

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
WHATCOM DISPATCHERS' GUILD)	CASE 14834-E-99-2470
)	
Involving certain employees of:)	DECISION 7322 - PECB
)	
CITY OF BELLINGHAM)	ORDER DENYING MOTION
)	FOR DISMISSAL
)	

On October 22, 1999, the Whatcom Dispatchers' Guild (WDG) filed a petition with the Public Employment Relations Commission under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of "dispatchers in the police department through the rank of shift supervisor" employed by City of Bellingham (employer). The petition identified the Washington State Council of County and City Employees (WSCCCE) as the incumbent exclusive bargaining representative of a larger bargaining unit which includes the petitioned-for employees, and that organization moved for intervention in the proceedings.

A letter was directed to the parties under date of November 4, 1999, pointing out that a petition seeking to sever dispatchers from the city-wide bargaining unit of office-clerical and administrative employees had been considered and rejected in *City of Bellingham*, Decision 792 (PECB, 1979), and pointing out that dismissal of this petition would be required unless a party could show that a substantial change of circumstances had occurred since the earlier decision was issued. The parties were notified that the petition would be dismissed unless good cause was shown on or before November 15, 1999.

The WDG submitted a response to the "show cause" directive by telefacsimile transmission on November 15, 1999, it filed the original of its response document on November 16, 1999, and it served a copy of that response on the other parties. Counsel for the WDG argued that the doctrine of res judicata is inapplicable to this case, that RCW 41.56.060 entitles the WDG to a hearing prior to a determination on whether the unit it proposes is an appropriate unit, that the community of interest factors support the petitioned-for unit, and that substantial changes have occurred in the bargaining unit since Decision 792 was issued in 1979.

On December 6, 1999, the WSCCCE submitted a "Motion to Dismiss" and contended that the response filed by the WDG was untimely. The WSCCCE relied on the Commission's decision in *Island County*, Decision 5147-B (PECB, 1995), where a jurisdictional document submitted by telefacsimile was rejected as untimely under the terms of WAC 391-08-120 then in existence.¹

Further processing of this representation case was then "blocked" for an extended period under WAC 391-25-370, due to the pendency of unfair labor practice cases in which an employee in the petitioned-for bargaining unit, Mary McHugh, complained that the employer and union each violated her rights under Chapter 41.56 RCW. See *City of Bellingham*, Decision 7040 (PECB, 2000). When that controversy was ended, on November 8, 2000, the processing of this case was resumed, and Hearing Officer J. Martin Smith was assigned.

¹ In *Island County*, the Commission interpreted the terms "filing" and "service" as they are defined in the state Administrative Procedure Act, Chapter 34.05 RCW (APA) in the context of the then-existing terms of the Model Rules of Procedure adopted by the Chief Administrative Law Judge of the State of Washington in Chapter 10-08 WAC. At that time, "filing" was complete only upon actual delivery of the document to the agency office.

On January 16, 2001, the Hearing Officer asked the parties for briefs on the "untimely response" issue. The WSCCCE filed its response on January 24, 2001; the WDG filed its response on January 26, 2001; there was no response from the City of Bellingham.

The Executive Director has considered the matter, and concludes: (1) that the motion for dismissal must be DENIED; and (2) that a hearing on the merits is necessary.

DISCUSSION

The Order to Show Cause Was Appropriate

Taken together, WAC 391-08-230 and WAC 10-08-135 provide for the issuance of a summary judgment in a case where no material issue of fact is shown to exist and one of the parties is entitled to a judgment as a matter of law. The APA requires administrative agencies to inform parties of deficiencies in their pleadings, and the agency routinely issues deficiency notices which give parties a limited period of time in which to cure apparent defects or face dismissal of their cases. Motions for dismissal or summary judgment initiated by parties are not frequent or commonplace, but due process requires that the other parties be given an opportunity to respond. The "show cause" procedure used in this case and similar situations satisfies those due process concerns.

