STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petitions of:	
	CASE 13517-E-97-2262
	DECISION 6291-A - PECB
TECHNICAL EMPLOYEES' ASSOCIATION	
	CASE 13518-E-97-2263
	DECISION 6292-A - PECB
Involving certain employees of:	CASE 13519-E-97-2264
	DECISION 6293-A - PECB
	CASE 13520-E-97-2265
KING COUNTY	DECISION 6294-A - PECB
	DECISION OF COMMISSION

Cline & Emmal, by James M. Cline, Attorney at Law, appeared on behalf of the petitioner.

Kerry H. Delaney, Attorney at Law, appeared on behalf of the employer as Special Deputy Prosecuting Attorney.

Frank & Rosen, by Martin Garfinkel, Attorney at Law, appeared on behalf of intervenor International Federation of Professional and Technical Employees, Local 17.

These cases come before the Commission on a petition for review filed by Technical Employees Association, seeking to overturn an order of dismissal issued by Executive Director Marvin L. Schurke.[1] We affirm.

BACKGROUND

The Technical Employees Association (TEA) filed five representation petitions with the Commission under Chapter 391-25 WAC, involving

[1] King County, Decision 6291 (PECB, 1998).

employees of King County. Four of those petitions are before the Commission at this time:[2]

- In Case 13517-E-97-2262, the TEA sought certification as exclusive bargaining representative of a county-wide bargaining unit of supervisory engineers, and it specifically acknowledged that International Federation of Professional and Technical Engineers, Local 17, is the incumbent exclusive bargaining representative of at least some employees in that proposed unit.

- In Case 13518-E-97-2263, the TEA sought certification as exclusive bargaining representative of a bargaining unit of non-supervisor engineering and engineering-support personnel, and it specifically acknowledged that IFPTE Local 17 is the incumbent exclusive bargaining representative of at least some employees in that proposed unit.

- In Case 13519-E-97-2264, the TEA sought certification as exclusive bargaining representative of a bargaining unit of professional engineers, and it specifically acknowledged that IFPTE Local 17 is the incumbent exclusive bargaining representative of at least some employees in that proposed unit.

- In Case 13520-E-97-2265, the TEA sought certification as exclusive bargaining representative of a bargaining unit limited to certain designers, and it specifically acknowledged that IFPTE Local 17 is the incumbent exclusive bargaining representative of at least some employees in that proposed unit.

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[2] The fifth petition, in Case 13521-E-97-2266, involved a unit of engineering support personnel, and is not before the Commission at this time.

The TEA's petitions were date-stamped as received at the Commission's office on November 3, 1997.

International Federation of Professional and Technical Employees (IFPTE), Local 17, moved for intervention in these cases, on the basis of its status as the incumbent exclusive bargaining representative of at least some of the employees affected by these petitions. The employer and IFPTE Local 17 were parties to a collective bargaining agreement in effect through December 31, 1997, covering employees in all four of the above-captioned cases. Granting of such a motion is appropriate under WAC 391-25-170.[3]

By letter dated April 17, 1998,[4] the Executive Director gave the TEA a period of time to show cause why the petitions should not be dismissed as untimely. RCW 41.56.070 and WAC 391-25-030(1) prohibit raising questions concerning representation except during the period not more than 90 days or less than 60 days prior to the expiration of an existing collective bargaining agreement. The petitions in each of the above-captioned cases were seen as infringing on the 60-day "insulated" period of a collective bargaining agreement between the employer and IFPTE, Local 17.

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[3] Teamsters Local 117 moved for intervention in Case 13518-E-97-2263, and claimed that petition infringed on a contract between the employer and Local 117 with a December 31, 1998 expiration date. The TEA opposed Local 117's motion for intervention, however, and Local 117 did not file a brief on review. We deem it unnecessary to decide the intervention issue, which is irrelevant if the petition must be dismissed because of the contract between the employer and IFPTE Local 17.

[4] There was a substantial delay in the initial processing of these cases, because the lists of employees provided by the employer did not match the bargaining units described in the petitions. Thus, the sufficiency of the respective showings of interest was not validated until March 1998.

The TEA responded on May 1, 1998, advancing several arguments in opposition to dismissal. The TEA argued that the petitions should be considered timely because they were actually delivered to the Commission's office on Friday, October 31, 1997, albeit after the close of business, and that extraordinary circumstances provide good cause for waiving the deadline.[5] The TEA asserted that no time deadline existed for filing the petitions, and that no contract bar existed, arguing in part, as follows:

> Assuming the Commission meant what it said in its prior ruling on the TEA petition – that circumstances of the County reorganization warranted wall to wall units of the concerned

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[5] The TEA enclosed an affidavit of Wyatt Wood, stating in part:

