through a multistep procedure ending in a "final and binding" arbitration hearing before an arbitrator selected by the parties.[4]

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1 Union (Un.) Ex. 1.

2 *Id.* at App. A.

3 *Id.* at Art. XVI, Sec. A(1).

4 *Id.* at Art. XVI, Sec. D.

The agreement contains a provision obligating the employer to provide the union with information "needed to assist the Federation in performing its representative responsibilities."[5] Also included is a broad waiver or "zipper" clause stating that the written contract "supersedes any previous agreements or understandings, whether oral or written, between the parties." Finally, the agreement includes an integration clause stating that "no oral statement shall add to or supersede any of its provisions."[6]

The union filed its unfair labor practice complaint on October 23, 2017, roughly five months after the parties signed their agreement. The union attached a copy of the collective bargaining agreement to the complaint. Under the heading "STATUTORY VIOLATIONS ALLEGED," the union defined its charges as follows:

> By bargaining in bad faith, withholding information, abandoning the parties' agreed-upon application of the language in the CBA, and instead unilaterally altering the approach to calculating the retroactive pay owed to the bargaining unit, the District has violated RCW 28B.52.073(1)(e) and 28B.52.073(1)(a).[7]

In its complaint, the union acknowledged receiving the information regarding retroactive compensation on August 25, 2017, nearly two months before the complaint was filed on October 23.[8] The union sought only prospective cease and desist relief for the alleged failure to provide information.[9]

The complaint was the subject of a November 9, 2017, preliminary ruling by an unfair labor practice administrator. The ruling broke the complaint into three allegations, all in alleged violation

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5 *Id.* at Art. III, Sec. F.

6 *Id.* at Art. XXVII.

7 Compl., Attach. A at 10.

8 *Id.* at 4.

9 *Id.* at 10.

of RCW 28B.52.073(1)(a) and (e). The ruling interpreted the union's complaint as charging the employer with

> (1) Breaching its good faith bargaining obligations and refusing to bargain with the union over the decision of using a new methodology of calculating increased compensation and the total amount of increased compensation owed to the bargaining unit employees.
>
> (2) Unilaterally changing the amount of agreed upon increased compensation and the methodology to calculate the increased compensation owed to the bargaining unit employees, without providing the union an opportunity for bargaining.
>
> (3) Refusing to provide relevant information requested by the union concerning data related to the compensation implementation.

There is no indication in the preliminary ruling that the agency considered deferring these "refusal to bargain" charges to the grievance and arbitration procedure under the parties' agreement.[10]

Before answering the complaint, the employer filed a motion under WAC 391-45-250 seeking to make the complaint more definite and detailed. In its motion, the employer wrote that *if* the Commission "ultimately defers the issues in the ULP complaint to the grievance and arbitration process," it would agree to waive procedural impediments. On December 13, 2017, the Examiner

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[10] The dissent observes that at the preliminary ruling stage, the agency had only the complaint, which it was obligated to treat as true and provable. It contrasts this with the National Labor Relations Board (NLRB)'s prosecutorial and investigative functions, and it contends the agency is comparatively disadvantaged in its ability to investigate possible deferral to arbitration.

In response, the complaint included a copy of the parties' recently executed collective bargaining agreement. The complaint asserted, among other things, that the respondent breached the statute by "abandoning the parties' agreed-upon application of the CBA." (Compl., Attach. A at 10.) This alone could have alerted the agency of the need to consider deferral of the contract application issue at the preliminary ruling stage. If additional information was needed, the agency could have delayed issuance of a preliminary ruling and asked for position statements from the parties on the matter of deferral, as the Executive Director did in *Whitman County*, Decision 1380 (PECB, 1982). *See also Snohomish County*, Decision 8274 (PECB, 2003) (agency director of administration ordered deferral after filing of employer's answer); *King County, Department of Youth Services*, Decision 2193 (PECB, 1985) (examiner, after the close of a hearing, sought position statement from parties regarding deferral and deferred case to arbitration). Whatever the practice of the NLRB, there were ample opportunities over the course of this case for the agency to consider possible deferral.

denied the employer's motion. The Examiner rejected the employer's suggestion that the unfair labor practice complaints were covered by negotiated terms of the parties' agreement and should be deferred to arbitration.

