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Court of Appeals Case No. 81322-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

AMERICAN FEDERATION OF TEACHERS, LOCAL 1950,

Petitioner,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION, a Washington State Agency, and SHORELINE COMMUNITY COLLEGE,

Respondents.

AMERICAN FEDERATION OF TEACHERS, LOCAL 1950'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

American Federation of Teachers, Local 1950 (AFT Local 1950), is an employee organization within the meaning of RCW 28B.52.020(1) and the bargaining representative of all faculty employed by Shoreline Community College. Administrative Record (AR) 155.

II. THE COURT OF APPEALS DECISION

Local 1950 seeks review the Court of Appeals' (Division I) August 23, 2021, decision upholding and the Public Employment Relations Commission (the Commission or PERC)'s decision in *American Federation of Teachers Local 1950 v. Shoreline Community College*, Decision 12973-A (CCOL, 2020). The Appellate Court's decision is attached in the Appendix hereto.

III. ISSUES PRESENTED FOR REVIEW

Where the Court of Appeals and the Commission departed from well-established legal principles and agency practice, contrary to the factors provided in RCW 34.05.570(3)(c), (d), (e), (h), and (i), by holding that alleged *statutory* unfair labor practices could be deferred to the private arbitration forum for *contractual* disputes, and when proper resolution of statutory disputes by the agency is necessary to the public interest, should this Court grant discretionary review under RAP 13.4(b) to resolve:

(a) the conflict between the departure from existing agency regulations and prior Commission case law, and

(b) the substantial question of whether the Commission can cede its legislatively-granted authority to arbitrators?

IV. STATEMENT OF THE CASE

In October 2017, Local 1950 filed an unfair labor practice (ULP) charge with PERC stemming from the negotiation and implementation of additional "increment" payments to full-time and part-time faculty members in 2017. AR 1757–67. In November 2017, the agency issued a preliminary ruling, finding three unique causes of action:

> Employer refusal to bargain in violation of RCW 28B.52.073(1)(d) [and if so, derivative interference in violation of RCW 28B.52.073(1)(a)], within six months of the date the complaint was filed, by:
>
> (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.

AR 1652–53.

Shoreline Community College responded by a motion asking that the complaint be deferred to arbitration because the CBA contained a right to obtain information and a provision for the increased compensation. AR 1630–37.

The Examiner denied the College's request to defer because "[t]he causes of action stated in the preliminary ruling do not arise from the parties' CBA but rather the parties rights and responsibilities outlined in RCW 28B.52.073." AR at 1615–17. She stated:

> [T]his case does not qualify for deferral. Deferral to arbitration is a discretionary action by the Commission provided for in WAC 391-45-110(3). The Commission may defer a unilateral change allegation upon an employer's request if the complaint and answer indicate that the arbitrator can assist the unfair labor practice process by validating or clearing away waiver defenses under a collective bargaining agreement. **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. As the instant case includes allegations beyond unilateral change, deferral is inappropriate.

AR at 1617 (emphasis added).

Later, following a four-day hearing and post-hearing briefing on the merits, the Examiner concluded that there had been no "meeting of the minds" between the parties regarding how to calculate the additional compensation, because while the CBA stated that the employer would

provide the additional compensation, the contract failed "to provide a more thorough explanation of the process" for calculating the compensation.[1] AR 144. She held that the employer's calculation method was "in direct conflict with the union's understanding of the agreement," and that from the evidentiary record, it was "unclear how or why [the employer] made these decisions." AR 146. *See also* AR 137, 139–40. She also held that the employer had compounded this misunderstanding by failing to provide the union with information it sought that "would have clued in the parties that they lacked a shared understanding" regarding methodology. AR 147. She specifically found that the College had bargained in bad faith in that by "failing to dispute the methodology and/or by ignoring the methodology the union proposed on multiple occasions, the employer failed to engage in full and frank bargaining. Therefore, the employer failed to meet its duty to bargain in good faith in violation of RCW 28B.52.073." AR 150.

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[1] The CBA language provides:

> All partial increment increases negotiated in this Agreement (Section B.1.a., b., and c.) shall be treated as deferred compensation retroactive to July 1, 2016. *See* Appendix C Memorandum of Understanding, dated December 7, 2016.
>
> a. Funding for one-half (1/2) step increment increase plus funds saved from a one-third (1/3) reduction in sabbatical funding and used for a partial increment increase based on a weighted average of increments due;
>
> b. Funding for one-half (1/2) step increment increase; and,
>
> c. Distribution of the annual turn-over dollars for partial increment increase.

AR 297.

The Examiner held: (1) the employer refused to provide relevant information in violation of RCW 28B.52.073(1)(d); (2) the employer refused to bargain in good faith over the calculations in violation of RCW 28B.52.073(1)(d) and; (3) the employer unilaterally changed the status quo in violation of RCW 28B.52.073(1)(d) by implementing its version of the calculations, along with related interference violations. AR 167.

In a 2-1 decision, the Commission reversed and ruled that *all* charges should be deferred to arbitration. AR 38–54. The majority opinion asserted that its decision was consistent with the Commission's regulation on deferral. AR 43–44 (citing WAC 391-45-110(3)). Although WAC 391-45-110(3) authorizes deferral only for unilateral change allegations, the majority ruled that both the unilateral change and the failure to bargain allegations should be deferred due simply to a general statement of "legislative preference of arbitration expressed in RCW 41.58.020(4)[2]." AR at 47.

Separately, the Commission determined that the failure to provide information claim should be deferred because the CBA included an

[2] That statute concerns arbitration of grievances only: "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 commission is directed to make its mediation and fact-finding services available in the settlement of such grievance disputes only as a last resort." RCW 41.58.020(4)

obligation for the employer to "'make available to the [union] information needed … [for] its representative responsibilities.'" AR 48 (quoting CBA).

