

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF  
COUNTY AND CITY EMPLOYEES,

Complainant,

vs.

CITY OF MILL CREEK,

Respondent.

CASE 132886-U-20

DECISION 13402 - PECB

DECISION OF COMMISSION

*Ed Stemler, General Counsel, for the Washington State Council of County and City Employees.*

*Katheryn Bradley and Shirley S. Lou-Magnuson, Attorneys at Law, Lane Powell PC, for the City of Mill Creek.*

**BACKGROUND**

On July 8, 2020, the Washington State Council of County and City Employees (union) filed an unfair labor practice complaint against the City of Mill Creek (employer). Unfair Labor Practice Administrator Emily K. Whitney issued a preliminary ruling finding that the complaint stated causes of action for employer refusal to bargain in violation of RCW 41.56.140(4) by unilaterally changing employment through layoffs, contracting out bargaining unit work, and refusing to provide information. On August 20, 2020, the employer filed an answer.

On February 18, 2021, the employer filed a motion to file an amended answer. The employer also filed a motion for a continuance, for deferral to arbitration or, in the alternative, for summary judgment. The union filed a response in opposition to the employer's motions. The employer filed a reply.

On June 9, 2021, Examiner Erin J. Slone-Gomez granted the employer's motion to amend the complaint and denied the motion for deferral to arbitration and the motion for summary judgment. Because the parties had agreed to continue the hearing, the Examiner did not rule on the motion for a continuance.<sup>1</sup>

On June 16, 2021, the employer filed a motion for discretionary review of the Examiner's decision denying the employer's motion for deferral and/or summary judgment. On June 28, 2021, the union filed a response to in opposition to the motion.

### ISSUES

The issue before the Commission is whether to grant discretionary review under WAC 391-45-310. We deny the employer's motion.

### ANALYSIS

#### Applicable Legal Standard

"A party seeking review by the commission of an interlocutory decision of . . . a hearing examiner must file a motion for discretionary review with the commission and a copy with the executive director, his or her designee, or a hearing examiner, within seven days after the decision is issued." WAC 391-45-310(1)(a).

Under WAC 391-45-310(1)(b), the Commission accepts discretionary review only:

- (i) If the executive director, his or her designee, or a hearing examiner has committed an obvious error which would render further proceedings useless; or
- (ii) If the executive director, his or her designee, or a hearing examiner has committed probable error and the decision of the interlocutory decision of the

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<sup>1</sup> The Commission does not address employer's motion for a continuance for the same reason.

hearing examiner substantially alters the status quo or substantially limits the freedom of a party to act; or

(iii) If the executive director, his or her designee, or a hearing examiner has so far departed from the accepted and usual course of administrative proceedings as to call for the exercise of revisory jurisdiction by the commission.

WAC 391-45-310(c) further limits motions for discretionary review by the following:

(c) The commission will not accept motions for discretionary review of:

(i) The scope of proceedings issued in a preliminary ruling by the executive director or his or her designee or a hearing examiner under WAC 391-45-110; or

(ii) Application of the six-month statute of limitations;

(iii) Any evidentiary ruling by a hearing examiner during the course of an administrative hearing.

WAC 391-45-110 reads in pertinent part as follows:

(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.

#### Application of Standard

At this stage in the proceeding, we are not tasked with reviewing the merits of the employer's motions. We review the rulings only to the extent necessary to determine whether the examiner committed an error delineated in WAC 391-45-310(1)(b) that would necessitate exercising revisory jurisdiction.

#### *The motion seeking discretionary review of the denial of deferral to arbitration*

The Examiner's decision denying deferral to arbitration is a preliminary ruling bearing on the scope of proceedings under WAC 391-45-110. Under WAC 391-45-310(c)(i), we will not accept motions for discretionary review of preliminary rulings regarding the scope of proceedings. *King*

*Public Hospital District 1*, Decision 12446 (PECB, 2015). The employer's motion for discretionary review of the Examiner's rejection of its motion to defer to arbitration is denied.<sup>2</sup>

*The motion seeking discretionary review of the alternative motion for summary judgment*

The employer's arguments on discretionary review center around WAC 391-45-310(1)(b)(iii). Specifically, the employer argues that the Examiner did not follow established case law and precedent thereby departing from the accepted and usual course of administrative proceedings when she denied the motions for summary judgment.

The union opposes the motion for discretionary review. We hold that the employer has not met the conditions for discretionary review under the rule.

The primary purpose of summary judgment procedure is to avoid a trial when one is not necessary. *Johnson v. Rothstein*, 52 Wn. App. 303 (citing *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602 (1980); *Ryder v. Port of Seattle*, 50 Wn. App. 144, 148 (1987)). A denial of summary judgment on the presence of material, disputed fact is an interlocutory decision. *Johnson v. Rothstein*, 52 Wn. App. 303, 305-307. Therefore, 'denial of a motion for summary judgment is ordinarily not reviewable.'" *City of Redmond v. Hartford Accident & Idem. Ins. Co.*, 88 Wn. App. 1, 6 n.2 (1997) (citing *Zimny v. Lovric*, 59 Wn. App. 737, 739 (1990)).

The Examiner found that material facts were in dispute. While summary judgment is permitted under the Administrative Procedures Act, we will not review an Examiner's interlocutory decision finding the existence of disputed material facts absent a showing of error. In this case, the employer may disagree with the Examiner's characterization of the dispute, but the employer has not established that she departed from the accepted and usual course of administrative proceedings.

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<sup>2</sup> Our denial of the employer's request for discretionary review of the Examiner's ruling denying deferral does not operate as a decision on the merits of the deferral motion. "Denial of discretionary review of a decision does not affect the right of a party to obtain later review of the executive director's, his or her designee's, or hearing examiner's decision or the issues pertaining to that decision." WAC 391-45-310(1)(e).

ORDER

The employer's motion for discretionary review of Examiner Erin Slone-Gomez's June 9, 2021 ruling is denied. The matter is remanded to the agency for further processing.

ISSUED at Olympia, Washington, this 9th day of September, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



MARK BUSTO, Commissioner



KENNETH J. PEDERSEN, Commissioner



# RECORD OF SERVICE

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ISSUED ON 09/09/2021

DECISION 13402 - PECB 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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CASE 132886-U-20

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