> 3. I left our attorney's office with the petitions at about 1:30 p.m. for the Public Employment Relations Commission – Executive Director's Office, Marvin Schurke, in Olympia, Washington. The trip, South on Interstate 5 was "normal" through Tacoma.... normal being occasional moderate slow downs from Seattle through Tacoma. Then, somewhere near Ft. Lewis traffic stopped and held, and held longer. No one could get on the freeway. The only thing moving was the occasional emergency vehicle, driving down the shoulder.
> 4. About 3:15 p.m., I became concerned, we were moving occasionally (barely) and it was beginning to appear that I would have trouble getting to the PERC office before it closed at 5:00 p.m. So I called Marvin Schurke on my cell phone. I ended up talking to Marvin Schurke and to Sally Iverson, and I was assured, by Marvin Schurke, that if I slid my papers under the door when I arrived my difficulties would be considered and the deadline would be extended.
> 5. I arrived at the PERC building at 6:30 p.m. after passing a huge wreck with 28 damaged vehicles still on site. I slid our petitions under the door.

> employees — no contract bar exists. *City of Mount Vernon*, Decision 4199-B (PECB, 1992).
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> TEA has filed nine petitions in total — the five at issue and four others based on an assumption that the Commission might relent and return to its prior position of allowing King County technical and engineering employees to organize on a non-wall to wall basis. But until the Commission ultimately decides that issue it is premature to conclude that a contract bar exists.

The TEA also argued that the contract bar window period did not close until Monday, November 3, 1997. It reasoned that the normal cutoff day was Sunday, November 2, 1997, so that the period should be extended through the close of business on the following Monday.

On June 18, 1998, the Executive Director dismissed these petitions as untimely.[6] The TEA filed a petition for review, thus bringing the cases before the Commission.

POSITIONS OF PARTIES

TEA now argues that an evidentiary hearing was needed prior to summary dismissal of the case, in order to demonstrate the existence of a "valid" collective bargaining agreement covering "an appropriate bargaining unit" under the standards outlined in WAC 391-25-030. TEA's brief on review asserts, for the first time in these cases, that the bargaining units represented by IFPTE Local 17 exist only by voluntary agreement and have never been certified by the Commission, and that they might not be appropriate in light

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[6] The Executive Director barred the filing of a petition for investigation of a question concerning representation affecting employees in the proceedings for 60 days following the date of the order.

of Commission precedent. TEA contends that summary dismissal of the petition improperly shifts the burden of proof on the issue to TEA and violated fundamental due process rights of TEA and its members. In the alternative, TEA suggests that even if the contract bar principle applies, the petitions were filed in a timely manner under the statute. TEA claims it did raise the issue within the window period by delivering the petition and its supporting documentation to the Commission offices after the close of business on October 31, 1997, as the following day [Saturday] would have been 62 days prior to the expiration of the agreement and within the thirty day window period. In the alternative, if the Commission decides that the window period closed on October 31st, the TEA urges the Commission to waive its rules to allow the petition.[7]

The employer agrees with the Executive Director's order dismissing the petitions on the basis of untimeliness. The employer argues that in order to be timely, the TEA would have had to file its petition between October 3, 1998 and November 1, 1998. The employer argues that a hearing is not necessary, since a valid collective bargaining agreement between the employer and Local 17 existed when the TEA filed its petitions. The employer requests the Commission to uphold the order of dismissal.

IFPTE Local 17 argues that TEA's petition was filed on November 3, 1997, that the filing occurred two days after the end of the contract bar period. It claims the window period was October 3, 1997 through November 1, 1997 as Local 17's collective bargaining agreements expired on January 1, 1998. Local 17 contends that the

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[7] Additional arguments advanced by the TEA in regard to the propriety of the existing bargaining units and the need for an evidentiary hearing need not be addressed, in light of our decision on the timeliness issue.

Commission has no power to waive the contract bar rule of the statute. Local 17 argues that issues such as the appropriateness of existing bargaining units are not covered by Commission precedent holding that certain petitioned-for bargaining units were inappropriate. Local 17 asserts that an evidentiary hearing as suggested by TEA is not necessary to decide the cases, and that the order of dismissal should be affirmed.

DISCUSSION

The Contract Bar

A "contract bar" policy traditional in the private sector was codified in RCW 41.56.070, as follows:

> Where there is a valid collective bargaining agreement in effect, no question of representation may be raised except during the period not more than 90 or less than 60 days prior to the expiration day of the agreement. ...

WAC 391-25-030 restates the statutory "contract bar" time limits, as follows:

> WAC 391-25-030 PETITION--TIME FOR FILING. In order to be timely filed:
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> (1) Where there is a valid written and signed collective bargaining agreement in effect covering an appropriate bargaining unit which includes any or all of the employees to be affected by the petition, a petition must be filed **during the period not more than ninety nor less than sixty days prior to the expiration date of the collective bargaining agreement,** or after the expiration thereof.