In dissent, PERC Chairperson Marilyn Glenn Sayan exposed the majority's departure from WAC 391-45-110(3) by stating that the "Examiner followed agency policy" when she did not defer the case to arbitration.[3] AR 51. By reversing and deferring all charges, the "majority's decision to defer … to arbitration is not consistent with the rule or long established agency practice." *Id.* Chairperson Sayan further observed that the departure from the WAC in deferring statutory violations was an abdication of the Commissions duty to enforce statutory regulation of collective bargaining:

> 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.

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[3] Chairperson Sayan also objected that in order to request deferral, the employer should have either filed a request to defer in the first place (not its later motion) or an interlocutory appeal of the Examiner's denial under WAC 391-45-310. Deferral is not proper where the Employer's answer asserts waiver by contract as a defense, AR 1604; *Seattle School District*, Decision 11161-A (PECB, 2013).

Id. at 52–53. Under this analysis, the majority "den[ies] a party their right to pursue a statutory violation before the Commission." *Id.*

The Court of Appeals affirmed the Commissions' ruling. The appellate decision shows no indication that the Court understood that failure to bargain the calculations and failure to provide information claims are *statutory* rights meant to provide a fair and effective framework for collective bargaining, completely independent of the result of that bargaining, the CBA. The decision's effect is exactly as Chairperson Sayan indicated; it "allow[s] parties to strip the Commission of its authority to administer the collective bargaining laws … ." Moreover, it endorses the elimination of parties' statutory rights in the name of "judicial efficiency." *See* App. at 12, n. 11. This decision is binding authority denying public sector employees, unions, and employers of the right to have PERC impartially and uniformly enforce a legislated set of labor relations rules, and instead pushes enforcement of those rights to private arbitration, free from legislated language, free from rules developed through the due process inherent in the Administrative Procedure Act, and free from the review of Washington's courts.

V. ARGUMENT

A. This Court Reviews Cases That Present Issues of Substantial Public Interest

This Court determines whether to review a Court of Appeals decisions under RAP 13.4(b). Review is appropriate where the decision presents an issue of substantial public interest. RAP 13.4(b)(4).

B. By Converting Statutory Rights Under PERC's Authority Into Contractual Rights, PERC Undermines the Public Interest.

1. PERC's prior deferral standard correctly balanced the Agency's expertise in enforcing labor law with arbitrator's expertise in enforcing contracts.

a. Three separate violation of collective bargaining parameters are at issue.

The statutory requirement that employers collectively bargain with unions encompasses many different duties, three of which were implicated in Local 1950's complaint: a duty to engage in good faith bargaining; a related but separate duty to refrain from altering working conditions without bargaining, and a duty to provide information necessary to perform collective bargaining duties, including bargaining. *See* RCW 28B.52.020(7) (defining collective bargaining); RCW 28B.52.073(1)(e) (unfair labor practice to refuse to collectively bargain). As reflected in the preliminary ruling, AR at 1652–53, PERC has long recognized these as three separate statutory violations, each a variation of a violation of the

duty to bargain in good faith, each with its own test and name: failure to bargain, unilateral change, and failure to provide information, respectively. *See City of Yakima*, Decision 3564-A (PECB, 1991).[4]

These are independent statutory "rules of the road" for labor relations. The duty to bargain a proposed change, and the duty not to implement that change without first completing good faith bargaining are separate statutory obligations as explained by the Commission in *Lake Washington School District*, Decision 11913-A (2014), at 3–4 (failure to bargain the decision to skim bargaining unit work is independent of the unlawful unilateral change implementing the skimming). The duty to provide information is a separate important statutory rule of the road intended to facilitate informed bargaining. *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 383, 831 P.2d 738, 743 (1992); *King County*, Decision 6994-B (PECB, 2002); RCW 28B.52.010 (purpose of statute "includes the elements of open communication and access to information in a timely manner.")

b. Only unilateral change allegations may be deferred.

Only one of these violations has ever been deferrable: the unilateral change. WAC 391-45-110(3)(a)[5]; *City of Yakima*, Decision

[4] PERC's decisions can be found on PERC's website at https://perc.wa.gov/.
[5] Providing PERC "may" defer to arbitration where:

3564-A (PECB, 1991) (explaining only unilateral change matters can be deferred, and, in n. 10, that "[o]ther 'refusal to bargain' claims dealing with 'good faith' or refusals to provide information" may not be deferred); *King County*, Decision 11597-A (PECB, 2014) (refusal to provide information allegations are statutory and not deferrable.).

There are sound reasons that only the unilateral change ULP was deferrable. As the Commission explained in *City of Yakima*, the other rules of the road are not within the expertize of an arbitrator, and bad faith bargaining charges "often put the legitimacy of the contract or the grievance procedure itself in question", thus requiring the agency to apply the statutory standards to enforce the bargaining obligation that will render a legitimately enforceable contract. *Id*.

This division of labor between PERC and arbitrators is the same across all the statutes that the Commission enforces, and the Legislature has made clear that it is PERC who must enforce the statutory rules of the road for collective bargaining. This is reflected in RCW 28B.52.065 which

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(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;
(ii) The parties' collective bargaining agreement provides for final and binding arbitration of grievances concerning its interpretation or application; and
(iii) There are no procedural impediments to a determination on the merits of the contractual issue through proceedings under the contractual dispute resolution procedure.

provides for Commission adjudication of unfair labor practices, and allows for arbitral resolution of only if the parties mutually agree to seek adjudication under the CBA instead. And it is reflected in the statute creating PERC, RCW 41.58.010, to administer certain collective bargaining statutes which requires "efficient and expert administration" that is "uniform and impartial." RCW 41.58.005.[6] In the words of this Court, the "Legislature has delegated to PERC the delicate task of accommodating the diverse public, employer and union interests at stake in public employment relations" a task requiring "particularity and sensitivity." *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Comm'n*, 113 Wn.2d 197, 203, 778 P.2d 32, 35 (1989).

c. Unilateral change cases are deferrable only where a contractual waiver is at issue, because that defense, if colorable, is the only purely contractual issue that arises in processing unfair labor practices and because PERC is charged with statutory enforcement.

