City of Tacoma, Decision 5634-B (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 120, Complainant,	CASE 11727-U-95-2761
vs.	DECISION 5634-B - PECB
CITY OF TACOMA, Respondent.	ORDER DENYING RECONSIDERATION

Julia C. Mullowney, Legal Counsel, and Audrey B. Eide, General Counsel, appeared on behalf of the union.

George S. Karavitas, Senior Assistant City Attorney, appeared on behalf the employer.

This case comes before the Commission on a petition filed by the employer, seeking reconsideration of a decision issued by the Commission on October 2, 1996.[1]

On August 14, 1996, Examiner William A. Lang issued his findings of fact, conclusions of law and order in the above-captioned unfair labor practice case. Examiner Lang found that the City of Tacoma (employer) unlawfully implemented a unilateral change involving a mandatory subject of collective bargaining, and failed and refused to bargain in good faith with Washington State Council of County and City Employees, Local 120 (union), in violation of RCW 41.56.140(4) and (1).

Chapter 391-45 WAC regulates the processing of unfair labor practice cases and provides for the filing of a petition for review of an Examiner's decision in WAC 391-45-350, which states in part:

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1 City of Tacoma, Decision 5634-A (PECB, 1996).

> The examiner's findings of fact, conclusions of law and order shall be subject to review by the commission on its own motion, or **at the request of any party made within twenty days following the date of the order issued by the examiner.** ... In the event no timely petition for review is filed, an no action is taken by the Commission on its own motion within thirty days following the examiner's final order, the findings of fact, conclusions of law and order of the examiner shall automatically become the findings of fact, conclusions of law and order of the commission and shall have the same force and effect as if issued by the commission.

[Emphasis by **bold** supplied.]

Under WAC 10-08-080, the deadline for filing a petition for review was computed in this case as Tuesday, September 3, 1996.

The employer filed a petition for review on September 4, 1996. On September 18, 1996, the union moved for dismissal of the petition for review as untimely. On October 2, 1996, the Commission dismissed the petition for review and closed the case.[2]

The employer filed a petition for reconsideration on October 10, 1996, citing RCW 34.05.470.[3] The union filed a response to that petition on October 21, 1996, urging its rejection.

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[2] The Commission did not exercise its option to review the Examiner's decision on its own motion.

[3] That Administrative Procedure Act (APA) provision allows for filing of a petition for reconsideration within ten days of the service of a final order, but states, "The place of filing and other procedures, **if any**, shall be specified by agency rule." [Emphasis by **bold** supplied.] The employer also cites WAC 10-08-215, a provision of the Model Rules adopted by the Chief Administrative Law Judge under authority conferred by the APA, but it merely specifies that any petition for reconsideration of a final order is to be filed in the office of the person or persons who entered the order.

The Public Employment Relations Commission has not adopted rules establishing any procedures for obtaining reconsideration of Commission orders, but we respond to this petition because it raises questions that apparently need to be clarified.

Commission Precedent

The Commission has previously dismissed petitions for review filed one day late. See, Seattle Public Health Hospital (American Federation of Government Employees, Local 1170), Decision 1781-B (PECB, 1984); Inchelium School District, Decision 2395-C (PECB, 1987); City of Seattle, Decision 2230-A (PECB, 1985); Lewis County, Decision 2957-A (PECB, 1988). In dismissing late petitions for review, the Commission has not discriminated between those filed by attorneys and those filed by pro se parties. See, Spokane School District, Decision 310-A (EDUC, 1978); Port of Ilwaco, Decision 970-A (PECB, 1980); Port of Seattle, Decision 2661-B (PORT, 1988); Othello School District, Decision 3037-A (PECB, 1988); Kennewick School District, Decision 3330-A (PECB, 1989); City of Seattle, Decision 4556-A (PECB, 1994); City of Seattle, Decision 3199-A (PECB, 1989).[4]

The Commission has excused parties from strict compliance with time limits, where there was a basis to conclude the agency contributed to the party's error. City of Tukwila, Decision 2434-A (PECB, 1987) [erroneous advice from staff member]; Island County, Decision 5147-C (PECB, 1996) [rule on "filing by fax" ambiguous].