Time Limit for Response Was Discretionary

The motion for dismissal filed by the WSCCCE in this case suffers from the fact that it is based entirely on the time period for response set forth in the "show cause" directive. However, unlike

a time limit fixed by a statute,² or a time limit fixed by a Commission rule,³ the time allowed for response to a deficiency notice or "show cause" directive is discretionary and not jurisdictional. Such a deadline can be extended, particularly where no prejudice to other parties is shown. WAC 391-08-003. In this case, the presence of the blocking charges precluded the processing of the case regardless of whether the WDG response was filed on November 15th or November 16th, so no prejudice is shown.

Availability of Filing by Fax

The *Island County* case relied upon by the WSCCCE no longer reflects the applicable legal standard. When *Island County* was decided, the Model Rules of Procedure adopted by the Chief Administrative Law Judge of the State of Washington, in Chapter 10-08 WAC, did not allow for filing of any papers by fax or other means that did not involve delivery of the actual documents to the agency office. In the absence of any guidance from the official with primary responsibility to adopt rules implementing the adjudicative proceedings provisions of the APA, the Commission concluded that filing could not be effected by means of the fax methodology. That

² The time limitations imposed by the APA for judicial review have been strictly enforced by the courts in cases such as *City of Seattle v. PERC*, 116 Wn.2d 923 (1991) and in cases as recent as *Technical Employees Association v. PERC et al.*, WPERR CD-____ (Court of Appeals No. 250900-0-II, 2001).

³ The time limitations imposed by WAC 391-25-470 for filing election objections have been strictly enforced by the Commission in cases such as *Lake Washington Technical College*, Decision 6344-A (PECB, 1998); the time limitations imposed by WAC 391-45-350 for filing appeals have been strictly enforced by the Commission in cases as recent as *City of Richland*, Decision 6120-C (PECB, 1998); *City of Tacoma*, Decision 5634-B (PECB, 1996); and *King County*, Decision 5720-A (PECB, 1987).

changed on November 6, 1999, when the Chief Administrative Law Judge amended WAC 10-08-110 to explicitly permit parties to effect filing of papers by fax.

Taking the direction provided by the Chief Administrative Law Judge, the Commission has subsequently amended WAC 391-08-120 to allow filing by fax, and now provides in relevant part:

WAC 391-08-120 FILING AND SERVICE OF PAPERS. (1) Papers to be filed with the agency shall be filed at the commission's Olympia office. The executive director shall post, and from time to time revise as appropriate, a list containing the street and mailing addresses for filing by actual delivery of papers, the telephone number for filing by **electronic telefacsimile transmission (fax)**,

(2) Papers may be filed by any of the following methods:

(a) FILING BY ACTUAL DELIVERY of papers to the agency (including filings delivered by United States mail)

(b) **FILING BY FAX shall be subject to the following limitations:**

(i) **Parties shall only transmit one copy of the paper, accompanied by a cover sheet or form identifying the party filing the paper, the total number of pages in the fax transmission, and the name, address, telephone number and fax number of the person sending the fax.**

(ii) **The original paper filed by fax shall be mailed to the commission's Olympia office on the same day the fax is transmitted.**

(iii) The case number(s) shall be indicated on the front page of each document filed by fax, except for petitions and complaints being filed to initiate proceedings before the agency.

(iv) Filing by fax shall occur only when a complete legible copy of the paper is received by the agency. If a fax is not received in legible form, it will be treated as if it had never been filed. A party attempting to file a paper by fax bears the risk that the

paper will not be timely or legibly received, regardless of the cause.

(v) If receipt of a fax transmission commences after office hours, the paper will be deemed filed on the next business day the office is open.

(vi) Fax shall not be used to submit or revoke authorization cards for purposes of a showing of interest or cross-check under chapter 391-25 WAC.

(Emphasis supplied.)

The procedure followed by the WDG in this case would clearly have been appropriate if the document were being filed today.