The purpose of deferral "is to obtain an arbitrator's interpretation of the labor agreement, to assist [PERC] in evaluating a 'waiver by

[6] PERC oversees a web of similar laws that apply the same legal principles to various public sector workers, including Chapter 28B.52 RCW, which addresses public employment in community colleges. The employer actions prohibited by RCW 28B.52.073 are substantially the same as those actions prohibited in related statutes applying to other groups of workers, e.g., RCW 41.56.140 and RCW 41.58.110. PERC interprets these statutes consistently, and treats ULP decisions made under these statutes interchangeably. *See, e.g., Edmonds Community College,* Decision 10250-A (CCOL, 2009) (relying on, without comment, decisions interpreting unfair labor practices under RCW 41.56 and RCW 41.58 to interpret ULPs under RCW 28B.52).

contract' defense." *City of Yakima*, Decision 3564-A (PECB, 1991). But outside this very narrow circumstance, there is no legislative preference for deferral. *Id.*; RCW 41.56.160(1) (PERC's authority "shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law"). And "arbitrators have no particular expertise in the interpretation or administration of the statute." *City of Bremerton*, Decision 6006-A (PECB, 1998) (*citing City of Bellevue,* 119 Wn.2d at 381); *Seattle School District*, Decision 5542-C (PECB, 1997) ("Arbitrators have no particular expertise in other issues, however, and the Commission does not defer … other types of 'refusal to bargain' charges").

Because unilateral changes may only be deferred when the action is "arguably" privileged under the contract, before deferring a unilateral change case to arbitration, PERC has always been required to decide whether the employer's waiver by contract defense is colorable. *City of Yakima*, Decision 3564-A (PECB, 1991) (PERC "could interpret any collective bargaining agreement to the extent necessary to decide a pending unfair labor practice case" and limits deferral to unilateral changes that are "**arguably protected or prohibited by an existing collective bargaining agreement**".) (emphasis in original).

Once PERC determines that an employer has a colorable argument that the existing contract permitted the unilateral change, the case may be deferred to arbitration, and the arbitrator will determine whether the Employer's action was indeed authorized by the contract. If the Arbitrator rules that the CBA permitted the change, the Agency will dismiss the ULP charge. Decision 3564-A. If the arbitrator determines the contract prohibited the employer's action, the Agency will still dismiss the case, because the Union will receive a remedy from the arbitrator. *Id.* at n.21. Finally, if the arbitrator determines that the CBA neither permits nor prohibits the action, the Agency will institute further proceedings. *Id.*

Thus, in a case that is properly deferred, statutory issues that have been waived by contract need not be resolved and statutory issues that are not affected by contract are preserved for Commission adjudication. Here, in the decision to defer the unilateral change allegation, the Commission summarily passed over the related statutory failure to bargain over the calculations of the payments and the failure to provide information concerning the calculations. It thus abandoned its duty to adjudicate those statutory claims, and departed from longstanding and legally sound practice of not bifurcating claims for deferral.

d. Even where a unilateral change claim is otherwise deferrable, if there are other claims, the Commission does not have discretion to defer any of the claims.

Deferral to arbitration under WAC 391-45-110(3) may be ordered only "where the **sole** cause of action is for a unilateral change." *Seattle School District*, Decision 11161-A (PECB, 2013) (emphasis added). When other allegations are present, the Agency would refuse to defer the entire matter. *Snohomish County Police Staff and Auxiliary Services Center*, Decision 12342 (PECB, 2015), *aff'd*, Decision 12342-A (PECB, 2016) ("although the preliminary ruling includes causes of action for unilateral changes, the remaining causes of action concern statutory claims that are not subject to deferral. The Commission does not bifurcate unfair labor practice complaints.") (cleaned up); *City of Spokane*, Decision 11626 (PECB, 2013) (preliminary ruling holding that "[a]lthough a cause of action is given for a unilateral change, the cause of action for refusal to provide information concerns an alleged statutory violation that is not subject to deferral" and therefore entire matter could not be deferred).

2. The Commission and the Court of Appeals' new deferral standard assumed, rather than analyzed, the critical issue regarding the employer's contractual defense and in so doing, weakened statutory bargaining protections.

The Commission radically altered the standard in this case, holding that all three charges should be deferred. It is not that the Commission

reviewed the record and determined that substantial evidence supported that the employer's waiver argument was colorable. Rather, the Commission held that whether or not the parties had a meeting of the minds regarding the contract "is a matter of contractual interpretation" appropriate only for an arbitrator. *Id.* But because the meeting of the minds question was central to the s*tatutory* failure to bargain claim arising from the parties' obligations to bargain in good faith where disagreement still existed, this claim should never have been deferred, and would not have been deferred if the Commission adhered to WAC 391-45-110(3).

Failure to bargain occurs where the totality of the circumstances show a failure or refusal to bargain in good faith or the intent to frustrate or avoid an agreement. *Central Washington University*, Decision 10413-A (PSRA, 2011). The alleged failure to bargain over the calculation methodology here has to do with how the parties followed the statutory rules of the road, putting the legitimacy of the contract itself in question. *City of Yakima*, Decision 3564-A (PECB, 1991).

By altering the standard so that an arbitrator, not the Agency, determines whether the employer's waiver by contract defense to a unilateral change allegation is colorable, the Commission silently assumed that the parties abided by their statutory good faith bargaining, thus essentially sidestepped the failure to bargain claim, and by so doing,

implicitly decided it for the employer. Yet, under the statutory mandate to PERC and the settled deferral policy found in WAC 391-45-110(3) the arbitrator will not (and should not) answer the question of whether the employer bargained in good faith.[7]

The Court of Appeals then endorsed this approach, holding that all three claims were properly deferred. App. at 16. This decision rubberstamps PERC's failure to enforce the rules of the collective bargaining process and its abdication of that role to an arbitrator who does not have that jurisdiction and creates an erroneous precedent which will affect subsequent cases.

