

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
PUBLIC SCHOOL EMPLOYEES)
OF WASHINGTON) CASE 16300-E-02-2701
)
Involving certain employees of:) DECISION 7878 - PECB
)
CHEHALIS SCHOOL DISTRICT) DECISION OF COMMISSION
)
_____)

Greg Kirsch, Superintendent, for the employer.

Eric T. Nordlof, Attorney at Law, for the union.

This case comes before the Commission on objections filed by the Chehalis School District, seeking to overturn the results of a representation election. The Commission dismisses the objections and remands the case for issuance of the appropriate certification.

BACKGROUND

On March 21, 2002, Public School Employees of Washington (PSE) filed a petition with the Commission under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of "all full-time and regular part-time school bus drivers, excluding confidential employees, supervisors and all other employees" of the Chehalis School District (employer).

In a letter filed on April 3, 2002, in response to a routine request for a list of employees and related information, the employer asserted that resolution of multiple issues would be needed. That letter indicated that a copy was mailed to PSE.

An investigation conference was conducted on April 19, 2002. An investigation statement issued on the same day framed issues as to: (1) Whether a document asserted by the employer as covering the Chehalis transportation employees constituted a "contract bar" under WAC 391-25-030; and (2) whether the Centralia School District is actually the employer of the employees involved because the drivers work under a transportation cooperative administered by the Centralia School District.

On July 10, 2002, PSE filed a motion for summary judgment with supporting affidavits, exhibits, and a brief. PSE argued there was no contract bar because: (1) There was no valid collective bargaining agreement in effect on the date the petition was filed; (2) there was no organized group of bus drivers; (3) no employee had agreed to the terms of the purported "contract" asserted by the employer; and (4) neither an employee nor a PSE staff member had ever seen the purported "contract" prior to the commencement of this proceeding. PSE also argued that the Chehalis School District is the employer of the employees involved, because: (1) It controls the bus drivers' terms of employment; (2) the purported "contract" demonstrates that the Chehalis School District asserts control over the employees at issue; and (3) payroll stubs issued to employees identify the Chehalis School District as the issuer. Finally, PSE argued that it was entitled to recover attorney fees because the objections raised in this matter were frivolous and designed to disrupt the momentum of PSE's organizing campaign. The employer withdrew its concerns.

The hearing process was suspended, and an election was conducted by mail ballot to determine the question concerning representation.

In a letter filed on August 13, 2002, while ballots were out to the employees, the employer asserted that the ballot should contain a choice for self-representation in addition to the choice of PSE as

the exclusive bargaining representative. That letter did not indicate that a copy was served on PSE.

The tally of ballots was issued on August 29, 2002. The tally indicated the following results:

Approximate number of eligible voters	24
Votes cast for PSE of Washington	14
Votes cast for no representation	6
Valid ballots counted	20
Challenged ballots	0
Number of valid ballots needed to determine election	11

Thus, the results of the election were conclusive, and it appeared that PSE would be entitled to certification as the exclusive bargaining representative of the employees involved.

In a letter filed on September 3, 2002, the employer purported to "appeal" from the tally of ballots and reiterated its claim that the ballot should have contained a choice for self-representation. That letter did not indicate that a copy was served on PSE.

In a letter sent to the parties on September 9, 2002, the Executive Director noted the potential failure to serve and explained the Commission's practices, stating:

By a letter dated August 30, 2002, and filed in this office on September 3, 2002, the employer has purported to file a notice of appeal in the above-referenced matter. The term "purported" is used in light of the absence of any indication that a copy of the letter was served on Public School Employees of Washington. In contrast, earlier correspondence sent by the employer on this case, such as a letter dated July 12, 2002, and filed with the Commission on July 15, 2002, had specifically indicated that a copy had been sent to the union. WAC 391-08-120 re-

quires that any document filed with the agency be served on other parties in a timely manner.

