NO. 100236-0

**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.

# STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION'S ANSWER IN OPPOSITION OF SUPREME COURT REVIEW

ROBERT W. FERGUSON
Attorney General

MARK S. LYON
Assistant Attorney General
WSBA #12169
P.O. Box 40113
Olympia WA 98504-0113
360-753-6238
OID: 91028

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## I. IDENTIFICATION OF RESPONDENT PERC

Respondent Public Employment Relations Commission (PERC) files this answer opposing discretionary review of the decision of the Court of Appeals, which affirmed PERC's order deferring unfair labor practice (ULP) charges pending arbitration.

The case involves a labor dispute between a faculty union and Shoreline Community College regarding implementation of pay increases bargained as part of their current collective bargaining agreement. Without reaching the merits of this underlying dispute, PERC requests this Court decline review because Petitioner American Federation of Teachers, Local 1950 (AFT) fails to raise an issue of substantial public interest appropriate for Supreme Court review. PERC opposes review because: (1) PERC's discretionary decision to delay processing ULP charges pending resolution of contract issues through grievance arbitration is consistent with prior PERC practice; (2) PERC's decision to defer, in the exercise of its expertise in

balancing state labor policies, is the kind given great deference by the courts; and (3) further appellate review on the procedural issue of deferral to arbitration unnecessarily delays resolution of the dispute between the union and employer on the merits.

## II. ISSUES PRESENTED FOR REVIEW

Is PERC's decision to defer adjudication of unfair labor practice charges pending arbitration consistent with WAC 391-45-110(3) and the collective bargaining agreement, and within PERC's labor relations expertise and authority?

## III. ARGUMENT

### A. PERC's Role in Opposing this Request for Discretionary Review to the Washington Supreme Court

PERC recognizes that as the adjudicatory agency below, its role on appeal is limited. *See Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993). However, where the claims on appeal raise challenges to PERC's jurisdiction, procedures or rules, it is appropriate for the agency to respond. *Kaiser*, 121 Wn.2d at 782; *City of Everett v.*

*Pub. Emp't Rels. Comm'n*, 11 Wn. App. 2d 1, 14, 451 P.3d 347, (2019), *review denied sub nom*. *City of Everett v. Washington Pub. Emp't. Rels. Comm'n*, 195 Wn.2d 1005, 458 P.3d 779 (2020) ("While the role of PERC on appeal is limited, we consider the arguments that are in response to the City's assertion that PERC acted outside its statutory authority or erroneously interpreted and applied the [public employee bargaining law].")

Here, this case has not yet reached the merits of the dispute between AFT and Shoreline Community College regarding the underlying ULP charges. Instead, AFT seeks review of PERC's procedures for handling statutory ULP charges which are significantly intertwined with contractual claims arising out of the parties' collective bargaining agreement and subject to grievance arbitration. Likewise, the question currently before this Court—whether to accept discretionary review of PERC's procedure in this case—is a procedural issue. PERC files this answer to address these procedural issues.

### B. PERC's Discretionary Decision to Defer ULP Charges Pending Resolution of Parallel Contract Issues Through Grievance Arbitration Does Not Warrant Supreme Court Review as an Issue of Substantial Public Interest

Discretionary review is limited to cases meeting certain enumerated criteria. RAP 13.4(b).[1] AFT agrees that this case does not present significant constitutional issues, or conflicts between Washington appellate opinions. Instead, AFT argues that this case warrants review as a matter that "involves an issue of substantial public interest that should be determined by the Supreme Court." AFT Pet. at 8; *see* RAP 13.4(b)(4).

[1] (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

PERC does not dispute that the public has some interest in how PERC, a public agency, administers the public employee bargaining laws of the state. PERC does challenge that this public interest is "substantial" in this case. In practice, the public has little interest in whether the merits of a public sector labor dispute are decided initially by arbitration or administrative hearing, as long as the purposes of the state's public sector labor law are served.

### 1. PERC's decision in this case is consistent with previous agency practice

The decision as to whether to defer this case to arbitration was vigorously debated within the agency, and among the Commissioners. This does not mean, however, that the majority's ultimate decision to defer is a radical departure from previous agency practice, as asserted by AFT. Rather, PERC has long had the ability to defer proceedings in favor of contractually agreed arbitration, where the arbitrator's decision will facilitate the ultimate resolution of the case.

As noted by the Court of Appeals below, PERC has broad discretion to determine when deferral is appropriate. *Am. Fed'n of Tchrs. Loc. 1950 v. Pub. Emp't Rels. Comm'n*, 493 P.3d 1212, 1220 (Wash. Ct. App. 2021). "RCW 41.59.160 vests the Commission with considerable discretion in the processing of unfair labor practice cases." *City of Wenatchee*, Decision 6517-A (PECB, 1999) at 15; *Pierce County*, Decision 1671-A (PECB, 1984) at 3.[2] PERC's deferral doctrine has its origin in the National Labor Relations Board (NLRB)'s approach to deferral as set out in the Board's seminal decision, *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).[3] *City of Richland*, Decision 246 (PECB 1977). "Early in its history, the

[2] The numbering and citation of PERC decisions are governed by administrative rule. WAC 391-08-650, -670. PERC's decisions are available at PERC's website at https://perc.wa.gov/.