Approval for Fax Filing was Granted

The WSCCCE does not contest that the WDG sought and obtained approval to use the fax methodology for its filing at issue in this motion. Agency personnel necessarily responded to that request in the context of a days-old amendment to the Model Rules which allowed filing by fax in Washington administrative proceedings. The WDG cannot now be faulted for acting in conformity with the advice it received from the agency office. See *City of Tukwila*, Decision 2434-A (PECB, 1987).

Change of Circumstances is Alleged

In its response to the show cause directive, the WDG has alleged that a substantial change of circumstances has taken place since 1979, when *City of Bellingham*, Decision 792, was issued, so that the "history of bargaining" component of the statutory unit determination criteria is not, standing alone, sufficient to preclude a severance of the petitioned-for dispatch personnel from the bargaining unit which has historically included them. Specifically, the WDG alleges that desk dispatchers and reception-

ists positions have been replaced by more formally-trained 911 personnel, and that the dispatch services historically provided by the City of Bellingham have been expanded throughout Whatcom County. Additionally, a reclassification study conducted in the autumn of 1999 appears to have redefined the tasks that the employees involved are obligated to perform. While petitioners seeking a "severance" are always somewhat burdened by the history of bargaining, Commission precedents have long recognized the possibility of changes in bargaining unit configurations following a change of circumstances. See *City of Richland*, Decision 279-A, (PECB, 1978); *Pasco School District*, Decision 5016-A (PECB, 1995).

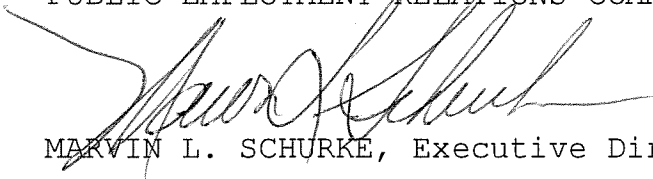
NOW, THEREFORE, it is

ORDERED

1. The motion of the Washington State Council of County and City Employees for dismissal of the petition in the above-captioned case is DENIED.
2. The matter is remanded to the Hearing Officer for further proceedings under Chapter 391-25 WAC.

Issued at Olympia, Washington, on the 20th day of March, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

CITY OF ELLENSBURG

420 NORTH PEARL STREET
ELLENSBURG, WASHINGTON 98926

January 29, 2001

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PUBLIC EMPLOYMENT
RELATIONS COMMISSION

Mr. Martin Smith
Public Employment Relations Commission
603 Evergreen Plaza Bldg.
711 Capitol Way
P.O. Box 40919
Olympia, WA 98504-0919

Re: IBEW Local 77 and the City of Ellensburg
Case No. 15522-G-00-00063 (Sonstegaard)
Mediation date: February 7, 2001 at 10:00 a.m.

X James Pidduck

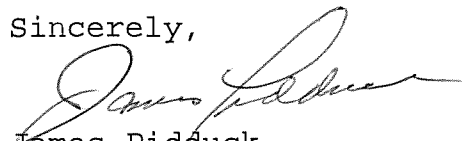
Dear Mr. Smith,

I have been orally advised there is a mediation scheduled in the above matter on February 7, 2001, at 10:00 a.m.

I have taken the liberty of reserving the Ellensburg City Council Chambers from 10:00 a.m. until 4:00 p.m. and the adjacent Council Conference Room from 11:00 a.m. until 4:00 p.m. (The conference room is not available until 11:00.) Both rooms are located at 102 N. Pearl St., approximately four blocks south of City Hall.

I would appreciate it if PERC would see that its records reflect that I am representing the City of Ellensburg in this matter. The Union's formal mediation request erroneously identified Paul Sullivan as the City's attorney.

Sincerely,



James Pidduck
City Attorney

c: David D. Timothy
Jerry Yerkes
Richard H. Robblee
Bob Titus
Carl Jensvold