The August 30 letter makes reference to a letter sent by the employer under date of August 13, 2002, and filed with the Commission on August 14, 2002. Upon close examination, that letter suffers from the same absence of any indication that a copy was served on the union in a timely manner. I would ordinarily decline to respond to an *ex parte* letter, but the August 30 letter made requests that could not have been granted even if the letter was properly served on the union:

1. The employer's request that the ballots then out to employees be replaced because of an alleged defect sought an action contrary to Commission practice and precedent. Requests to stop an election process in mid-course are denied because of potential for creating undue confusion among the employees involved. If an election result must be voided because of some procedural defect, the entire election will be re-run with notice to the employees clearly explaining the problem.
2. The employer's request that the ballot include a choice for "self-representation" sought an action directly contrary to the Commission's rules. If there is or was an organization which claimed to be the incumbent exclusive bargaining representative of the employees involved, it needed to make a motion for intervention and demonstrate its incumbency under WAC 391-25-170. If there is or was an organization that desired to be on the ballot but did not claim status as an incumbent union, it needed to make a motion for intervention and provide a 10 percent showing of interest under WAC 391-25-190. In the absence of a timely motion (within the seven day period prescribed in the same rules), there could be no basis for an additional choice on the election ballot.

The further processing of the above-reference case will be controlled by the "service" problem noted above. WAC 391-08-120(5) re-

quires the party filing a document to provide proof of service upon request. Thus:

On or before September 16, 2002,
the Chehalis School District must provide proof of service conforming to the requirements of WAC 391-08-120, to establish that its letter dated August 30, 2002, was served on the union in a timely manner.

(emphasis added).

The employer did not provide proof of service by September 16, 2002.

In a letter filed on September 25, 2002, PSE stated that it had not been served with a copy of the "appeal" letter, and it reiterated its request for an award of attorney fees.

In a letter filed on October 9, 2002, the employer acknowledged that it did not serve its "appeal" on the union, but it reiterated the objections contained in its August 13 and September 3, 2002, letters and did not expressly withdraw its appeal.

DISCUSSION

Applicable Standards

Service -

The parties to a representation case are each responsible for the presentation of their side of the controversy, and the Commission is not responsible for either transmitting documents or building a record for either party. *King County*, Decision 7221-A (PECB, 2001). The Rules of Procedure promulgated by the Commission in Chapter 391-08 WAC are applicable, as well as Chapter 391-25 WAC.

The Commission has adopted a rule that specifically governs service of papers filed with the agency. WAC 391-08-120 includes:

SERVICE ON OTHER PARTIES

(3) A party which files any papers with the agency shall serve a copy of the papers upon all counsel and representatives of record and upon unrepresented parties or upon their agents designated by them or by law. Service shall be completed no later than the day of filing, by one of the following methods:

- (a) Service may be made personally
- (b) Service may be made by first class, registered, or certified mail, and shall be regarded as completed upon deposit in the United States mail properly stamped and addressed.
- (c) Service may be made by commercial parcel delivery company
- (d) Service may be made by fax
- (e) Service may be made by e-mail attachment

PROOF OF SERVICE

(4) On the same day that service of any papers is completed under subsection (3) of this section, the person who completed the service shall: . . .

- (a) Obtain an acknowledgment of service from the person who accepted personal service; or
- (b) Make a certificate stating that the person signing the certificate personally served the papers by delivering a copy at a date, time and place specified in the certificate to a person named in the certificate; or
- (c) Make a certificate stating that the person signing the certificate completed service of the papers by:
 - (i) Mailing a copy under subsection (3)(b) of this section; or
 - (ii) Depositing a copy under subsection (3)(c) of this section with a commercial parcel delivery company named in the certificate; or

(iii) Transmitting and mailing a copy under subsection (3)(d) or (e) of this section.

(5) Where the sufficiency of service is contested, an acknowledgment of service obtained under subsection (4)(a) of this section or a certificate of service made under subsection (4)(b) or (c) of this section shall constitute proof of service.

Parties take a risk if they do not follow the procedure set forth in WAC 391-08-120(5). *King County*, Decision 7221-A, *supra*; *Spokane School District*, Decision 5151-A (PECB, 1995). Because proof of service can be required at any time in cases before the Commission, it is important for parties to preserve a contemporaneous documentation of service. *King County*, Decision 7221-A, *supra*; *Spokane School District*, *supra*. Where a claim of defective service is raised, the burden is on the party that filed the document to prove that it served the other party or parties. *King County*, Decision 7221-A, *supra*; *King County*, Decision 6329 (PECB, 1998); *Thurston County*, Decision 5633 (PECB, 1996).