3. The Commission and the Court of Appeals' decision on deferral of the alleged statutory duty to provide information violation is an abdication of its enforcement duty and additionally undermines the arbitration process.

The Commission, and the Court of Appeals, also inappropriately downgraded the Union's *statutory* right to information into being only a *contractual* right. AR 48–50. But the statutory right to information is a necessary rule of the road to ensure good faith bargaining, and to enable unions in "sifting out unmeritorious claims," before taking such claims to arbitration. *City Of Bremerton*, Decision 6006-A (PECB, 1998) (*quoting*

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[7] It is a fundamental principle of labor law that arbitrators' function is "limited to interpretation of the bargained-for agreement." BNA, Elkouri & Elkouri, How Arbitration Works 3.3.B (Kenneth May et al. eds., 8th ed. 2016).

N.L.R.B. v. Acme Indus. Co., 385 U.S. 432, 438, 87 S. Ct. 565, 569, 17 L. Ed. 2d 495 (1967) (upholding NLRB's determination that NLRA required employer to provide information, overturning Seventh Circuit's ruling to defer to arbitration). "[T]he goal of the process of exchanging information is to encourage the resolution of disputes, short of arbitration hearings … so that the arbitration system is not 'woefully overburdened.'" *Id.* (*quoting Pennsylvania Power and Light Compan*y, 301 NLRB 1104, 1105 (1991) (*citing Acme*, 385 U.S. at 438)).

The Court of Appeals distinguished *Bremerton* because "the parties here negotiated language in their CBA governing the duty to provide information." This improperly compressed two independent rights, a statutory right to have information and a contractual right, into a single right, and improperly places sole enforcement with the arbitrator *City of Yakima*, Decision 3564-A (PECB, 1991) (arguments for broader deferral standard "ignore that two separate sets of rights are being invoked"). Deferral of this claim violates WAC 391-45-110(3) and frustrates the efficient vetting of contractual claims, the very purpose the statutory requirement to provide information is designed to achieve. Under this improper deferral precedent, unions will be forced to seek arbitration to determine whether they are entitled to the information needed for a contractual dispute, prevail at

arbitration, receive the information, and then go to arbitration a second time on the underlying contractual dispute.

C. The Commission and The Court of Appeals New Deferral Standard Imperils The Public Interest by Improperly Disrupting the Harmony Between Arbitration of CBA Disputes and PERC's Role in Statutory Enforcement and Eviscerates the Courts' Role in Adjudicating Statutory Labor Rights.

The legislative preference for arbitration regarding "application or interpretation" of labor contracts, RCW 41.58.020(4), applies where the parties have lawfully negotiated a CBA. The fairness of this process is ensured because PERC enforces the statutory rules of the road for the collective bargaining process, which ensures resulting CBAs are appropriate for arbitral review. This is similar to the gatekeeping role Courts play in determining whether an agreement to arbitrate is conscionable. *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 47, 470 P.3d 486, 491 (2020) (explaining that although Washington policy favors arbitration, whether arbitration agreement is valid "is a preliminary question for judicial consideration."). Just as Washington courts ensure arbitration agreements are substantively and procedural fair, *id.*, PERC ensures that collective bargaining agreements are negotiated according to

statutory process rules. Arbitrators do not have this expertise; nor do they have this duty.[8]

In interpreting a related issue under federal law, the U.S. Supreme Court has explained that the presumption of arbitrability "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA." *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78, 119 S. Ct. 391, 395, 142 L. Ed. 2d 361 (1998). Washington courts have echoed this, explaining that unionized workers' statutory rights are distinct from their contractual rights, and that therefore, presumptions of arbitrability do not apply to *statutory* rights. *Jeoung Lee v. Evergreen Hosp. Med. Ctr.*, 7 Wn. App. 2d 566, 577 and n.26, 434 P.3d 1071, 1077, *aff'd*, 195 Wn.2d 699, 464 P.3d 209 (2020) (*quoting* 525 U.S. at 78). It is PERC, not arbitrators, that "is empowered and directed to prevent any unfair labor practice[s]." RCW 41.56.160.[9] By deferring statutory claims, PERC abdicates its

[8] In critiquing the National Labor Relations Board's deferral standards, commentators have raised similar concerns, noting it is "neither constructive, practicable, nor appropriate to choose not to adjudicate statutory issues involving public rights in deference to a decision by a privately appointed decision maker of contractual claims." Friedman, 92 Tul. L. Rev. at 889 (2018). This is the agency has more "comparative institutional competence" to aid in "the process of statutory interpretation and [is] more cognizant of…the public policies underlying the enactment of that statute, than private individuals who…resolve contractual disputes." *Id.* at 891–92.

[9] In fact, PERC has previously held that "agreements between parties cannot restrict the jurisdiction of the Commission" to determine statutory rights. *Snohomish County Police*

legislatively-mandated role in protecting the collective bargaining process and hands the keys for public-sector labor relations over to arbitrators.

Significantly, court review of arbitrator's decisions is extremely narrow, so by converting statutory claims into contractual claims, PERC has not only abandoned its own duty, but hamstrung the parties' right to access the courts as the final adjudicator of rights arising under Washington law.

VI. CONCLUSION

For the foregoing reasons, AFT Local 1950 respectfully requests that the Court accept review.

DATED this 22nd day of September, 2021.

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Staff and Auxiliary Services Center, Decision 12342 (PECB, 2015), *aff'd* Decision 12342-A (PECB, 2016).

DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury that on the date noted below, I caused the foregoing document to be electronically filed with the Supreme Court via the appellate efiling system, which will automatically provide notice of such filing to all required parties.

SIGNED this 22nd day of September, 2021, at Seattle, WA.

