STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
STATE OF WASHINGTON - DEPARTMENT OF GENERAL ADMINISTRATION	)	CASE 17422-E-03-2830
Involving certain of its employees represented by:	)	DECISION 8087 - PSRA
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	ORDER DENYING MOTION FOR DISMISSAL

Pamela VanSpoor, Human Resource Manager, for the employer.

Gladys V. Burbank, Director of Activities, for the union.

This case comes before the Executive Director on a request filed by the Washington Federation of State Employees (WFSE or union) for dismissal of a representation petition filed by the Department of General Administration (employer). The Executive Director concludes that, while procedural defects may need to be corrected, dismissal of the entire petition is not appropriate at this time.

BACKGROUND

The employer is a state general government agency that is subject to both the State Civil Service Law, Chapter 41.06 RCW, and the Personnel System Reform Act of 2002 (PSRA), portions of which are codified in Chapter 41.80 RCW. Among other functions, the employer operates the state Consolidated Mail Service.

Origins of a Bargaining Relationship

Review of records transferred to the Public Employment Relations Commission by the Department of Personnel (DOP) and Washington Personnel Resources Board (WPRB) under the PSRA discloses that:

1. On August 26, 1976, the Washington State Personnel Board (a statutory predecessor of the WPRB) created a "messenger service" bargaining unit in its case RU-129,[1] described as follows:

> All civil service employees in the Messenger Service of the Department of General Administration with the exception of . . . State Transport Services Coordinator and . . . all other [supervisors].

On or about September 2, 1976, the DOP issued a notice to employees in that bargaining unit in its case RC-62, announcing that Teamsters Union, Local 378, had been certified as exclusive bargaining representative of that bargaining unit.

2. On June 1, 1988, the DOP issued an order in its case RD-26, removing Teamsters Local 378 from status as the exclusive bargaining representative of the "messenger service" bargaining unit. A letter covering transmittal of that order explained that Local 378 had disclaimed the bargaining unit in

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[1] A two-stage process was used to resolve representation issues under the state civil service rules:

First, a bargaining unit would be "created" by the WPRB or its predecessor, based on a petition filed by an employee organization; then

Second, an employee organization could seek certification as exclusive bargaining representative by filing a petition with the DOP, and prevailing in an election or cross-check conducted by the DOP staff.

the face of a representation petition filed by the WFSE, and that the DOP would go forward with the representation proceeding without participation by Local 378.

3. On June 15, 1988, the DOP issued a certification in its case RC-91, naming the WFSE as exclusive bargaining representative of the "messenger service" bargaining unit on the basis of "proof that it represents a majority (60%) of the 15 employees in the unit" and an absence of any contest by employees or any other organization. Attached to that certification is a notice addressed to employees in the bargaining unit dated June 15, 1988, announcing that the WFSE was their exclusive bargaining representative.

4. On August 1, 1988, the DOP issued a certification in its case US-82, announcing that "a majority of the eligible employees voted to establish a union shop" in a union security referendum conducted in the "messenger service" bargaining unit.[2] The union was thereafter entitled to enforce union shop obligations upon the employees in that bargaining unit.

5. On January 19, 1990, the DOP issued a certification in its case US-89, announcing that "a majority of the eligible employees voted to retain a union shop" in a second union security referendum conducted in the "messenger service" bargaining unit. The union thus continued to be entitled to

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[2] Under RCW 41.06.150, as in effect in 1988 and remaining in effect until July 1, 2004, union security is not a subject for bargaining for unions representing state civil service employees. Union shop obligations are authorized and/or deauthorized only by majority vote of the bargaining unit employees in referendums (elections) conducted under the civil service rules.

enforce union shop obligations upon the employees in that bargaining unit.

6. On April 10, 1991, the DOP issued a certification in its case US-95, announcing that "a majority of the eligible employees voted to remove the existing union shop" in a third union security referendum conducted in the "messenger service" bargaining unit. Thus, although the union continued to be the exclusive bargaining representative of that bargaining unit, it could no longer enforce union shop obligations upon the employees in that bargaining unit.

The DOP and WPRB records disclose no transactions concerning the "messenger service" unit from 1991 through June 12, 2002.

