MEMO TO FILE

Re: Legality of Arbitrator Opinion – mandatory subject determinations

From: Bonne Beavers

Date: 7.20.11

Question: Whether PERC had the authority to delegate to an arbitrator the determination of whether the amendments to the ombudsman ordinance were mandatory subjects of bargaining under the state’s collective bargaining laws.

Short Answer: No. Agency delegation is subject to legislative mandate and is usually limited to ministerial actions. However, here there was express legislative authorization to delegate judicial or quasi-judicial functions to arbitrators. There was not, however, express authorization to delegate mandatory subject matter determinations which by the agency’s regulations and case law are reserved to PERC.

Question: Was the arbitrator’s determination ultra vires or a procedural violation subject to APA review?

Answer: Perhaps both. The applicable statutes require PERC to retain jurisdiction when deferring resolution of unfair labor complaints to arbitration and limit arbitration to contract interpretation and application. Acts are ultra vires where there was no authority to act. Here, the arbitrator had express legislative, delegated authority to act in a judicial/quasi-judicial manner, but limited to contract interpretation/application and not mandatory subject determination. Thus the order was both procedurally deficient and without authority.

Question: Should the City appeal this ruling?

Answer: Yes. Under WAC 391-45-350 any ruling up to the issuance of the order may be appealed to the commission within 20 days of the issuance of the order. If the arbitrator’s opinion through deferral falls within WAC 391-45-310, it will become the final agency order if not appealed. While it would appear the opinion cannot be binding both because PERC must retain jurisdiction after deferral and because the parties by law cannot waive, by action or inaction, PERC’s sole authority to make mandatory subject determinations, diligence dictates filing. The ruling issued on July 11, 2011. Twenty days falls on a Sunday making filing due on **August 1, 2011**.

**LEGAL DISCUSSION**

PERC AUTHORITY

It is a fundamental rule of administrative law that “an agency may only do that which it is authorized to do by the Legislature.” *Rettkowski v. Dept. Ecology*, 122 Wn. 2d 219, 226, 858 P.2d 232 (1993). Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority. [*Municipality of Metro. Seattle v. Public Empl. Relations Comm'n,* 118 Wn.2d 621, 633, 826 P.2d 158 (1992)](http://web2.westlaw.com/find/default.wl?serialnum=1992055377&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916). Agencies have implied authority to carry out their legislatively mandated purposes. *See Municipality of Metro. Seattle v. Public Empl. Relations Comm'n, supra;* [*Stegriy v. King Cy. Bd. of Appeals,* 39 Wn.App. 346, 693 P.2d 183 (1984)](http://web2.westlaw.com/find/default.wl?serialnum=1985100844&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916); [*Greig v. Metzler,* 33 Wn.App. 223, 653 P.2d 1346 (1982)](http://web2.westlaw.com/find/default.wl?serialnum=1982150922&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916); [*Anderson, Leech & Morse, Inc. v. State Liquor Control Bd.,* 89 Wn.2d 688, 694–96, 575 P.2d 221 (1978)](http://web2.westlaw.com/find/default.wl?serialnum=1978108440&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916). When a power is granted to an agency, “everything lawful and necessary to the effectual execution of the power” is also granted by implication of law. [*State ex rel. Puget Sound Nav. Co. v. Department of Transp.,* 33 Wn.2d 448, 481, 206 P.2d 456 (1949)](http://web2.westlaw.com/find/default.wl?serialnum=1949103445&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916) (quoting [*State ex rel. R.R. Comm'n v. Great N. Ry. Co.,* 68 Wash. 257, 123 P. 8 (1912)](http://web2.westlaw.com/find/default.wl?serialnum=1912002315&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=660&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916)). *See* [*Dalton v. Clarke,* 18 Wn.2d 322, 331–32, 139 P.2d 291 (1943)](http://web2.westlaw.com/find/default.wl?serialnum=1943103566&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916). Likewise, implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. [*Ortblad v. State,* 85 Wn.2d 109, 117, 530 P.2d 635 (1975)](http://web2.westlaw.com/find/default.wl?serialnum=1975124893&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916); [*Green River Comm'ty College v. Higher Educ. Personnel Bd.,* 95 Wn.2d 962, 633 P.2d 1324 (1981)](http://web2.westlaw.com/find/default.wl?serialnum=1981138328&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916).  Agencies also have implied authority to determine specific factors necessary to meet a legislatively mandated general standard. *See* *[ASARCO, Inc. v. Puget Sound Air Pollution Control Agency,](http://web2.westlaw.com/find/default.wl?serialnum=1988046415&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916" \t "_top)* [51 Wn.App. 49, 751 P.2d 1229 (1988)](http://web2.westlaw.com/find/default.wl?serialnum=1988046415&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916" \t "_top), *aff'd,* [112 Wn.2d 314, 771 P.2d 335 (1989)](http://web2.westlaw.com/find/default.wl?serialnum=1989055030&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BBBE3B98&ordoc=1994027916).