Jennifer Woodward
Paralegal

Appendix

FILED
8/23/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AMERICAN FEDERATION OF TEACHERS, LOCAL 1950,

Appellant,

v.

STATE OF WASHINGTON, PUBLIC EMPLOYMENT RELATIONS COMMISSION, a Washington State Agency; and SHORELINE COMMUNITY COLLEGE,

Respondents.

No. 81322-6-I

DIVISION ONE

PUBLISHED OPINION

BOWMAN, J. — The American Federation of Teachers, Local 1950 (Union), appeals the decision of the Public Employment Relations Commission (Commission) to defer consideration of the Union's unfair labor practice (ULP) complaints against Shoreline Community College (College) until after an arbitrator resolves the College's affirmative defense of waiver by contract. Because the Commission has broad authority to determine when deferral to arbitration is appropriate, and a substantial question of contract interpretation exists that could influence or control the outcome of the statutory ULP claims, we affirm.

FACTS

The Union and the College began negotiating a new collective bargaining agreement (CBA) in 2017. A central issue in the bargaining process was how to compensate faculty for past wage increases that had been authorized but unfunded by the legislature since 2008. The College estimated it could contribute $311,000 from its reserve fund, but this amount did not cover summer quarter costs. The Union agreed to reduce its budget for sabbatical leave by $200,000 and add that money to the increment wages pool.

According to the Union, it communicated its strong desire to the College that “those who had missed the most in terms of unfunded increments would be able to get more [of] a share of the money.” This required calculating each teacher’s increase using a “weighted average” of workload, number of quarters worked, and several other factors. From the Union’s perspective, the College appeared to accept the Union’s methodology and was more concerned about the total number of dollars than the manner of distribution.

In negotiating the wage increases, the Union relied heavily on the work of its treasurer and College faculty member, Brad Fader. Fader taught accounting at the College and had 25 years of experience negotiating contracts and running financial analyses for the Boeing Company. Fader developed a method for calculating distribution of the pool of money and provided it to the College. He

also drafted language related to the unfunded wage increments that the parties later incorporated into the CBA as "Appendix A."[1]

The parties included language in the CBA requiring the College to "make available to the [Union] information needed to assist the [Union] in performing its representative responsibilities," as well as standard waiver and integration clauses. For example, the CBA "constitutes the negotiated agreement between the [College] and the [Union] and supersedes any agreements or understandings, whether oral or written, between the parties." And the "Agreement expressed herein in writing constitutes the entire Agreement between the parties, and no oral statement shall add to or supersede any of its provisions." Finally, the CBA provided that any allegation that the College violated a section or provision of the agreement is subject to arbitration.

The parties executed the new CBA in May 2017 with an effective date of June 1, 2017. Several times between May and the end of June 2017, Fader asked the College to provide him with details about faculty workloads so he could complete his distribution calculations. The College did not give Fader the information. Instead, it told him it would release its calculations by the end of August.

When the College released its calculations in August 2017, Fader recognized they did not align with his methodology. According to the Union, the calculations used by the College "grossly underfunded" the pool, did not include

[1] The first paragraph of Appendix A addressed only "the current situation that the parties were faced with (funding increments)." The second paragraph included Fader's "long-term" and more detailed provision for future increase calculations because it would be an "evolving formula" used over time.

summer quarter, "shortchanged long-term faculty increments," and "did not have any sort of weighting . . . at all, certainly not for course loads." And part-time faculty members received compensation for certain work, while full-time faculty did not.

A series of communications between the Union and the College in early September 2017 did not resolve the problem. The College insisted it was correctly implementing the wage increases under the CBA. It asserted the Union was not accounting for benefit costs that the College had to deduct from the faculty payments, which the Union believed had been part of the initial funding. The College also explained that it did not include compensation for the summer quarter because the CBA did not mention summer. The Union asserted that the College used a method to calculate back pay that the Union did not contemplate or agree to during negotiations. The Union also complained that the College's two-month delay in releasing its calculations led to the faculty receiving back pay before the Union could address the discrepancies.

Communication between the two groups deteriorated. The "Joint Union Management Committee" took up the issue but could not resolve the dispute, so on October 23, 2017, the Union filed a ULP complaint before the Commission.

A Commission manager determined the Union raised viable ULP claims against the College and characterized them as (1) refusal to bargain and breach of good faith bargaining "over the decision of using a new methodology of calculating increased compensation and the total amount of increased compensation owed," (2) refusing to provide relevant information concerning data

related to the compensation distribution, and (3) unilaterally changing the amount of compensation and methodology for distribution without providing an opportunity to bargain. The first two claims are statutory ULP complaints in violation of RCW 28B.52.073(1)(a) and (e). The third claim is a contractual dispute subject to arbitration under the terms of the CBA. The manager called for an answer from the College and assigned the matter to a hearings examiner (Examiner).

The College asserted an affirmative defense of waiver by contract to all of the Union's claims.[2] It argued that the Union's claims all related to conduct authorized under the CBA, and that interpretation of the parties' contractual obligations should be resolved through the CBA's grievance and arbitration process. The College moved to dismiss the claims for lack of jurisdiction, or defer them all to an arbitrator.

The Examiner denied the College's motion, reasoning that claims (1) and (2) are statutory claims subject to Commission jurisdiction and not appropriate for deferral. The Examiner concluded that while claim (3) is a unilateral change allegation characterized as a contract dispute "appropriate" for arbitration, "the Commission does not bifurcate [ULP] complaints where statutory violations are also alleged."

After a four-day hearing with testimony and posthearing briefing, the Examiner ruled for the Union. While the Examiner did not directly address the

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[2] No ULP violation exists when a party acts or makes changes in a manner authorized by the contract or consistent with established practice. See Pub. Sch. Emps. of Wash., N. Franklin Chapter v. N. Franklin Sch. Dist., No. 12665-U-96-3022, 1998 WL 84382, at *1-*5 (Wash. Pub. Emp't Relations Comm'n Feb. 1, 1998).