Enactment of the PSRA

Some portions of the PSRA took effect on June 13, 2002, including transfer of authority concerning unit determination and representation cases from the DOP and WPRB to the Public Employment Relations Commission. Applicable PSRA provisions include:

> RCW 41.06.340 UNIT DETERMINATION, REPRESENTATION AND UNFAIR LABOR PRACTICE PROVISIONS APPLICABLE TO CHAPTER. (1) With respect to collective bargaining as authorized by RCW 41.80.001 through RCW 41.80.130, the public employment relations commission created by chapter 41.58 RCW shall have authority to adopt rules, on and after the effective date of this section, relating to determination of appropriate bargaining units within any agency. In making such determination the commission shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by the employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees. ***The public employment relations commission created in chapter 41.58 RCW shall adopt***

> ***rules and make determinations relating to the certification and decertification of exclusive bargaining representatives.***
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> . . .
>
> RCW 41.80.070 BARGAINING UNITS - CERTIFICATION. (1) A bargaining unit of employees covered by this chapter existing on June 13, 2002, shall be considered an appropriate unit, unless the unit does not meet the requirements of (a) and (b) of this subsection. . . . [A] unit is not appropriate if it includes:
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> (a) Both supervisors and non-supervisory employees . . . .
>
> (b) More than one institution of higher education. . . .
>
> (2) ***The exclusive bargaining representatives certified to represent the bargaining units existing on June 13, 2002, shall continue as the exclusive bargaining representatives without the necessity of an election.***

(emphasis added). The Commission adopted emergency rules to implement the PSRA in June and October of 2002, and it adopted permanent rules in January of 2003.

Rules on Employer-Initiated Petitions

The Commission's general rule on employer-initiated representation petitions states, in pertinent part:

> WAC 391-25-090 PETITION FILED BY EMPLOYER. (1) Where an employer has been presented with one or more demands for recognition of an exclusive bargaining representative of previously unrepresented employees, it may obtain a determination of the question concerning representation by filing a petition under WAC 391-25-070. Instead of a showing of interest under WAC 391-25-110, the employer shall attach copies of any written demand(s) for recognition or other correspondence pertaining to the claimed question concerning representation.
>
> (2) ***Where an employer disputes the majority status of the incumbent exclusive bargaining representative of its employees, it shall obtain a determination of the***

> ***question concerning representation by filing a petition under WAC 391-25-070.***
>
> (a) Instead of a showing of interest under WAC 391-25-110, the ***employer shall attach affidavits and other documentation as may be available to it to demonstrate the existence of a good faith belief that a majority of its employees in an existing bargaining unit no longer desire to be represented by their incumbent exclusive bargaining representative.***
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> (b) Unsolicited signature documents provided to the employer by employees and filed by the employer in support of a petition under this subsection must be in a form which would qualify under WAC 391-25-110 if filed by the employees directly with the commission, and shall be treated as confidential under WAC 391-25-110.
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> (3) A petition under this section shall be filed at the commission's Olympia office, as required by WAC 391-08-120(1). The ***employer shall serve a copy of the petition (excluding any showing of interest) on each employee organization named in the petition as having an interest in the proceedings, as required by WAC 391-08-120 (3) and (4).***

(emphasis added). That general rule had been in its present form since August 1, 2001, and had been in effect in some form since the Commission's "consolidated" rules were adopted in 1980. That general rule became a subject of debate, however, in connection with the adoption of rules to administer the PSRA.

On June 14, 2002, the Commission adopted an emergency rule making WAC 391-25-090 completely inapplicable to bargaining units of state civil service employees. The proponents of a variance for state civil service employees had cited RCW 41.80.070(2), and had argued that the enactment of the PSRA was not intended to create an open season for employers to upset existing bargaining relationships.