The Washington State Legislature has empowered and directed PERC to prevent any unfair labor practices and to issue appropriate remedial orders. RCW 41.80.120(1). If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist, and to take affirmative as necessary. RCW 41.80.120(2).

The Legislature also directed PERC to appoint an executive director who “shall perform such duties and have such powers as the commission shall prescribe in order to implement and enforce the provisions of this chapter.” RCW 41.58.015. And it authorized PERC to “delegate to the executive director authority with respect to, but not limited to, representation proceedings, unfair labor practice proceedings, mediation of labor disputes, arbitration of disputes concerning the interpretation or application of a collective bargaining agreement, and, in certain cases, fact-finding or arbitration of disputes concerning the terms of a collective bargaining agreement.” *Id*. This delegation, however, may not eliminate a party's right of appeal to the commission. *Id*. The legislature also ordered PERC to promulgate regulations and policies as necessary to effectuate its duties. RCW 41.56.090; 41.59.110.

Although a party may file an unfair labor practices claim with the Superior Court or the Public Employment Relations Commission ( [*Imperato v. Wenatchee Valley College* 247 P.3d 816](http://web2.westlaw.com/find/default.wl?serialnum=2024704899&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=0004645&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=D973C894&ordoc=11005841) (2011)), when a claim is filed with PERC, the executive director must determine whether the facts alleged in the complaint may constitute an unfair labor practice. WAC 391-45-110. The executive director must take certain actions depending on the allegations. If the facts alleged do not state a claim, a deficiency notice issues. If one or more allegations do state a cause of action, a preliminary ruling must be issued or the agency may defer the processing of allegations which state a cause of action pending arbitration regarding related contractual dispute resolution procedures. WAC 391-45-110(3). But the agency MUST retain jurisdiction. *Id*.

Deferral is appropriate only where a) employer conduct alleged constitutes an unlawful unilateral change of wages, hours or working conditions which is either protected or prohibited by the collective bargaining agreement, b) the agreement contains an arbitration clause concerning its interpretation or application, and c) there are no procedural impediments to an arbitration award. WAC 391-45-110(3)(a). The contract interpretation made in the contractual proceedings shall be considered binding, except where the proceedings were not conducted in a fair and orderly manner or the contractual procedures reached a result repugnant to the purposes and policies applicable to the collective bargaining statute. WAC 391-45-110(3)(b).

Reading the statute and regulations together, the arbitrator only had jurisdiction to make decisions regarding contract interpretation and application. Instead, the arbitrator first decided whether the employer’s acts as alleged were a mandatory subject, i.e. one which requires bargaining by law.

This determination is expressly reserved to PERC. WAC 391-45-550 provides “the determination as to whether a particular subject is mandatory or nonmandatory to be a question of law and fact to be determined by the commission, and which is not subject to waiver by the parties by their action or inaction. It is the policy of the commission that a party which engages in collective bargaining with respect to a particular issue does not and cannot confer the status of a mandatory subject on a nonmandatory subject.” Moreover, according to the State Supreme Court, “PERC has a fundamental responsibility to determine the scope of mandatory bargaining under the public employment collective bargaining laws.” *International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Com'n****,*** 113 Wn.2d 197, 203, 778 P.2d 32
(1989) citing *Cf. Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979) (“[c]onstruing and applying the duty to bargain ... are tasks lying at the heart of the [National Labor Relations] Board's function”).

DELEGATION

The rule in this state and others is that where the legislature by enabling legislation indicates the legislative body authorized to perform a legislative function, that body may not delegate its power absent specific legislative authorization. [*Lutz v. Longview*, 83 Wn.2d 566, 570, 520 P.2d 1374 (1974)](http://web2.westlaw.com/find/default.wl?serialnum=1974123825&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052); [*Noe v. Edmonds School Dist.* 15, 83 Wn.2d 97, 515 P.2d 977 (1973)](http://web2.westlaw.com/find/default.wl?serialnum=1973125519&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052); [*In re Puget Sound* *Pilots* *Ass'n*, 63 Wn.2d 142, 145-46 & n.3, 385 P.2d 711 (1963)](http://web2.westlaw.com/find/default.wl?serialnum=1963124685&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052); [Roehl v. PUD 1, 43 Wash.2d 214, 240, 261 P.2d 92 (1953)](http://web2.westlaw.com/find/default.wl?serialnum=1953103608&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052); [*Neils v. Seattle*, 185 Wn. 269, 53 P.2d 848 (1936)](http://web2.westlaw.com/find/default.wl?serialnum=1936104503&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052); [*Benton v. Seattle Elec. Co*., 50 Wn. 156, 96 P. 1033 (1908)](http://web2.westlaw.com/find/default.wl?serialnum=1908002287&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=660&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052); 2 E. McQuillin, *supra* at s 10.40. The rationale underlying this rule is that enabling legislation is a grant rather than a limitation of authority, which means that only those powers enumerated in the statute may be exercised by the agency or municipality. *See generally Moses Lake School Dist. 161 v. Big Bend Community College,* 81 Wn.2d 551, 556, 503 P.2d 86 (1972), appeal dismissed, [412 U.S. 934, 93 S.Ct. 2776, 37 L.Ed.2d 393 (1973)](http://web2.westlaw.com/find/default.wl?serialnum=1973245820&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=708&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052); [*Union High School Dist. 1 v. Taxpayers of Union High School Dist. 1,* 26 Wn.2d 1, 6-7, 172 P.2d 591 (1946)](http://web2.westlaw.com/find/default.wl?serialnum=1946102851&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=0B49AADD&ordoc=1980148052).