College's waiver-by-contract argument, her ruling appears to reject the defense because "the [U]nion and [College] never had a meeting of the minds in regard to compensation for missed increments."

The College appealed the Examiner's ruling to a three-member panel of the Commission. In a split decision, the Commission vacated the Examiner's ruling and deferred the matter to arbitration to resolve the College's "colorable" waiver-by-contract defense to all three of the Union's claims. One member dissented, arguing the Commission's ruling departs from its policy to defer only unilateral change allegations to arbitration, not statutory ULP claims.

The Union appeals.

ANALYSIS

The Union argues the Commission wrongly deferred its statutory ULP claims to arbitration. The College contends that the Commission properly exercised its discretion to withhold consideration of the Union's ULP claims until an arbitrator determines whether the claims were waived by contract. We agree with the College.

When reviewing a decision of the Commission, we look to the findings and conclusions of the Commission, not those of the Examiner. Int'l Ass'n of Firefighters, Local 469 v. Wash. Pub. Emp't Relations Comm'n, 38 Wn. App. 572, 575-76, 686 P.2d 1122 (1984). The Examiner's findings are part of the record, however, and we may weigh them in considering the evidence supporting the Commission's decision. Pasco Police Officers' Ass'n v. City of Pasco, 132 Wn.2d 450, 459, 938 P.2d 827 (1997).

Though we may substitute our own determination for that of the Commission in reviewing questions of law, we give great weight and substantial deference to the Commission's interpretation of the Public Employees' Collective Bargaining Act, RCW 41.56.010-.900, RCW 41.06.150. Teamsters Local 839 v. Benton County, 15 Wn. App. 2d 335, 343, 475 P.3d 984 (2020). Along with Washington law, we look to National Labor Relations Board (NLRB) decisions construing the National Labor Relations Act, 29 U.S.C. §§ 151-169. Pasco Police, 132 Wn.2d at 458. Federal precedent is persuasive, but not controlling. Nucleonics All., Local Union 1—369, Oil, Chem., & Atomic Workers Int'l Union, AFL-CIO v. Wash. Pub. Power Supply Sys., 101 Wn.2d 24, 32-33, 677 P.2d 108 (1984).

We review an appeal from the Commission's decision involving a ULP claim in accordance with the Administrative Procedure Act (APA), chapter 34.05 RCW. Lincoln County v. Pub. Emp't Relations Comm'n, 15 Wn. App. 2d 143, 150-51, 475 P.3d 252 (2020), review denied, 197 Wn.2d 1003, 483 P.3d 774 (2021). Under the APA, we may grant relief from an agency order for any one of nine reasons set forth in RCW 34.05.570(3)(a)-(i).

The Union argues that we should reverse the Commission's decision because it is (1) inconsistent with WAC 391-45-110(3) and does not provide a rational basis for departing from the rule in violation of RCW 34.05.570(3)(h), (2) arbitrary and capricious in violation of RCW 34.05.570(3)(i), (3) unsupported by substantial evidence in violation of RCW 34.05.570(3)(e), and (4) a

misinterpretation of the law in violation of RCW 34.05.570(3)(d).[3] As the party challenging the agency action, the Union has the burden of proving the invalidity of the Commission's decision. RCW 34.05.570(1)(a).

(1) WAC 391-45-110(3)

The Union claims the Commission's decision to defer its claims to arbitration "is inconsistent with WAC 391-45-110(3), and the Commission failed to demonstrate a rational basis for this inconsistency." We disagree.

Commission decisions " 'are accorded extraordinary judicial deference, especially in the matter of remedies.' " Teamsters Local 839, 15 Wn. App. 2d at 349 (quoting Pasco Hous. Auth. v. Wash. Pub. Emp't Relations Comm'n, 98 Wn. App. 809, 812, 991 P.2d 1177 (2000)). And we defer to the Commission's interpretation of its rules, so long as the interpretation is reasonable. See Chelsea Indus., Inc. v. Nat'l Labor Relations Bd., 285 F.3d 1073, 1075 (D.C. Cir. 2002). The Commission acts unreasonably "if it departs from established policy without giving a reasoned explanation for the change." Chelsea Indus., 285 F.3d at 1075-76 (D.C. Cir. 2002) (citing ConAgra, Inc. v. Nat'l Labor Relations Bd., 117 F.3d 1435, 1443-44 (D.C. Cir. 1997)).

To interpret an administrative or agency rule like WAC 391-45-110(3), we use the same standards of construction as when reviewing issues of statutory construction. Dep't of Licensing v. Cannon, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). That is, we conduct a de novo review, with our fundamental objective

[3] The Union does not support its fourth claim with authority in its brief. See RAP 10.3(a)(6). We need not consider arguments that are not developed in the briefs and for which a party has not cited authority. Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004).

being to ascertain and give effect to the legislature's intent. Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 432, 395 P.3d 1031 (2017). We begin with the plain meaning of the statute. City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604, 119 Wn.2d 373, 380, 831 P.2d 738 (1992). We consider the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. Columbia Riverkeeper, 188 Wn.2d at 432. If the meaning of the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent. Columbia Riverkeeper, 188 Wn.2d at 435. And we read statutes in a manner to avoid rendering any portion meaningless or superfluous. Stroh Brewery Co. v. Dep't of Revenue, 104 Wn. App. 235, 239-40, 15 P.3d 692 (2001).

Under RCW 41.58.020, the Commission has jurisdiction to adjudicate all ULP claims, whether statutory or contractual. And the legislature has empowered the Commission to "make, amend, and rescind" rules and regulations as may be necessary to carry out these functions in a manner prescribed by the APA. RCW 41.58.050. But the legislature has also expressed a strong preference that parties resolve contractual disputes through the method agreed upon in their contract:

> 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 [CBA].

RCW 41.58.020(4).

