



STATE OF WASHINGTON
PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL P. SELLARS, EXECUTIVE DIRECTOR

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MINUTES

February 8, 2022

The regular meeting of the Public Employment Relations Commission was held
at 1:02 p.m. via Zoom

Those present and participating:

Marilyn Glenn Sayan, Chairperson

Mark R. Busto, Commissioner

Kenneth J. Pedersen, Commissioner

Mike Sellars, Executive Director

Charity Atchison, Appeals Administrator

Chris Casillas, Labor Relations Adjudicator/Mediator

Dario de la Rosa, Unfair Labor Practice/Representation Administrator

Dianne Ramerman, Field Services Manager

Kristin Lamson, Office of the Attorney General

Vanessa Smith, Confidential Secretary

Also present:

Matt Greer, PERC, Labor Relations Adjudicator/Mediator

Jamie Siegel, PERC, Labor Relations Adjudicator/Mediator

Michael Snyder, PERC, Labor Relations Adjudicator/Mediator

Stephen Hallstrom, Benton County

Thomas Leahy, Reid, McCarthy, Ballew & Leahy, LLP

Minutes of the Previous Meetings

The minutes of the previous regular meeting held on January 11, 2022, and of the special meeting held on January 20, 2022, were adopted as presented.

Report of the Executive Director

1. January was an active month with respect to case filings. The number of cases filed was the highest for any January since 2014 and the second most cases filed in a month since October 2019. Mediation requests have picked up, but no particular issue seems to be driving these. The first eight days of February have been slow.

2. In late January, we launched the PERColator podcast series. In this podcast, Labor Relations Adjudicators/Mediators Emily Martin, Chris Casillas, and Matt Greer will explore negotiation theory, addressing one tool per episode. Four episodes are already available and three more are ready to go. Episodes will release every two weeks. Mike extended kudos to Emily, Chris, and Matt for their innovation and helping parties to negotiate.
3. We received the first request for appointment of an arbitrator from the Law Enforcement Arbitrator Roster from the City of Yakima. Susan Bauman was the first appointee. Mike suspects we will see another request soon.
4. We are halfway through the legislative session. It has been a very slow, light session. Mike gave a brief overview of the bills that PERC has been monitoring.

Court Docket

Mike noted that the only pending court case is the one that will be discussed in executive session.

Compliance Docket

Benton County, Cases 128595-U-16 and 128900-U-17. Mike Sellars presented this case on behalf of Compliance Officer Emily Whitney. Mike gave an overview of the case history and the Examiner's order, which had been appealed to and affirmed by the Commission. The Commission's decision in turn had been affirmed by the Superior Court and the Court of Appeals. Mike noted that, since then, the parties diligently worked toward compliance, and the parties agree that compliance has been completed. Mike recommended that compliance be accepted and that the case be closed. The Commission accepted compliance, and the case will be closed. The Commission thanked the parties for their attendance at this meeting.

Discussion Re: Rules Revisions

Dario de la Rosa gave an overview of a new proposed chapter, 391-75 WAC, which would encompass both the Dispute Resolution Panel and the new Law Enforcement Arbitrator Roster. The Commission offered input, and Mike and the rules committee answered any questions surrounding the proposal.

Commissioner Pedersen requested that his January 18, 2022, memorandum regarding WAC 391-65-070 be attached to the minutes of this meeting. Chairperson Sayan and Commissioner Busto did not object to this request.

Executive Session and Action Following Executive Session

The Commission, Executive Director Mike Sellars, Appeals Administrator Charity Atchison, and Assistant Attorney General Kristin Lamson went into executive session to discuss potential litigation under RCW 42.30.110(1)(i) at 1:30 p.m.

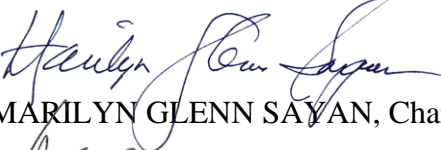
The public meeting reconvened at 1:51 p.m. The Commission acted unanimously to direct AAG Kristin Lamson to transmit a settlement counteroffer to the other party in *Public School Employees of Washington v. Washington State Public Employment Relations Commission*, Court of Appeals No. 56518-8-II and delegate authority to Executive Director Mike Sellars to execute any documents to finalize a settlement or negotiate minor changes consistent with the parameters of the approved counteroffer discussed in executive session.

Adjournment

There being nothing further to come before the Commission, the public meeting was adjourned at 1:55 p.m.