Communication Between Parties -

Healthy labor-management relations depend upon communications between the parties. In *Mason County*, Decision 3108-B (PECB, 1991), the Commission noted that the collective bargaining statutes administered by the Commission embody a legislative policy requiring employers and unions to communicate with one another. See also RCW 41.56.030(4); RCW 41.56.100; RCW 41.58.040. In *City of Puyallup*, Decision 5460-A (PECB, 1996), the Commission wrote:

To further the statutory policies of communication between the parties, we expect the parties to be vigilant in closely monitoring their own compliance with the rules. If there is a failure of a party to do so, we have an obligation to apply the rule in fairness to the other party.

The Commission's rules on service effectuate the purposes of the collective bargaining statutes. *King County*, Decision 7221-A, *supra*. If the Commission were to accept late service of appeals, other parties would normally be prejudiced. *King County*, Decision 7221-A, *supra*; *King County*, Decision 6772-A (PECB, 1999). Thus, the Commission has dismissed untimely appeals in numerous cases. *City of Richland*, Decision 6120-C (PECB, 1998).

Statutory Construction -

Courts interpret agency rules so as to give effect to every word and phrase and so that no part is rendered meaningless or superfluous. *City of Spokane ex rel. Wastewater Management Dept. v. Washington State Dept. of Revenue*, 104 Wn. App. 253 (2001). Thus, our rules requiring service of papers filed with the agency cannot be ignored. *King County*, Decision 7221-A, *supra*.

Application of Standards -

We dismiss the appeal filed in this representation case, because the employer has failed to provide proof of service.

Attorney Fees

PSE contends that the Commission has both the authority and occasion to award attorney fees in this case. It argues, "it is clear that this employer has no intent of actually prosecuting any legitimate conduct or legal objection to the election in this case, but is simply maneuvering to frustrate the collective bargaining rights of its employees as long as possible."

Limited Authority and Application -

Although RCW 41.56.160(1) and (2) provide the Commission with the power to issue appropriate remedial orders and direct it to take such affirmative action as will effectuate the purposes and policy

of the statute, those statutes concern unfair labor practice proceedings. Similarly, although the Supreme Court of the State of Washington has held that "remedial" action in RCW 41.56.160 is broad enough to permit a remedial order containing an award of attorney fees, the Court has reserved such awards for unfair labor practice cases. *State ex. rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60 (1980); *Lewis County v. PERC*, 31 Wn. App. 853 (1982). See also *Anacortes School District*, Decision 2464-A (EDUC, 1986).

Even where it is available, the Commission uses the "extraordinary" remedy of attorney fees sparingly. *Pasco Housing Authority, supra*. Commission orders awarding attorney fees have been based upon repetitive illegal conduct or on egregious or willful bad acts by a respondent that has been found guilty of unfair labor practices. *City of Bremerton*, Decision 6006-A (PECB, 1998); *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *PUD 1 of Clark County*, Decision 3815 (PECB, 1991); *City of Kelso*, Decisions 2633 (PECB, 1988).

Application of Standards -

The case at hand is a representation case, and thus, it is not the type of case in which attorney fees are awarded. PSE has not filed an unfair labor practice case, and the employer has not been found guilty of any unfair labor practice up to this time.

NOW, THEREFORE, it is

ORDERED

1. The objections and/or "appeal" filed by the Chehalis School District on August 30, 2002, are DISMISSED.


2. The case is remanded to the Executive Director for issuance of the appropriate certification.

Issued at Olympia, Washington, on the 12th day of November, 2002.

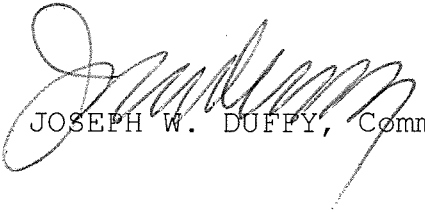
PUBLIC EMPLOYMENT RELATIONS COMMISSION



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