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[4] The employer argues that City of Seattle v. Public Employment Relations Commission, 116 Wn.2d 923 (1991), cited in our earlier decision, is not relevant. That case was used only as an example, to show how strictly the courts apply time limits for petitions for review. The Commission has also ruled that it lacks jurisdiction if the time requirements for a petition for review are not met. City of Seattle, Decision 3199-A, supra.

Request for Waiver

The employer contends that the Commission has the power to waive the time requirement. WAC 391-08-003 does allow the Commission to waive rules, but that is discretionary, based on whether a waiver will effectuate the purposes of the applicable collective bargaining statute. Mason County, Decision 3108-B (PECB, 1991).

According to an affidavit of its attorney, the reason for the tardiness of the employer's petition for review is that the attorney:

> [M]ade an error in reading the rule and failed to note that the 20 days should be counted from the date upon which the examiner signs or issues the order rather than the date upon which I had received the Order.
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> ...
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> The fact that the petition was one day late was simply and solely the result of this computational error.

The employer argues that its one day tardiness is not prejudicial, and that the union did not allege it was prejudiced by the delay. While lack of prejudice is the only reason for waiver explicitly stated in WAC 391-08-003, the rule does not make waivers automatic when there is no prejudice. As noted in Mason County, supra:

> The collective bargaining statutes administered by the Commission embody a legislative policy requiring employers and unions to communicate to one another. RCW 41.56.030(4); RCW 41.56.100; 41.58.040. The same statutes also establish administrative procedures for bringing orderly resolution to disputes. RCW 41.56.050 through .080; 41.56.160 ...; 41.58-.020. In this case and in countless others, appeals have been dismissed when employers or unions fail to process their disputes in accordance with those statutes.

The only instance found where the Commission has waived the time limit for filing a petition for review was in Island County, Decision 5147-C (PECB, 1996), where a majority of the Commission found that the tardy party had substantially complied with the purpose of the 20-day filing requirement and the other party was not prejudiced by the delay.[5] Even then, the Commission noted that then-existing rules concerning the unacceptability of filing by "fax" were not clear on their face.[6] We have no substantial compliance in the case now before us, and the 20-day rule is clear.

The tardiness of the petition for review here is due only to a mistake made by the employer's attorney. Responding to an acknowledgement of attorney error in Mason County, supra, the Commission stated:

> [T]he only "cause" of the employer's untimely service was its own lack of due diligence. If the Commission were to excuse untimely service for such a reason, we would completely undermine the service requirements of WAC 391-45-350 and the underlying policy of orderly dispute resolution.

Where the only cause of untimeliness is inadvertent error or lack of due diligence, and there is no erroneous agency advice or substantial compliance, waiver is not justified. City of Puyallup, Decision 5460-A (PECB, 1996). The Commission has refused to waive rules in two other recent cases: King County, Decision 5595-A (PECB, 1996) [petition for review did not show on its face that other parties were properly served] and Colville School District,

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[5] The party had transmitted its petition for review to the Commission by telefacsimile on the date it was due, had mailed it to the Commission on the same day, and had effected timely service on the other party.

[6] After Island County, the Commission adopted amendments to WAC 391-08-120 which explicitly preclude filing by "fax" in adjudicative proceedings under the APA.

Decision 5319-B (PECB, 1996) [election objections filed after the end of the seven day period provided by the rules].