[3] "[D]ecisions construing the National Labor Relations Act (NLRA), while not controlling, are persuasive in interpreting state labor acts which are similar or based upon the NLRA." *Nucleonics Alliance, Loc. Union 1-369 v. Wash. Pub. Power Supply Sys. (WPPSS)*, 101 Wn.2d 24, 32, 677 P.2d 108 (1984).

Commission ruled that deferral to arbitration is a matter of policy, rather than a matter of law." *Finley Sch. Dist.*, Decision 7806 (PECB, 2002) at 8; *City of Seattle*, Decision 809-A (PECB, 1980) at 3.

"As a discretionary (rather than mandatory) policy, deferral is ordered where it can be anticipated that the delay in processing of an unfair labor practice case will yield an answer to the question that is of interest to the Commission in resolving the unfair labor practice case." *Finley Sch. Dist.*, Decision 7806 (PECB, 2002) at 9. The Commission reviewed and summarized its policies on deferral to arbitration in *City of Yakima*, Decision 3564-A (PECB, 1991):

> This 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 . . . . *The goal of "deferral" in such cases is to obtain an arbitrator's interpretation of the labor agreement, to assist this Commission in evaluating a . . . defense which has been or may be asserted in the unfair labor practice case.*

(Emphasis added.) *City of Yakima*, Decision 3564-A at 9. The Commission has codified precedents concerning deferral in WAC 391-45-110(3), as follows:

> *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;
>
> (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.

> (b) *Processing of the unfair labor practice allegation under this chapter shall be resumed following issuance of an arbitration award or resolution of the grievance*, and the contract interpretation made in the contractual proceedings shall be considered binding, except where:
>
> > (i) The contractual procedures were not conducted in a fair and orderly manner; or
> >
> > (ii) The contractual procedures have reached a result which is repugnant to the purposes and policies of the applicable collective bargaining statute.

(Emphasis added.) Deferral to arbitration implements a legislative preference that is stated in RCW 41.58.020(4) and that is patterned after Section 203(d) of the federal Labor-Management Relations Act of 1947 (the Taft-Hartley Act), as follows: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *See also* RCW 28B.52.065 ("The commission may adjudicate any unfair labor practices alleged by a board of trustees or an

employee organization and shall adopt reasonable rules to administer this section, except that a complaint must not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission or in superior court. *However, the parties may agree to seek relief from unfair labor practices through binding arbitration.*" (Emphasis added.)). "Given the legislative exhortation found in RCW 41.58.020(4), . . . as well as the other considerations . . . 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 (such as representation cases - e.g., *City of Richland*, Decision 279-A (PECB, 1978))." *Pierce County*, Decision 1617-A (PECB 1984) at 3.

As noted by the Court of Appeals below, while WAC 391-45-110(3) summarizes PERC's prior case law, it does not circumscribe PERC's ability to continue to develop the deferral doctrine in appropriate cases where the decision of an arbitrator will facilitate PERC's ultimate resolution of the case.

*Am. Fed'n of Tchrs. Loc. 1950*, 493 P.3d at 1219 ("The Commission's decision is consistent with the plain language of WAC 391-45-110(3)"); AR at 22 ("An expansive interpretation of [WAC 91-45-110(3)] is appropriate given the broad scope of its first sentence and the legislative preference for arbitration expressed in RCW 41.58.020(4)").

In this case, PERC found that the specific facts of this case warrant deferral to arbitration. These include the fact that both the disputed formula for faculty pay, and the right to information to administer the bargaining agreement, are specifically addressed in the parties' collective bargaining agreement. Despite AFT protestations to the contrary, the employer is asserting contractual agreement as a defense. Also, the information sought by the union was provided to the union two months before AFT filed its ULP charges. Under these circumstances, it is not unreasonable for PERC to decide that an arbitrator's determination will assist in the timely resolution of this labor dispute.

### 2. PERCs case-by-case policy regarding deferral of ULP charges involves a discretionary determination by the agency and PERCs decision to defer is the kind of which the court should give deference

"[D]eferral to arbitration is a matter of policy, rather than a matter of law." *Finley Sch. Dist.*, Decision 7806 at 8 (citing *City of Wenatchee*, Decision 6517-A (PECB, 1999) at 16); AR at 19. In applying this doctrine, PERC approaches deferral on a case by case basis. *Accord Collyer Insulated Wire*, 192 NLRB at 841 ("From the start the [NLRB] has, case by case, both asserted jurisdiction and declined, as the balance was struck on particular facts and at various stages in the long ascent of collective bargaining to its present state of wide acceptance.").