On October 8, 2002, the Commission adopted an emergency rule that amended the special rule adopted in June as WAC 391-25-096, to allow employer-initiated representation petitions under limited

circumstances. The concise explanatory statement filed by the Commission under the Administrative Procedure Act (APA), Chapter 34.05 RCW, included:

> WAC 391-25-096 Special provision - - State civil service employees.
>
> REASONS FOR CHANGE: Emergency rule adopted in June amended to allow employer-filed representation petitions where exclusive bargaining representative of a bargaining unit has become defunct or has abandoned representation of a unit. On June 14, 2002, the Commission adopted a [WFSE] proposal completely banning employer-filed representation petitions, and did not adopt a [Washington Public Employees Association (WPEA)] proposal to allow employer-filed representation petitions under limited circumstances. Upon further review of the PSRA, the Commission concurs that some limitation on employer-filed representation petitions is appropriate, because of language in RCW 41.80.070(2) which went into effect on June 13, 2002 and carries over existing certifications of exclusive bargaining representatives without need for an election. There is, however, need for a procedure to "clear the air" in the circumstances addressed by the WPEA proposal. Different from other laws administered by [the Commission], there are (and will be) no voluntarily recognized bargaining units of state civil service employees. Prior to June 13, 2002, the [WPRB] abolished a number of bargaining units which remained on its books, even though they had no exclusive bargaining representative. Amendment permits a PSRA employer to file a petition with [the Commission] if it has basis to believe that the organization certified as exclusive bargaining representative of a bargaining unit is defunct or has abandoned the bargaining unit. [The Commission] would provide notice to the union, and the union would have an opportunity to demonstrate that it was still a viable entity. References to a "question concerning representation" in the WPEA proposal seemed to suggest an election, but that would have created a "certification bar" which would have delayed the exercise of statutory bargaining rights by the employees through another organization. Amendment simply vacates the certification if the union is found to be defunct or to have abandoned the unit.
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> CLIENTELE COMMENTS: None received.

The Commission thus adopted the emergency rule as proposed by its staff.

In January of 2003, the Commission re-adopted the emergency rule adopted in October of 2002, as a permanent rule. It provides:

> WAC 391-25-096 SPECIAL PROVISION--STATE CIVIL SERVICE EMPLOYEES. (1) ***WAC 391-25-090 is inapplicable*** to bargaining units of state civil service employees.
>
> (2) ***Where an employer claims that an employee organization previously certified as the exclusive bargaining representative of state civil service employees has become defunct or has abandoned representation of a bargaining unit, it may file a petition*** under WAC 391-25-070 to obtain a determination as to whether the employee organization continues to represent the bargaining unit. Instead of a showing of interest under WAC 391-25-110, the ***employer shall attach affidavits and other documentation as may be available to it to demonstrate the existence of a good faith belief that the employee organization has become defunct or has abandoned representation of the bargaining unit.*** The documentation provided under this section shall not include signature documents provided to the employer by employees.
>
> (3) An employee organization named in a petition filed under this section shall be given a reasonable opportunity to respond and rebut the allegations in the petition. ***Ongoing activity as exclusive bargaining representative may be demonstrated by evidence showing that the employee organization has been holding meetings of its members, collecting dues, electing or appointing officers and representatives for the purposes of dealing with the employer, processing grievances, negotiating collective bargaining agreements, or similar activities for and on behalf of employees in the bargaining unit.***
>
> (4) If it is determined that the employee organization is defunct or has abandoned its responsibilities for and on behalf of the employees in the bargaining unit, the executive director shall vacate the certification of the employee organization as exclusive bargaining representative. An order issued by the executive director shall be subject to appeal under WAC 391-25-660.

(emphasis added).

The permanent rule was effective on February 14, 2003.[3] The context for implementation of that "clear the air" procedure includes a three-year period of transition from the limited-scope bargaining process which had existed within the civil service law and rules under Chapter 41.06 RCW to a broader scope of collective bargaining under Chapter 41.80 RCW.

The Petition in This Case

The employer filed the petition to initiate the above-captioned matter on April 9, 2003. The documents filed as attachments to the employer's petition included a copy of a three-year collective bargaining agreement signed by the WFSE and the employer in 1990, a copy of the order issued by the DOP in its case US-95 in 1991 (certifying the union shop deauthorization as described above), a copy of a notice to employees issued by the DOP in 1991 concurrent with issuance of the order in its case US-95, and a statement as follows:

- The contract was signed as part of the employees' desire to have the [union] act as exclusive bargaining representative for all employees in the Messenger Services Bargaining Unit. This contract was finalized in mid 1988.
- The employees voted to decertify the union shop and it was decertified April 10, 1991. WFSE remained the exclusive representative.
- ***Records do not indicate the appointment of any shop steward or that any Labor Management meetings have been held since the decertification*** date of this bargaining unit.
- The original bargaining unit was made up of 15 employees in the "Driver Mail Carrier" classifications. The current unit is made up of 77 employees

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[3] WSR 03-03-064, § 391-25-096, filed 1/14/03.