Subsequently, the Examiner conducted a hearing and issued a decision. *Shoreline Community College*, Decision 12973 (CCOL, 2019). In its post-hearing brief the union argued that the parties reached an agreement but did not have a meeting of the minds.[11] The Examiner found that the parties did not have a meeting of the minds.[12] The Examiner concluded that the employer failed to provide information the union requested, the employer breached its good faith bargaining obligation on changes to compensation, and the employer unilaterally changed the compensation methodology. The Examiner did not again address the employer's affirmative defenses of waiver by contract and the Commission's alleged lack of jurisdiction over contractual disputes. The employer filed a timely appeal.

The union's unfair labor practice complaint arose from the union's disagreement with the way the employer implemented the agreed wage increases and its claim that the employer refused to provide information. The employer has consistently contended that the unfair labor practice complaint is a contractual dispute that should be deferred to arbitration. The employer's claim of contractual right under the collective bargaining agreement is viable. The employer has agreed to waive any procedural defenses should the case be deferred to arbitration.

This was thus an appropriate case for deferral to arbitration under Commission precedent, particularly given the legislature's statutory preference that disputes under collective bargaining agreements be resolved through arbitration. Finding that the parties did not have a meeting of the minds deprived the employer of the benefit of its agreement that contractual disputes be resolved through arbitration, strayed from the legislature's statutory preferences, and expended limited agency resources on matters outside the Commission's expertise.

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11 Un. Post-hr'g Br. at 13 and 15.

12 *Shoreline Community College*, Decision 12973, at 18.

We conclude that the parties had a collective bargaining agreement that governed the issues raised by the union's unfair labor practice complaint. Commission precedent, RCW 41.58.020(4), and WAC 391-45-110(3) direct the agency, in appropriate cases, to defer unfair labor practice complaints to arbitration. The gravamen of the union's complaint is that the employer unilaterally changed compensation without notice and failed to provide information required under chapter 28B.52 RCW. The alleged refusal to bargain arises from the same set of facts as the unilateral change. In both matters the employer asserts colorable contractual justification for its actions. Accordingly, we reverse the Examiner's decision and conclude that the matter should be deferred to arbitration.

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006). The Commission also reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

The Commission reviews findings of fact for substantial evidence in light of the entire record. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not observed on every appeal, is especially appropriate in fact-oriented appeals. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

The Legislative Preference for Arbitration

In RCW 41.58.020(4), the legislature expressed its preference for resolving disputes arising under collective bargaining agreements through contractual dispute resolution processes. RCW 41.58.020(4) states:

> 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 legislature modeled the statute on the Labor Management Relations Act of 1947 (LMRA), 29 USC § 173(d). *City of Richland*, Decision 246 (PECB, 1977). RCW 41.58.020(4) reflects a strong legislative policy favoring the arbitration of contractual labor disputes, consistent with the fact that "[i]n contemporary American labor law the arbitration process is the primary mechanism for resolving disputes arising under collective bargaining agreements." 2 MORRIS, THE DEVELOPING LABOR LAW 18-3 (7th ed. 2017); *see also City of Walla Walla*, Decision 104 (PECB, 1976) ("Arbitration of such disputes is a process preferred by both federal and State labor policy.").

Deferral to Arbitration

When a complainant files an unfair labor practice complaint, an unfair labor practice administrator reviews the complaint to determine whether the facts alleged in the complaint state a cause of action. WAC 391-45-110. At the preliminary ruling phase, the facts are assumed true and provable. *Whatcom County*, Decision 8245-A (PECB, 2004). If one or more of the allegations state a cause of action, the agency issues a preliminary ruling framing the issues for hearing. WAC 391-45-110(2). If a cause of action exists, the agency may defer the unfair labor practice complaint for resolution under the grievance and arbitration procedure in the parties' collective bargaining agreement. WAC 391-45-110(3). Under WAC 391-45-110(3),

> (3) The agency may defer the processing of allegations which state a cause of action under subsection (2) of this section, pending the outcome of related contractual dispute resolution procedures, but shall retain jurisdiction over those allegations.
>
> (a) Deferral to arbitration may be ordered where:

> (i) Employer conduct alleged to constitute an unlawful unilateral change of employee wages, hours or working conditions is arguably protected or prohibited by a collective bargaining agreement in effect between the parties at the time of the alleged unilateral change;
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> (ii) The parties' collective bargaining agreement provides for final and binding arbitration of grievances concerning its interpretation or application; and
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> (iii) There are no procedural impediments to a determination on the merits of the contractual issue through proceedings under the contractual dispute resolution procedure.