Application of this deferral doctrine involves a "balancing rule which requires deferral to arbitration only where a balance of both supporting and antagonistic policies favors deferral." *Loc. Union 2188, Int'l Brotherhood of Elec. Workers v. N.L.R.B.*, 494 F.2d 1087, 1090 (D.C. Cir. 1974).

> Thus, this case like each such case compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices.

*Loc. Union 2188*, 494 F.2d at 1090. While the major policy factors are adherence to the parties' agreed contract and arbitration procedure on the one hand (RCW 41.58.020(4)) and enforcement of the statutory rights to bargain and organize on the other (RCW 28B.52.025, .030, .073), in fact this is a multi-factor inquiry.

This multifactor, case-by-case analysis requires PERC to call upon its labor relations expertise in deciding whether or not to defer. *Accord Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320 (1964) ("[NLRB] has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.") Washington courts give considerable deference to this kind of

decision requiring the Commission to exercise labor expertise. PERC is a state agency charged with enforcement of Washington's public sector bargaining laws. RCW 41.58.005. Commission members are selected for their knowledge of state labor relations and PERC is recognized by both statute and case law as possessing expertise in the labor relations area. RCW 41.58.010(2); *City of Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wn.2d 655, 674-75, 818 P.2d 1076 (1991). On appeal the court determines the law independently of the agency's decision and applies it to facts as found by the agency, but courts apply "substantial weight and great deference" to PERC's determination of the legal component. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 470, 938 P.2d 827 (1997); *Renton Educ. Ass'n v. Pub. Emp't Rels. Comm'n*, 101 Wn.2d 435, 441, 680 P.2d 40, 44 (1984).

### C. Even Where it Defers ULP Charges Pending Arbitration, PERC Retains Jurisdiction to Resolve Statutory Allegations

AFT argues that by deferring the statutory ULP claims in this case, PERC is improperly delegating its function of enforcing the public sector bargaining law to private arbitrators. AFT Pet., at 16. This is incorrect. Even where it defers ULP charges pending arbitration, PERC retains jurisdiction to resolve statutory allegations. WAC 391-45-110(3) ("The agency may defer . . . but shall retain jurisdiction over those allegations.")[4] As one federal court has noted:

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[4] In this case, the Commission has directed:

> 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.

AR at 51.

> "[D]eferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed."
>
> Deferment does not diminish [the charging party's] right to a public forum; it merely delays it.

*Hammontree v. NLRB*, 925 F.2d 1486, 1497 (D.C. Cir. 1991) (alternation in original) (citation omitted). The Court of Appeals came to a similar conclusion, holding "defer" in this context means "delay." *Am. Fed'n of Tchrs. Loc. 1950*, 493 P.3d at 1218.

### D. Further Appellate Review on the Procedural Issue of Deferral to Arbitration Unnecessarily Delays Resolution of the Dispute Between the Union and Employer on the Merits

In this case, AFT filed ULP charges on October 23, 2017, roughly five months after the parties signed their collective bargaining agreement. AR at 14. The union acknowledges receipt of the information regarding retroactive compensation on August 25, 2017, nearly two months before the complaint was filed. AR at 14. At that time, no grievance had been filed under

the contract, and since PERC issued its deferral order on January 16, 2020, PERC is not aware of any effort by AFT to pursue grievance arbitration. Had AFT sought arbitration in January 2020, it is likely that by now the arbitration would be complete and any remaining statutory issues would be ripe for further action by PERC.

One of the purposes of PERC is to "achieve more efficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services." RCW 41.58.005(1). To the greatest extent possible, prompt resolution of labor disputes is important to preserving labor peace and is desirable to meet the purposes of bargaining laws.

In this case, the Court of Appeals has already given PERC's decision to defer a thorough appellate review. Granting discretionary review of the preliminary procedural issue of deferral will simply prolong the dispute between the parties without resolving the merits of the underlying labor dispute.

## IV. CONCLUSION

For the reasons set out above, this Court should decline discretionary review of PERC's decision to defer to arbitration as affirmed by the Court of Appeals.

This document contains 2600 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 5th day of November 2021.

ROBERT W. FERGUSON
Attorney General

*/s/ Mark S. Lyon*
MARK S. LYON
WSBA #12169
Assistant Attorney General
Attorneys for Respondent
P.O. Box 40113
Olympia WA 98504-0113
360-753-6238
OID: 91028

## CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify, under penalty of perjury under the laws of the state of Washington, that on November 5, 2021, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter upon the parties herein via the Appellate Court filing portal.

DATED this 5th day of November 2021.

*/s/Traci Vaughan*
TRACI VAUGHAN
Legal Assistant

## WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

## November 05, 2021 - 2:25 PM

## Transmittal Information

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**Filing on Behalf of:** Mark Spencer Lyon - Email: MarkL1@atg.wa.gov (Alternate Email: )

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