Although the statutes and regulations allow delegation to an arbitrator, they expressly limit the arbitrator to contract interpretation and application. There is nothing in the statute that provides authority for the arbitrator to determine what is or isn’t a mandatory subject. Indeed, it could be argued that a party appearing before PERC is legally entitled to the judgment, consideration and expertise of PERC on this issue as well as review.

Moreover, the regulation required PERC to retain jurisdiction which then would have allowed the City to request review under WAC 391-45-350 and chapter 34.05 RCW. RCW 41.56.165(actions taken on behalf of commission subject to APA and the right of judicial review.) *See also* RCW 34.05.570(4)(allowing review of an agency’s failure to perform a legally required duty). By allowing the arbitrator to exceed its authority, the PERC stripped the City of its procedural rights.

Thus, one could argue that the subdelegation was prohibited.

ULRA VIRES

“Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed. Ultra vires acts cannot be validated by later ratification or events. *South Tacoma Way, LLC v. State,* 169 Wn. 2d 118, 123, 244 P.3d 871 (2010).*See also* *Chemical Bank I,* 99 Wn.2d 772, 799, 666 P.2d 329 (1983)(government contracts entered into without statutory authority are void). Where an act is truly void, it may be challenged at any time, even years later. *Id*. at 124.

“Conversely, acts done without strict procedural or statutory compliance are subject to different review. Those acts may or may not be set aside depending on the circumstances involved. Thus, government entities may remain responsible for lesser deviations in authority, such as failures to comply with proper procedure. *E.g.,* [*Haslund v. City of Seattle,* 86 Wn.2d 607, 622, 547 P.2d 1221 (1976).](http://web2.westlaw.com/find/default.wl?serialnum=1976113509&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=661&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=5DDE6A14&ordoc=2022371226)” *Id*.

The question here is whether PERC had the authority to delegate mandatory subject determinations to an arbitrator. “It is a general principle of law, expressed in the maxim ‘delegatus non potest delegare,’ that a delegated power may not be further delegated by the person to whom such power is delegated. Apart from statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or, on the order, discretionary or quasi-judicial. Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. \* \* \**'Application of Puget Sound Pilots’ Ass’n,* 63 Wn. 2d 142, 385 P.2d 711 (1963) 145-46 *quoting* 42 Am. Jur., Public Administrative Law, § 73.

Here, the legislature expressly authorized delegation of judicial or quasi-judicial matters to arbitrators. However, this delegation did not extend to mandatory subject determinations to an arbitrator with no right of review. One might argue that this falls under a procedural deformity which must be challenged under the APA as well as an ultra vires act for which there is no authority, but more research is needed.

RIGHT OF APPEAL

WAC 391-45-350 provides that an order issued under WAC 391-45-110(1) (deficiency notices) or 391-45-310 (examiner decisions) or any other rulings up to the issuance of the order may be appealed to the Commission within 20 days of the issuance of the order. WAC 391-45-310 applies to interlocutory decisions by the executive director, his or her designee, or a hearing examiner and requires a party seeking discretionary review of such interlocutory order to file within 7 days of the issuance of the order. WAC 391-45-310(1)(a). Denial of review does not affect the right of appeal to the commission. Moreover, after the examiner or other designee issues his or her final decision, review is available under WAC 391-45-350.

Under the facts here, it appears that the arbitrator’s opinion is a ruling in the proceeding prior to the issuance of PERC’s final order. One could argue that PERC still has jurisdiction and that it must issue a final order from which an appeal would lie. But, if the City does not appeal the arbitrator’s opinion, PERC might simply consider the decision final. WAC 391-45-310(2); 391-45-350. Filing is due August 31, 2011.