Deferral to arbitration is a matter of policy, rather than a matter of law. *City of Wenatchee*, Decision 6517-A (PECB, 1999) (citing *City of Seattle*, Decision 809-A (PECB, 1980)). That policy, as set by the legislature, favors arbitration as the means of resolving "disputes arising over the application or interpretation of an existing collective bargaining agreement." RCW 41.58.020(4). The Commission has adopted the National Labor Relations Board (NLRB)'s approach to deferral as set out in the Board's seminal decision, *Collyer Insulated Wire*, 192 NLRB 837 (1971); *City of Richland*, Decision 246. The Commission does not exercise its jurisdiction and does not enforce collective bargaining agreements through the unfair labor practice proceedings. *City of Walla Walla*, Decision 104 (the legislature "has not delegated to the Commission authority to determine violation of contract allegations as unfair labor practices under Chapter 41.56 RCW"); *City of Richland*, Decision 246; *City of Kennewick*, Decision 334 (PECB, 1977).

Application of Standards

The Commission Had Jurisdiction

On appeal, the employer argued that conclusion of law 1, finding that the Commission had jurisdiction, was in error. The Commission has jurisdiction to hear unfair labor practice complaints filed under chapter 28B.52 RCW. The Commission has declined to exercise jurisdiction over unfair labor practices to remedy alleged contract violations. *City of Walla Walla*, Decision 104. As stated in *Pierce County*, Decision 1671-A (PECB, 1984),

> Given the legislative exhortation found in RCW 41.58.020(4), supra, as well as the other considerations outlined above, we find it prudent not to assume jurisdiction of a case that has been, could be, or could have been arbitrated, except in special situations . . . .

The Examiner Erred in Concluding that the Parties Did Not Have a Meeting of the Minds

The Examiner concluded that the employer and union "never had a meeting of the minds in regard to compensation for missed increments."[13] The question whether the parties reached a meeting of minds regarding compensation for missed increments is a matter of contractual interpretation reserved under the agreement to an arbitrator. The Examiner's consideration of concepts pertaining to contract formation and related issues runs counter to the principle that the Commission lacks jurisdiction over allegations of breach of collective bargaining agreement and that colorable "waiver by contract" issues should be resolved in the first instance through the parties' arbitration processes.

There are sound policy reasons for this. When the Commission grounds its decisions in the statutes it is charged by the legislature with administering, reviewing courts accord its decisions "great weight and substantial deference." *Kitsap County Juvenile Detention Officers' Guild v. Kitsap County*, 1 Wn. App.2d 143, 154 (Div. 2 2017) (citing *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014)). But when the agency grounds its decisions on interpretation of a collective bargaining agreement, the decision is entitled to no deference in the reviewing courts. *See Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190, 201 (1991) ("[T]he NLRB is neither the sole nor the primary source of authority in [interpreting collective bargaining contracts] . . . . [A]rbitrators and courts are still the principal sources of contract interpretation . . . ."). Thus, an arbitrator's construction of a collective bargaining agreement is entitled to "great deference" and court review of an arbitration award is "extremely limited." *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 317–18 (2010).

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[13] *Shoreline Community College*, Decision 12973, at 18.

The Unfair Labor Practice Complaint Should Have Been Deferred to Arbitration

The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statutes it administers. *City of Walla Walla*, Decision 104; *City of Richland*, Decision 246. Rather, consistent with the legislature's goal "to promote the continued improvement of the relationship between public employers and their employees," and its preference for private dispute resolution as stated in RCW 41.58.020(4), the Commission long ago adopted the NLRB's policy of deferral to arbitration in appropriate instances as established in the Board's seminal decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971). *City of Richland*, Decision 246.[14]

The union's unfair labor practice complaint meets the requirements of WAC 391-45-110(3) for deferral to arbitration. When the union filed the unfair labor practice complaint on October 23, 2017, the parties had a collective bargaining agreement in effect from June 1, 2017, through June 30, 2019. In its complaint, the union alleged that the employer "unilaterally alter[ed] the approach to calculating the retroactive pay owed to the bargaining unit."[15] This satisfies the requirement of WAC 391-45-110(3)(a)(i).