To carry out the legislature's intent, the Commission adopted WAC 391-45-110(3), showing its preference to defer contractual disputes to arbitration. See Int'l Ass'n of Fire Fighters, Local 469 v. City of Yakima, No. 7900-U-89-1699, 1991 WL 733702, at *5 (Wash. Pub. Emp't Relations Comm'n Jan. 1, 1991) (quoting WAC 391-45-110(3)(a)(i)). WAC 391-45-110(3) provides:

> The [Commission] may defer the processing of allegations which state a cause of action under subsection (2)[4] 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 [CBA] in effect between the parties at the time of the alleged unilateral change;
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> (ii) The parties' [CBA] provides for final and binding arbitration of grievances concerning its interpretation or application; and
>
> (iii) There are no procedural impediments to a determination on the merits of the contractual issue through proceedings under the contractual dispute resolution procedure.

The Union argues WAC 391-45-110(3)(a) "narrows the scope of the type of [ULP] charges which may be deferred to arbitration" by limiting deferral to only unilateral change allegations.[5] According to the Union, the Commission erred in deferring all of its claims to arbitration because "two of the three ULPs that the Commission identified[6] were not unilateral change allegations." The Union is

[4] Subsection (2) of WAC 391-41-110 outlines the requirement that "[i]f one or more allegations state a cause of action for [ULP] proceedings before the [C]ommission, a preliminary ruling summarizing the allegation(s) shall be issued and served on all parties." The Commission manager followed this procedure before submitting the Union's claims to the Examiner.

[5] A unilateral change occurs where " 'without bargaining to impasse, [an employer] effects a unilateral change of an existing term or condition of employment.' " Intermountain Rural Elec. Ass'n v. Nat'l Labor Relations Bd., 984 F.2d 1562, 1566 (10th Cir. 1993) (quoting Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. Nat'l Labor Relations Bd., 501 U.S. 190, 198, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991)).

[6] Failure to provide information and failure to bargain in good faith.

correct that WAC 391-45-110(3)(a)(i) authorizes the Commission to defer to arbitration all claims that an employer unilaterally changed a term in a CBA. Indeed, such a claim will always be appropriate for arbitration, as it is necessarily resolved by interpreting the language of a CBA. See RCW 41.58.020(4); WAC 391-45-110(3)(a). And " '[a]rbitrators and courts are still the principal sources of contract interpretation.' " Nat'l Labor Relations Bd. v. Strong, 393 U.S. 357, 360-61, 89 S. Ct. 541, 21 L. Ed. 2d 546 (1969). But we reject the Union's contention that the WAC limits deferral of contractual disputes to only unilateral change allegations.

Under the plain language of WAC 391-45-110(3), the Commission may "retain jurisdiction" over but "defer"[7] alleged ULP violations "pending the outcome of related contractual dispute resolution procedures" in arbitration. This broad language is not limited to unilateral change allegations, and reflects the Commission's policy to encourage arbitration if "a substantial question of contract interpretation exists which could influence or control the outcome of the [ULP] case." Wash. Educ. Ass'n v. Finley Sch. Dist., No. 15859-U-01-4030, 2002 WL 31317730, at *3 (Wash. Pub. Emp't Relations Comm'n Aug. 14, 2002) (quoting WAC 391-45-110(3)(a)(i)).[8] Restricting arbitration to only questions of whether an employer unilaterally changed a term of the CBA goes against the plain language of WAC 391-45-110(3), and deviates from the legislature's intent to

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[7] We give "defer" its ordinary meaning of "delay" in this context. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 591 (2002).

[8] See also Fire Fighters, Local 469, 1991 WL 733702, at *5 (Commission may follow its discretionary policy to defer a matter to arbitration "where it can be anticipated that the delay in processing of the [ULP] case will yield an answer to the question that is '**of interest to the Commission to resolve the pending** [**ULP**].' ").

promote resolution of contractual disputes through the method agreed on by the parties as well as the Commission's policy to defer contractual disputes to arbitration.

Here, the Commission determined that the Union's claim alleging the College breached its good faith bargaining obligation arises from the "same facts" as the allegation that the College unilaterally changed the method of calculating the increased compensation, and that both claims "depend for their resolution on interpretation of the [CBA], a task assigned by the parties to an arbitrator." And the parties included in their CBA a provision obligating the College to supply the Union with information, which "furnishes a clear contractual basis for deferral" of the Union's claim of refusal to provide information.[9] As a result, the Commission retained jurisdiction over the Union's statutory ULP claims, but delayed considering them until the "colorable 'waiver by contract' issues [could] be resolved in the first instance through the parties' arbitration processes." " '[D]eferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the [Commission]'s processes to give the parties' own dispute resolution machinery a chance to succeed.' " Hammontree v. Nat'l Labor Relations Bd., 925 F.2d 1486, 1497 (D.C. Cir. 1991)[10] (quoting United Techs. Corp., 268 N.L.R.B. 557, 560 (1984)). The Commission's decision is consistent with the plain language of WAC 391-45-110(3).[11]

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[9] The deferral decision does not evaluate the merits of the defense; the arbitrator makes that determination. Cowlitz County Deputy Sheriffs' Guild v. Cowlitz County, No. 23831-U-11-6083, 2012 WL 5197263, at *2 (Wash. Pub. Emp't Relations Comm'n Oct. 12, 2012).

[10] First alteration in original.

[11] The decision also enhances judicial efficiency if an arbitrator concludes the CBA governs the parties' disputes.

(2) Arbitrary and Capricious

The Union argues that the Commission acted arbitrarily and capriciously in deferring its statutory claims to arbitration because the Commission "fails to explain its decision's inconsistency with [Commission] precedent."