APPROVED this 8th day of March, 2022.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



MARK R. BUSTO, Commissioner



KENNETH J. PEDERSEN, Commissioner

Public Employment Relations Commission

To: Marilyn Glenn Sayan, Mark Busto

From: Ken Pedersen

CC: Kristin Lamson, Mike Sellars

Date: January 18, 2022

Re: Staff Proposed Revisions to Administrative Code

I have reviewed the executive director's January 7 memo advocating for the expansion of his authority to appoint staff members to conduct arbitration hearings. I offer the following in response.

A. The proposal oversteps the agency's delegated authority

At present, while the administrative code permits parties to jointly request the assignment of a particular staffer to hear an arbitration case, the agency is not obligated to honor the request. WAC 391-65-070. Requesters are not permitted to select a staffer from a list nor to reject the staffer assigned to the matter by the Commission. *Id.*

The authority for WAC 391-65-070 comes from RCW 41.56.125. That statute allows the Commission to

“appoint a qualified person who may be an employee of the commission to act as an arbitrator to assist in the resolution of a labor dispute between such public employer and such bargaining representative arising from the application of the matters contained in a collective bargaining agreement.”

The limits of the authority delegated to the commission by the legislature are clear. Upon request the Commission may “appoint a qualified person,” who may be a staff member, to act as arbitrator in a dispute under a CBA. Nothing in the statute contemplates that the Commission may delegate its authority to appoint a “qualified person” (singular) to an employer and union and thus permit *them* to name a staff member. Equally importantly, there is no grant of authority to send a list of staff members to a union and employer from which they may select an arbitrator. The statute expressly allows only the agency to appoint a single “qualified person.”

As the Supreme Court has frequently noted,

Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication.

Washington State Human Rights Comm'n v. Cheney School Dist., 97 Wash.2d 118, 125 (1982) (quoting *State v. Munson*, 23 Wash.App. 522, 524 (1979)). *Accord*, *Municipality of Metropolitan Seattle v. Public Employment Relations Comm'n*, 118 Wash.2d 621, 633

(1992). The proposed regulation goes well beyond the authority delegated to the agency by the legislature in RCW 41.56.125.

When the Commission first promulgated WAC 391-65-070 it clearly understood the limits of its authority under the statute and enacted the regulation in accordance. The existing regulation complies with RCW 41.56.125 in permitting the agency to, upon joint request, denominate a single “qualified person” to act as arbitrator. There has been no shift in the agency’s legislative mandate justifying the proposed change.

The proposed expansion of arbitration services by the agency is a major enlargement of agency authority that should come only with a clear legislative directive. The proposed change is done under presumed authority that is neither “expressly” conferred by the legislature nor by “necessary implication” from existing statutes. *Washington State Human Rights Commission*, 97 Wash.2d at 125.

B. The impetus for the change is obscure

As a practical matter, there is little sign of demand for staff arbitrator services from Commission stakeholders. Employers and unions are at present little availing themselves of the current staff arbitration services. As the director noted at the end of his memo, only 24 cases went to hearing before a staff member from 2011 to the present, a rate of just over two per year. He notes that the number of requests has in fact “tapered off in the last five years.”

The executive director acknowledged that providing staff arbitration services to employers and unions at no cost to them can reasonably be expected to increase demand for those services. This may benefit staff in opening doors to other agency rosters¹ but using state resources to subsidize staff at the expense of practicing arbitrators creates an appearance of unfairness.

C. The proposal makes the executive director, rather than the Commission, the sole judge of arbitral fitness on for the “staff arbitrator roster”

The Commission at present administers two separate rosters of arbitrators, the regular roster and the law enforcement roster which we recently established pursuant to reform legislation. There are currently sixty-eight (68) arbitrators on the first roster and eighteen (18) on the second. The Commission oversees the qualifications of applicants to both rosters.

¹ For example, the Federal Mediation and Conciliation Service, probably the largest arbitrator referral agency, requires an applicant seeking admission to its roster of labor arbitrators to submit five recent final and binding arbitration awards rendered by the applicant. 29 CFR § 1404.5(b)(1). Issuing awards in cases while employed by the Commission would assist in that process. The American Arbitration Association requires training and experience in arbitration “and/or other forms of dispute resolution” for applicants to its labor panel. The Oregon Employment Relations Board requests that an applicant’s qualifications be preferably demonstrated by “the submission of actual arbitration awards and/or factfinding reports prepared by the applicant.”