The June 1, 2017, through June 30, 2019, collective bargaining agreement contains a provision for final and binding arbitration. This meets the requirement of WAC 391-45-110(3)(a)(ii).

While the union has not filed a grievance, the employer has agreed to waive the procedural impediments to an arbitrator reaching the merits of a grievance through the dispute resolution process in the collective bargaining agreement. Thus, WAC 391-45-110(3)(a)(iii) is not an issue.

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14 Our dissenting colleague cites *City of Yakima*, Decision 3564-A (PECB, 1991), as signaling a change in the Commission's approach to deferral. In that case the employer insisted at the preliminary ruling stage that it would "assert procedural defenses to arbitration," thus eliminating any possibility of Commission deferral to that process since employer waiver of procedural hurdles under the collective bargaining agreement is a mandatory prerequisite to deferral. *See* WAC 391-45-110 (3)(a)(iii). Because it was not an issue in that case, any discussion of the standards for deferral is dictum that cannot be read to undermine the Commission's holdings in *City of Walla Walla*, *City of Richland*, and related cases. Ill-considered dictum "should not be transformed into a rule of law." *State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 329 (1961).

15 Compl., Attach. A at 10.

The Examiner erred when she failed to sustain the employer's affirmative defenses of waiver by contract and lack of jurisdiction over contractual disputes. In her December 13, 2017, ruling on the employer's motion to make the complaint more definite and detailed, the Examiner wrote, "Only unilateral change allegations subject to a contract waiver defense are deferred; the Commission does not bifurcate unfair labor practice complaints where statutory violations are also alleged." In other words, the Examiner would not defer the unilateral change allegation because the preliminary ruling also framed an issue of refusal to bargain and failure to provide information.

The cause of action for the employer breaching its good faith bargaining obligation by refusing to bargain the decision to use a new method for calculating increased compensation and the total amount of increased compensation owed to employees arises from the same facts as the allegation that the employer unilaterally changed the amount of agreed upon compensation and the method of calculating the increased compensation. Both take aim at the same employer actions; e.g., the methodology the employer used to calculate and implement the increased compensation agreed to by the parties in the agreement. Both charges depend for their resolution on interpretation of the collective bargaining agreement, a task assigned by the parties to an arbitrator. However sliced, they amount to the same allegation: that the employer, without notice, altered the contractually agreed method for calculating employee retroactive pay after the agreement was put into effect, and thereby breached its duty to "bargain collectively with the representatives of its employees."

The Commission is not limited by how the parties characterize the allegations in their unfair labor practice complaints. In this case, the union alleged facts and asserted that those facts were a refusal to bargain and a unilateral change. The evidence demonstrated that the only issue was whether the employer unilaterally changed compensation. Accordingly, the complaint was subject to deferral pursuant to WAC 391-45-110(3). An expansive interpretation of that rule is appropriate given the broad scope of its first sentence and the legislative preference for arbitration expressed in RCW 41.58.020(4). The Examiner erred in failing to sustain the employer's affirmative defenses herein and in failing to defer the matters alleged as "refusal to bargain" unfair labor practices to arbitration.

The Information Request

In the unfair labor practice complaint, the union alleged that the employer violated RCW 28B.52.073(1)(e) and RCW 28B.52.073(1)(a) by "withholding information." The employer satisfied the union's information request on August 25, 2017, nearly two months before the unfair labor practice complaint was filed on October 23. Presumably because the union had the information it requested from the employer by the time the charge was filed, the union sought only prospective "cease and desist" relief.

The request for information charge should also have been deferred to arbitration. Article III, Section F of the parties' collective bargaining agreement provides:

> Upon request, the Employer shall make available to the Federation information needed to assist the Federation in performing its representative responsibilities. Such information shall be in the same form as is available to the general public or for internal College use.[16]

That provision is subject to the grievance and arbitration provisions of the agreement, where grievances over the "interpretation or the application" of the agreement may be heard. It is certainly within an arbitrator's capability to determine whether the employer breached its contractual duty to supply information needed by the union in fulfillment of its duty of representation. As stated in *Burns International Security Services v. National Labor Relations Board*, 146 F.3d 873, 877 (D.C. Cir. 1998), "So long as the employer plausibly claims contractual justification for its actions . . . and the matter in dispute is subject to arbitration, then the Board should leave the parties to their contract remedies . . . ." *See also Enloe Medical Center v. National Labor Relations Board*,

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16 Un. Ex. 1.