The Commission makes an arbitrary and capricious decision if it is willful, without reason, and without consideration and in disregard of facts and circumstances. State v. Rowe, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980). A decision is not arbitrary and capricious when there is room for two opinions, even if it appears the Commission reached an erroneous conclusion. Rowe, 93 Wn.2d at 284. A party seeking to show an action is arbitrary and capricious "must carry a heavy burden." Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

The Union cites two cases in support of its argument that the Commission's decision departed from its precedent, International Union of Operating Engineers, Local 609 v. Seattle School District, No. 12335-U-96-2918, 1997 WL 24812 (Wash. Pub. Emp't Relations Comm'n Jan. 10, 1997), and Bremerton Patrolmen's Ass'n v. City of Bremerton, No. 12707-U-96-3045, 1998 WL 86012 (Wash. Pub. Emp't Relations Comm'n Jan. 1, 1990).

In Operating Engineers, a union complained to the Commission that the school district violated RCW 41.56.140(1) and (4) (ULPs for public employers enumerated) by refusing to provide information about employees subject to discipline while their grievances were pending in arbitration.[12] Operating Eng'rs,

[12] The parties' CBA defined when the district must provide information to the union. Operating Eng'rs, 1997 WL 24812, at *2.

1997 WL 24812, at *1. The district moved to dismiss the union's statutory claim because "submission of the grievances to arbitration deprives the Commission of jurisdiction." Operating Eng'rs, 1997 WL 24812, at *4. The Commission rejected the contention that a ULP complaint "must be dismissed simply because [the underlying employees' grievances] have been taken to arbitration." Operating Eng'rs, 1997 WL 24812, at *5.[13] Contrary to the Union's assertion, Operating Engineers does not conclude that the Commission "will not defer a failure to provide information charge." Rather, it recognizes that pending arbitration does not deprive the Commission of jurisdiction to consider statutory claims, should it choose to do so.

In Bremerton Patrolmen's, a police union complained to the Commission that the employer refused to provide information it needed to adequately defend an employee in arbitration proceedings. Bremerton Patrolmen's, 1998 WL 86012, at *1-*2. The arbitrator later ruled that he did not have jurisdiction to consider some of the claims and, "as a result," much of the requested information was not relevant to the proceedings. Bremerton Patrolmen's, 1998 WL 86012, at *2. At a later hearing on stipulated facts, the Examiner found the employer committed a ULP when it failed or refused to provide the information to the union. Bremerton Patrolmen's, 1998 WL 86012, at *2. In a petition for review, the employer urged the Commission to defer to the arbitrator's ruling when considering the union's statutory refusal to provide information claim. Bremerton

[13] In reaching its decision, the Commission recognized that the "NLRB, for its own part, will not defer refusal to provide information [ULP] charges to arbitration." Operating Eng'rs, 1997 WL 24812, at *5 (citing U.S. Postal Serv., 302 N.L.R.B. 918 (1991)). But it stops short of concluding the Commission follows this NLRB policy.

Patrolmen's, 1998 WL 86012, at *3. The Commission declined, concluding the employer violated its disclosure duty because the union requested "relevant information necessary to assess whether the discipline imposed upon [the employee] was proportionate to other discipline within the bargaining unit." Bremerton Patrolmen's, 1998 WL 86012, at *5.

In reaching its decision, the Commission explained that the union needed the materials to defend its employee at arbitration, and it was "not required to wait until an arbitrator ruled on the relevancy of the materials." Bremerton Patrolmen's, 1998 WL 86012, at *7. The Commission expressed concern that the "duty to provide information to a party would have little meaning if it were dependent upon the outcome of a grievance" because resolution may be "[t]oo late for the union to properly represent its bargaining unit member(s) during the arbitration process" or provide "a basis for a continuance of the arbitration hearings." Bremerton Patrolmen's, 1998 WL 86012, at *7. And "deferral [to arbitration] is ordered only where it can be anticipated that the delay in processing of a[ ] [ULP] case will yield an answer to the question that is of interest to the Commission in resolving the [ULP] case." Bremerton Patrolmen's, 1998 WL 86012, at *6.

The Commission's decision here does not conflict with Bremerton Patrolmen's. Unlike the employer and police union in that case, the parties here negotiated language in their CBA governing the duty to provide information. As a result, delay in processing the Union's statutory claim pending the arbitration process may lead to its resolution. And since the Union received the calculations

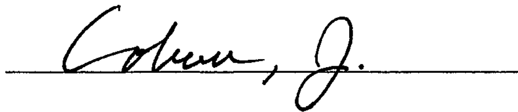
it requested about two months before it filed ULP claims, there is no concern that resolution of the issue at arbitration would prejudice the Union.

Neither Operating Engineers nor Bremerton Patrolmen's stand for the broad proposition that the Commission cannot defer to arbitration contractual disputes related to statutory claims. Rather, both recognize that the Commission has broad discretion to determine when deferral is appropriate. See Operating Eng'rs, 1997 WL 24812, at *4-*5; Bremerton Patrolmen's, 1998 WL 86012, at *6. Here, the Commission's decision to defer was not arbitrary and capricious. Its decision was reasonable because the College asserted a colorable waiver-by-contract defense that may control resolution of the Union's statutory claims. The decision "certainly falls within the not inconsiderable realm of reasonable discretion that an agency possesses to determine how to apply its own past precedents." Boch Imports, Inc. v. Nat'l Labor Relations Bd., 826 F.3d 558, 568-69 (1st Cir. 2016).[14]

[14] The Union's third claim on appeal asserts that substantial evidence does not support the Commission's conclusion that the Union's unilateral change claim subsumes its bad faith bargaining claim. But the Commission did not so conclude. Rather, it determined that the two claims arise from similar facts, and the College has a colorable waiver-by-contract defense to each. The Commission concluded the Union's allegations "depend for their resolution on interpretation of the [CBA]." Substantial evidence supports that conclusion.

We affirm the Commission's decision to withhold consideration of the Union's ULP claims until an arbitrator determines whether the claims were waived by contract.

WE CONCUR:



BARNARD IGLITZIN & LAVITT

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