> with 9 major job classifications. Currently 4 out of the 77 employees are Union members.

(emphasis added). On the petition itself (which was on the form promulgated by the Commission), the words "Decertified 4/10/91" and "Case Number: US-95" were inserted in the space provided for a description of the bargaining unit; the box on the form to indicate an "Employer Petition" was marked.

On April 16, 2003, the employer filed a notarized statement with the Commission, stating as follows:

> This certified memo is the Department of General Administration's petition for Investigation of Question Concerning Representation . . . . This incumbency question is regarding representation of the State Mail Services (now known as Consolidated Mail Services[)] and is being filed in accordance with WAC 391-25-090(2).

The document continued by reiterating the same four points set forth in the attachment to the original petition, as quoted above. That document does not indicate, on its face, that a copy was served on the union.

The initial step taken by the Commission staff in the routine processing of representation cases is to supply notices for posting under WAC 391-25-140 and to request a list of the employees involved. Consistent with that, a letter was sent to the employer on April 21, 2003. The employer responded on May 2, 2003, with a list of 17 "permanent" truck drivers and four "intermittent" truck drivers, for a total of 21 employees. The employer's letter covering transmittal of that list explained, "These positions perform the duties most similar to the positions in place when the contract was written." The employer's letter indicated, on its face, that a copy had been sent to the union.

The Request for Dismissal

On April 25, 2003, the union filed a letter requesting that the above-referenced case be dismissed, citing multiple grounds:

First, the union pointed out the discrepancy between the 77 employees mentioned in the petition and, "[T]he agency only reports 25 [sic] employees in the unit in the lists that they submit" to the union;

Second, the union pointed out that the decertification mentioned in the employer's petition related only to the union shop;

Third, the union asserted that the petition concerns a "questioning of majority status" for which WAC 391-25-090 is made inapplicable by WAC 391-25-096; and

Fourth, the union alleges it was not served with a copy of the notarized document filed with the Commission on April 16, 2003.

DISCUSSION

The Claimed Procedural Defects

Inopportune Procedure for Cleaning Up Unit Description - Some of the information set forth in the statement attached to the employer's original petition in this case could arguably be a basis for a unit clarification petition under Chapter 391-35 WAC. In particular, the employer alleged: "The original bargaining unit was made up of 15 employees in the "Driver Mail Carrier" classifications. The current unit is made up of 77 employees with 9 major job classifications." It is well established, however, that a proceeding which is aimed at terminating a bargaining relationship is not an appropriate vehicle for clarifying or modifying the

bargaining unit. *City of Seattle*, Decision 1229-A (PECB, 1982); WAC 391-25-210(1).

In fact, the employer appears to have sorted through the scope-of-unit issue on its own. The list of 21 employees supplied on May 2 is much closer to the 15 employees mentioned in the certification of the WFSE than to the 77 employees mentioned in the employer's original petition. Moreover, the employer's transmittal letter related the names on the list to the body of work historically performed by the "messenger service" bargaining unit.

Inopportune Procedure to Question Union's Majority Status -
Some of the statement attached to the employer's petition appears to question the union's majority status. In particular: "Currently 4 out of the 77 employees are Union members." Without ruling that such an allegation would be sufficient even if WAC 391-25-090 were applicable here,[4] it is clear that WAC 391-25-096 precludes state agencies and institutions of higher education from initiating representation petitions to question the majority status of a union representing state civil service employees.

Alleged Failure to Serve Amendment -
Collective bargaining is a process for communications between parties who appear before the Commission, and the Commission's rules require parties who file papers with the Commission to serve copies on all other parties to the proceedings:

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[4] Employer payroll deduction records will show the numbers and identities of individual employees who have authorized dues checkoff, but are still inherently ambiguous. An employer's payroll records can say nothing about employees who choose to pay dues directly to a union.