433 F.3d 834 (D.C. Cir. 2005). The parties' inclusion of a provision obligating the employer to supply the union with information furnishes a clear contractual basis for deferral.[17]

This case is distinguishable from NLRB private sector cases refusing to defer Section 8(a)(5) information request charges to arbitration. *American Standard, Inc.*, 203 NLRB 1132 (1973); *Chapin Hill at Red Bank*, 360 NLRB 116, n.2 (2014); *Medco Health Solutions of Spokane, Inc.*, 352 NLRB 640 (2008). None of the collective bargaining agreements at issue in those cases included a clause like Article III, Section F, obligating the employer to provide the union with "information needed to assist the [union] in performing its representative responsibilities," and backing it up with a "final and binding"[18] grievance and arbitration procedure.[19] The parties agreed to a contract provision obligating the employer to furnish necessary information to the union, and further agreed that disputes over the "interpretation or the application" of that provision would be submitted to arbitration. Under these facts, the alleged breach of the employer's duty to supply information under RCW 28B.52.073(1)(a) and (e) should be deferred to the arbitration process. As stated in *Collyer*,

> Certainly great damage could be done to the entire system of grievance arbitration, and to the process of collective bargaining, if parties believed they could ignore an agreed-upon method of settling disputes. Since in most cases deferring to

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17 The dissent objects to deferral of the charge of bad faith bargaining for failure to provide information because "parties could convert statutory obligations into contractual violations that could only be heard through the grievance and arbitration provisions of a collective bargaining agreement." The dissent further claims that the result would be "to allow parties to strip the Commission of its authority to administer the collective bargaining laws by converting statutory violations to contractual violations." The concern is misplaced. Each of the union's charges allege a violation of RCW 28B.52.073(1)(a) and (e), not just the refusal to provide information allegation, and the Commission retains authority to "administer the collective bargaining laws" if the arbitrator reaches a result that is repugnant to the purposes and policies of chapter 28B.52 RCW. Finally, the prospect that parties to a collective bargaining relationship will collude to strip the Commission of its statutory authority is remote at best.

18 Un. Ex. 1, Art. XVI, Sec. D(1).

19 This case more closely resembles the Board decision in *United Aircraft Corp.*, 204 NLRB 879 (1972), *aff'd sub nom. Lodges 700, 743, 1746, International Ass'n of Machinists and Aerospace Workers v. National Labor Relations Board*, 525 F.2d 237 (2nd Cir. 1975). There, as here, the agreement contained specific language establishing the employer's obligation to furnish information to the union and an arbitration clause to enforce it. Accordingly, the Board deferred the 8(a)(5) information request charge to arbitration under *Collyer*. Although *United Aircraft* has never been overruled, the Board has since expressed dissatisfaction with it. *See Chrysler, LLC*, 354 NLRB 1032 (2010).

> arbitration will encourage collective bargaining, the Board, in carrying out the Act's purpose, should see that full play is given to the arbitral process.

192 NLRB at 844 (Member Brown concurring). *See also City of Walla Walla*, Decision 104 (Commission lacks jurisdiction over contract disputes: "[T]hese violation of contract allegations should be litigated, if at all, under the grievance and arbitration machinery provided in the collective bargaining agreement between the parties.").

CONCLUSION

The parties had a collective bargaining agreement in place when the union filed its unfair labor practice complaint. That agreement contained provisions addressing employee wages and union requests for information. The entirety of the unfair labor practice complaint, including the allegations that the employer bargained in bad faith, unilaterally altered the approach to calculating the retroactive pay owed to the bargaining unit as agreed, and withheld information, all in violation of RCW 28B.52.073(1)(e) and RCW 28B.52.073(1)(a), are deferred to arbitration under the parties' collective bargaining agreement. In accordance with WAC 391-45-110(3)(b), jurisdiction of this proceeding is retained by the Commission for the limited purpose of considering an appropriate and timely motion for further consideration upon a showing that either (a) the contractual procedures were not promptly pursued or were not conducted in a fair and orderly manner; or (b) the contractual procedures have reached a result that is repugnant to the purposes and policies of chapter 28B.52 RCW.