Thus, membership on the regular roster requires a master's degree in labor relations or equivalent field, or a law degree, or qualifying experience. Applicants for admission to the regular roster are required to submit letters to the Commission "supporting their acceptability as an impartial" from

- (a) At least one management representative; and
- (b) At least one union representative; and
- (c) At least one impartial arbitrator, mediator or labor relations administrative agency official.

WAC 391-55-110(2). To be considered for appointment to interest arbitrations at present, the applicant must submit for Commission review at least five (5) arbitration or fact-finding cases. WAC 391-55-110(3).

Appointees to the law enforcement roster must demonstrate to the Commission that they have six (6) years' experience in a pertinent field of labor relations who have, in addition to other requirements, either served as advocate in at least ten (10) arbitration proceedings, worked as a full-time labor mediator, served as an arbitrator in at least ten (10) collective bargaining disputes, or practiced in or taught labor law. RCW 41.58.070(4)(a).

Staff appointments are presently handled as described in section A. above in accordance with RCW 41.56.125 and WAC 391-65-070. The proposed amendment to WAC 391-65-070 eliminates the existing regulation in favor of the following:

A request for appointment of a member of the agency staff as arbitrator will result in the automatic appointment of an agency staff member. Alternatively, the parties may request a list of staff members available to serve as a grievance arbitrator, and an arbitrator must be selected under the procedures specified in WAC 391-55-120. In lieu of receiving a list, the parties may request that a specific member of the agency staff be assigned as the grievance arbitrator, subject to final determination by the executive director.

See proposed amendment to WAC 391-65-070.² In contrast to the requirements for admission to the regular roster and the law enforcement roster, there are no statutory or regulatory prerequisites for placement on the proposed "staff arbitrator roster." Further, the Commission would play no role in determining the suitability of staff arbitrators. Appointment to the staff arbitration roster would apparently be left entirely to the *ad hoc* discretion of the executive director.

In all other matters involving the appointment of arbitrators to rosters, the Commission is the judge of qualifications. Carving out an exception to that responsibility in the case of staff arbitrators is a sharp deviation from historical practice. Worse, in the absence of

² The summary prepared for the Commission characterizes the proposed change as a "minor" and intended to align with "current practice."

any statutory or regulatory requirements for appointments of staff arbitrators, the proposal may create discord and the perception of favoritism within the agency.

D. The expansion of Commission authority to spend public funds

As earlier noted, the executive director considers it reasonable to believe that the proposed changes will result in an increase in demand for staff arbitration services. As he also stated, he intends to authorize the payment of expenses for staff arbitrators selected by the parties under the new regulation including mileage, airfare, hotel accommodations, and meals. The proposed regulation does not require the public employer and union to reimburse the agency for the salaries of the staff arbitrators while engaged in arbitration work even if the parties select the staff member by name or from a list of staff members.³

I am aware of only one statute in which the legislature authorized the Commission to appoint a staff arbitrator to resolve a dispute. Thus RCW 41.56.125, authorizing the Commission to appoint “a qualified person” to resolve a dispute under a CBA, contains a proviso stating that the appointment is without charge.

PROVIDED, That the commission shall not collect any fees or charges from such public employer or such bargaining representative for services performed by the commission under the provisions of this chapter...

RCW 41.56.125. As earlier stated, the proposed regulation expands the “staff arbitrator” system in a manner that commits the agency to significant additional costs including staff time to preside over arbitration hearings and write opinions and awards, and expenses in travel, room and board. Unfortunately, we have no estimate from the executive director as to how much this expansion may add to the agency budget.

Finally, as I mentioned in our meeting, I am concerned that the provision of no-cost staff arbitrator services to employers and unions in a manner that deviates from RCW 41.56.125 and current WAC 391-65-070, particularly in the private sector, could be an improper gift of public funds in violation of article VIII, section 5 of the Washington Constitution.⁴ I renew my request that this issue be referred to the Attorney General’s Office for guidance.

³ Although he references the practices of labor relations agencies in Massachusetts and Wisconsin and others in his January 7 memo, the executive director neglects to mention that those agencies charge the parties for the services of a staff arbitrator. In Massachusetts, the Department of Labor Relations charges \$1500 for the appointment of a staff arbitrator in a private sector dispute, and \$1000 for appointment of an arbitrator to a public sector matter. See M.G.L. Chapter 150 §6. The Wisconsin Employment Relations Commission charges \$800 for grievance arbitration and fact-finding services.

⁴ “The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.”