WAC 391-08-120 FILING AND SERVICE OF PAPERS.

FILING OF PAPERS WITH THE AGENCY

(1) Papers to be filed with the agency shall be filed at the commission's Olympia office. . . .

. . .

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, and shall be regarded as completed when delivered in the manner provided in RCW 4.28.080;

(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, and shall be regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid.

(d) Service may be made by fax, and shall be regarded as completed upon production by the fax machine of confirmation of transmission, together with same day mailing of a copy of the papers, postage prepaid and properly addressed, to the person being served.

(e) Service may be made by e-mail attachment, and shall be regarded as completed upon transmission, together with same day mailing of a copy of the papers, postage prepaid and properly addressed, to the person being served.

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.

(emphasis added). Thus, the employer should have served the union with a copy of the document it filed on April 16, 2003.

In this particular instance, the union's letter itself precludes strict application of the "service" requirement and supports granting a waiver under WAC 391-08-003:[5]

First, misdirection from the Commission's staff or rule is alleged, or at least a possibility. The union's April 25 letter indicates the employer was responding to a request made by the Commission staff. WAC 391-25-096 is recently-adopted. It has never before been utilized, so no precedents exist to guide either Commission staff members or clientele representatives. Moreover,

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[5] WAC 391-08-003 provides:

> The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.

unlike other rules which detail the service obligation, WAC 391-25-096 does not expressly restate the general rule requiring service on other parties. The Commission has waived errors made by clientele on the basis of erroneous information or advice from the Commission's staff or rules. *See City of Tukwila*, Decision 2434-A (PECB, 1987); *Island County*, Decision 5147-C (PECB, 1996). The union's letter does not depict the type of situation in which dismissal of the entire petition is appropriate.

Second, an absence of prejudice is evident in this case, where the letter filed by the union on April 25 indicates awareness that the notarized document filed by the employer on April 16 was actually only a resubmittal of the same four statements filed with the employer's original petition in this matter. Moreover, a dismissal would not give rise to a "certification bar" under WAC 391-25-030(2), so that the employer could merely re-file its petition. Without any substantive difference between the documents and with no claim of prejudice by the union, waiver is appropriate.

If a failure to serve actually occurred, it will suffice for the employer to promptly correct any deficiency by serving a copy of its notarized statement on the union.

Citation of Inapposite Rule -

The employer did not cite any rule in its original petition, but cited WAC 391-25-090 in the document filed on April 16, 2003. As noted above, WAC 391-25-096 makes WAC 391-25-090 inapplicable to this case. The error in an amended petition does not alter the substance of the employer's original statement. This is another form-over-substance problem which does not depict the type of situation in which dismissal of the entire petition is appropriate. It suffices to reiterate that this petition can (and will) be processed only under WAC 391-25-096.

Union Abandonment is Alleged

The employer's petition brings this case within WAC 391-25-096 by alleging: "Records do not indicate the appointment of any shop steward or that any Labor Management meetings have been held since the decertification [of the union shop for] this bargaining unit [in 1991]." If those factual allegations are not rebutted, the employer will be entitled to relief under WAC 391-25-096.

WAC 391-25-096 entitles the union to an opportunity to make a substantive response to the employer's petition. The union's April 25 letter only concerns procedural issues, and is not taken to be either a substantive response or a waiver of the union's opportunity to make a substantive response. A time period for a response is established below. If the union files a response that contests the facts alleged by the employer, the APA will require the Commission to conduct an evidentiary hearing.

NOW, THEREFORE, it is

ORDERED

1. The employer is directed to effect service on the WFSE, within seven days following the date of this order, of any documents filed in this proceeding that have not already been served in conformity with WAC 391-08-120.

2. The union is afforded a period of 28 days following the date of this order to file and serve a written statement in response to the "abandonment" claim set forth in the petition filed by the employer in the above-captioned matter. In the absence of a response, the certification of the union will be

vacated. If issues of fact are framed by a response filed and served by the union, an evidentiary hearing will be scheduled.

Issued at Olympia, Washington, on the 28th day of May, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director