ORDER

The Examiner's Order is VACATED and the following order is substituted:

The complaint charging unfair labor practices filed in the above-captioned matter is deferred to arbitration.

The Commission retains jurisdiction over the complaint for the limited purpose of considering an appropriate and timely motion for further consideration upon a showing that either (a) the contractual procedures were not promptly pursued or were not conducted in a fair and orderly manner; or (b) the contractual procedures have reached a result that is repugnant to the purposes and policies of chapter 28B.52 RCW. The case is returned to the Executive Director or his designee for monitoring consistent with this decision.

ISSUED at Olympia, Washington, this 16th day of January, 2020.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARK BUSTO, Commissioner

KENNETH J. PEDERSEN, Commissioner

OPINION DISSENTING

For the reasons set forth below, I respectfully dissent from the majority opinion.

I disagree that the Examiner erred by ruling that under agency standards, deferral was not appropriate in this case.

The majority notes that there is no indication in the preliminary ruling that the agency considered deferring the charges to the grievance and arbitration procedures of the parties' agreement. The preliminary ruling would not do that since it is based solely on the allegations contained in the complaint, which at the point are presumed to be true and provable. A preliminary ruling limits the causes of action before an examiner and the Commission. WAC 391-45-110 (b); *King County*, Decision 6994-B (PECB, 2002). Unlike the NLRB, the Commission does not investigate

allegations before they are adjudicated. The difference in practices creates a different procedure for deferral.

The Commission's approach to deferral has changed over time. First, the Commission began by adopting *Collyer*. *City of Richland*, Decision 246. Next, in *City of Yakima*, Decision 3564-A (PECB, 1991), the Commission clarified its approach to deferral. The Commission explained that the "Commission has taken a conservative approach, limiting 'deferral' to situations where an employer's conduct at issue in a 'unilateral change' case is arguably protected or prohibited by an existing collective bargaining agreement." *City of Yakima*, Decision 3564-A (citing *Stevens County*, Decision 2602 (PECB, 1987) and *Municipality of Metropolitan Seattle (METRO) (Amalgamated Transit Union Local 587)*, Decision 2746-A (PECB, 1989). However, the Commission clearly stated there that it could refuse to defer any unfair labor practice case and could interpret any collective bargaining agreement to the extent necessary to decide a pending unfair labor practice case. Ultimately, the Commission adopted WAC 391-45-110(3), which limits when deferral may be granted.

Deferral is a policy decision. The Examiner followed agency policy when she denied the employer's motion to make the complaint more definite and detailed and did not defer the case to arbitration. The employer filed a motion to make the complaint more definite and certain and asserted it would waive procedural defenses if the Commission deferred the case to arbitration. However, the employer did not file either a request to defer or an interlocutory appeal of the Examiner's decision denying deferral as provided in WAC 391-45-310. The majority's decision to defer the complaint to arbitration is not consistent with the rule or long established agency practice.

The Commission Does Not Defer Statutory Violations to Arbitration

The majority would defer the refusal to bargain by failing to provide information requested, a statutory violation, to arbitration because the parties affirmatively expressed their statutory obligation in their collective bargaining agreement. Under the majority's analysis, parties could convert statutory obligations into contractual violations that could only be heard through the grievance and arbitration provisions of a collective bargaining agreement. The effect of this

decision is to allow parties to strip the Commission of its authority to administer the collective bargaining laws by converting statutory violations to contractual violations.

While the legislature expressed a preference that the "desirable method for settlement of grievance disputes" is under the parties' collective bargaining agreement, RCW 41.58.020(4), the allegation that the employer refused to bargain by failing to provide requested information is a statutory violation. While the parties may have agreed to language affirming their statutory obligation, the majority should not, under the guise of complying with the legislature's expressed preference, deny a party their right to pursue a statutory violation before the Commission.

Determining whether a party violated the statute is within the purview of the Commission. The Commission has not deferred statutory allegations to arbitration. *City of Tacoma*, Decision 4104-A (PECB, 1993).

MARILYN GLENN SAYAN, Chairperson

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 01/16/2020

DECISION 12973 - CCOL has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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