> (2) Where a certification has been issued by the agency covering an appropriate bargaining unit which includes any or all of the employees to be affected by the petition, a petition must be filed:
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> (a) Not less than twelve months following the date of the certification of an exclusive bargaining representative; or
>
> (b) Not less than twelve months following the date of the latest election or cross-check in which the employees failed to select an exclusive bargaining representative.
>
> (3) Where neither subsections (1) nor (2) of this section are applicable, a petition may be filed at any time.

[Emphasis by **bold** supplied.]

The purpose of the "contract bar" is to avoid disruptions of collective bargaining negotiations between an employer and the incumbent exclusive bargaining representative of its employees late in the process of negotiations for a successor contract. Hence, the last 60 days of a contract term are often referred to as the "insulated" period.

The Existing Contracts -

At the time the TEA was preparing to file its petitions, the employer and IFPTE Local 17 had a collective bargaining agreement in effect for the period "January 1, 1995 through December 31, 1997" covering some employees in all four of the bargaining units sought by the TEA. We interpret that as meaning the contract was still in effect throughout all 24 hours of December 31, 1997, and that it actually "expired" as of 12:01 a.m. on January 1, 1998. Hence, the 60-day "insulated" period under RCW 41.56.070 and WAC 391-25-030 consisted of all 31 days in the month of December plus the last 29 days of the month of November. November 1 is thus normally the last day for filing a petition involving a bargaining unit under a contract with a December 31 expiration date.

In 1997, November 1 fell on a Saturday. The Commission's office is not open on Saturdays, so the TEA would have us apply WAC 391-08-100 to extend the period for it to file through the close of business on Monday, November 3, 1998.[8] Such an approach conflicts, however, with the "nor less than" language of the statute, and would foreshorten the "insulated" period. We affirm the Executive Director's rejection of the TEA's argument.

The TEA seems to have realized that October 31, 1997, was the last day for it to file its petitions, and it clearly made an effort to deliver its petitions to the Commission's office before the close of business on that date. The documents it slipped under the door after the close of business were properly date-stamped as filed on the next business day, which was November 3, 1997.

Request for Waiver of Rule -

The TEA's request that the Commission waive its rules is denied. The contract bar policy is statutory, not just a product of Commission decisions or rules. The Commission has no power to waive or modify the statute in any respect. Monroe School

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[8] WAC 391-08-100 provides:

> WAC 391-08-100 SERVICE OF PROCESS--COMPUTATION OF TIME. In computing any period of time prescribed or allowed by any applicable statue or rule, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

District, Decision 2017-A (PECB, 1984); Highline School District, Decision 1507 (PECB, 1982). We are not persuaded that the Executive Director would have suggested the deadline be extended, as attributed to him in the affidavit supplied by the TEA. He is well aware he has no authority to waive the statute. There was thus no claim or showing of prejudice. Inasmuch as the TEA's petitions did not reach the Commission's office prior to the close of business on October 31, 1997, they were untimely.

New Arguments Asserted on Appeal

TEA now articulates a claim that the collective bargaining agreement cited as the basis for application of the "contract bar" policy might cover bargaining units that are inappropriate under Commission precedent, so that the contract bar principle does not apply. The TEA now details its reliance on City of Mount Vernon, Decision 4199-B (PECB, 1992) for two principles: (1) that a collective bargaining agreement will be deemed "valid" within the meaning of RCW 41.56.070 only when it covers an appropriate bargaining unit, and (2) a merger of employer operations may render a previously appropriate bargaining unit inappropriate, so as to nullify an otherwise valid contract bar claim.

The arguments TEA makes on appeal were not made before the Executive Director. Indeed, the only "unit" arguments advanced before the Executive Director were tied to an erroneous interpretation of the Commission's decision in a previous case involving the same parties. The Executive Director responded to that argument, correctly pointing out that the previous Commission decision did not address the matter for which it was being cited. Without more, the bare citation of City of Mount Vernon, supra, did not put the Executive Director on notice of the unit issues now being urged before the Commission. The Commission does not allow

parties to bring forth new facts on appeal that could have been considered in proceedings before Examiners or the Executive Director. See, e.g., Tacoma School District, Decision 5465-E (EDUC, 1997); Island County, Decision 5147-D (PECB, 1996); Okanogan School District, Decision 5394-A (PECB, 1997); and Chelan County, Decision 5559-A (PECB, 1996). The Supreme Court of the State of Washington applies a similar standard for new arguments, theories, or issues not advanced below. Washburn v. Beatt Equipment Co., 120 Wn.2d 246 (1992). The TEA's "no valid bargaining unit" argument is rejected.

NOW, THEREFORE, it is

ORDERED

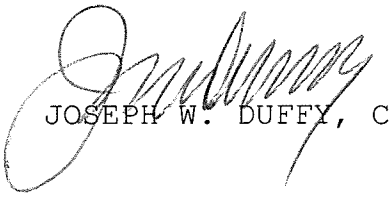
The Order of Dismissal issued by the Executive Director in the above-captioned matters is AFFIRMED.

Issued at Olympia, Washington, on the 14th day of October, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner



JOSEPH W. DUFFY, Commissioner