The employer cites Port of Tacoma, Decision 4627-A (PECB, 1995), as an example where the Commission waived its rules, but that case is inapposite. The Commission affirmed an Examiner's acceptance of a late answer in Port of Tacoma, but the only argument before the Commission there was that it was an abuse of discretion for the Examiner to excuse the late answer. It has been long-standing practice of the Commission to grant reasonable requests for extensions of time to answer complaints and file briefs. See, Port of Seattle, Decision 2796-A (PECB, 1989). The case now before the Commission does not involve an interlocutory action before an Examiner, but a petition for review of an order that would otherwise become final under WAC 391-45-350.

Rules Claimed to be Burdensome

The employer attributes its error to an assumption that it had to act within 20 days following receipt of the Examiner's decision. Chapter 10-08 WAC sets forth the existing standards for Washington administrative practice generally, and Chapter 391-08 WAC sets forth additional standards for practice before the Commission. Like the APA itself, each of those WAC chapters provides that "service" is deemed complete upon deposit in the United States mail properly stamped and addressed. Thus, computation of the period for filing a petition for review as commencing when the Examiner's decision was mailed was consistent with procedures uniformly applicable before Washington administrative agencies.

The employer cites Superior Court Rule CR 6(e) as an example of a "sensible policy" which the Commission should consider. It states:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a

> notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

The Commission's rules at one time allowed three extra days for response to mailed materials. However, with the implementation of APA amendments in the early 1980's which authorized the Chief Administrative Law Judge of the state of Washington to adopt model rules of procedure for all administrative agencies, and with explicit rejection of the "three extra days" concept by the Chief Administrative Law Judge in Chapter 10-08 WAC, the Commission's rules were modified more than 10 years ago to conform to the state-wide standard for practice before administrative agencies.

The employer notes that WAC 391-45-350 requires a brief in support of a petition for review to be filed with the petition for review, and that it had only 12 weekdays to prepare materials in this case. The employer argues that the time period is unusually short, and the Commission should flexibly apply the rules. Those arguments are not persuasive, however. Since its original adoption in 1980, the rule has expressly allowed the Commission, the Executive Director or his designee to grant an extension of the time for filing of a brief, once a party has filed a timely petition for review. The employer could have submitted a petition for review and sought an extension of time to file its brief in this case, but did not do so.

Noting that the Commission's refusal to waive the filing deadline requirement will prevent the Commission from considering the substantive issues, the employer argues that failure to review the case on its merits diminishes the value of the hearing process, and does not serve the statutory duty of the Commission. Substantive issues go undecided, however, any time a case is rejected for noncompliance with time limits. The Commission does not allow

parties to bend the rules for their own convenience, whether it be to accommodate a mistake in counting days, or other error.[7]

Conclusions

The Commission has considered the petition for reconsideration and finds that it provides insufficient grounds to justify a waiver of the rules in this case. Under Mason County, the requested waiver would neither further the statutory policies of "communication" and "orderly dispute resolution", nor promote peace in labor relations.

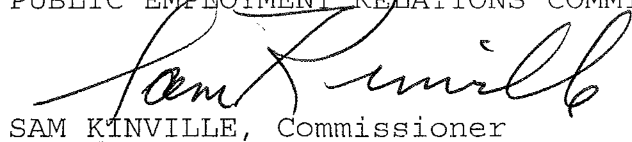
NOW, THEREFORE, it is

ORDERED

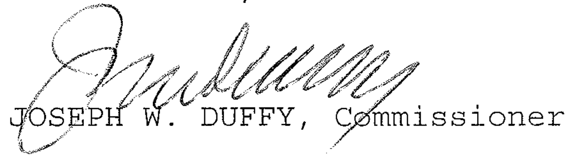
The decision entered on May 3, 1996, stands as the final order of the Commission in this matter.

Issued at Olympia, Washington, the 28th day of October, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



SAM KINVILLE, Commissioner



JOSEPH W. DUFFY, Commissioner

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7 The Commission recently rejected a petition for review received seven days late, where the employer's board did not convene to consider the matter until the day before the petition for review was due. The Commission determined that such a reason did not justify waiving the rules. Puget Sound Educational Service District, Decision 5126-A (PECB, 1995).