STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE MANAGEMENT ASSOCIATION,	)	
Complainant,	)	CASE 15867-U-01-4033
vs.	)	DECISION 7705 - PECB
CITY OF SEATTLE,	)	
Respondent.	)	RULINGS ON MOTIONS

This case is before the Examiner for rulings on two motions: (1) The employer's request for an extension of the time for it to file an answer to the complaint; and (2) the union's request for a default judgment in the matter. The Examiner denies the employer's motion and grants the union's motion.

PROCEDURAL BACKGROUND

On June 18, 2001, the Seattle Police Management Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Seattle (employer) as respondent. A preliminary ruling was issued by the Commission's Director of Administration on July 31, 2001, finding a cause of action to exist on allegations summarized as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and derivative "interference" in violation of RCW 41.56.140(1)], by

> its unilateral change in the provision of psychological services to employees, without providing an opportunity for bargaining.

The preliminary ruling letter explicitly directed that the employer file and serve its answer to the complaint within 21 days following the date of the preliminary ruling letter. The employer's answer was thus due on August 21, 2001.

No answer was filed by August 21, 2001. The earliest response from the employer apparently came in the form of a telephone message left for the Director of Administration on August 23, 2001. In that message, an attorney in the city attorney's office acknowledged that the employer's answer was already two days past due; stated that she had contacted the union's attorney for an extension of time for filing the answer; related that the union's attorney had indicated a need to confer with his client before responding to the employer's request; and indicated that she would file a notice of appearance.

The employer filed a notice of appearance by telefacsimile (fax) on August 30, 2001. By that time, the employer's answer was nine days past due.

On September 4, 2001, when the employer's answer was 14 days past due, the employer filed several documents with the Commission:

1. A conforming copy (as required by WAC 391-08-120) of the notice of appearance previously filed by fax;

2. The employer's proposed answer to the complaint (filed by fax); and

3. A letter addressed to the union's attorney and the Director of Administration (filed by fax).

In the letter dated and filed on September 4, 2001, the attorney for the employer wrote:

> Last week I contacted each of you to request an extension of time within which to file an answer to the above-referenced complaint. Though [counsel for the union] and I discussed the merits of the complaint, we were unable to conclude our discussion regarding the Union's willingness to allow for an extension of time. This morning, a co-worker again attempted to contact [counsel for the union], but was told he was involved in another matter in Spokane and unable to return the phone call.
>
> Attached is the City's answer to the above-referenced complaint. I will continue to try to contact [counsel for the union] to seek his concurrence to the extension and concurrently, file a motion and affidavit to support my request to excuse the deadline by which the Respondent's answer must be filed.[1]

No justification or other explanation was provided for the employer's failure to file its answer by August 21, 2001.

In a letter filed on September 6, 2001, the union's attorney reserved the right to oppose consideration of the employer's late answer, and indicated he would not submit a complete response until he had seen documentation filed by the employer to support its request.

The Commission issued a letter on September 13, 2001, designating the undersigned Examiner to conduct further proceedings in the matter. There was a routine reference in that letter to the Examiner taking steps to set a hearing.

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[1] Conforming copies of the answer and letter were filed on September 5, 2001.

In a letter filed on September 17, 2001, the attorney for the union reiterated his position regarding the late answer. He also protested the setting of a hearing in the matter until the issue regarding the late answer was resolved.

The employer did not file any motion or affidavit, as was suggested in the letter it filed on September 4, 2001. Nor did the employer respond to the letters filed by the union's attorney.

On November 20, 2001, the Examiner directed the employer to file and serve information in support of its request for the extension of time to file its answer. The Examiner established a deadline of November 30, 2001, and further directed the union to file any response it wished to make by December 14, 2001. Both parties timely filed information and arguments, as described below.

POSITIONS OF THE PARTIES

The employer asserts that its attorney was left unaware of the due date for the answer until after it had passed, due to a filing error. The employer also points to the absence during the period of time before the answer was due of two persons with information critical to preparation of a complete answer, and to a lack of familiarity of the attorney who eventually filed the answer with the issues involved in the complaint. The employer contends those circumstances constitute good cause for granting an extension of time for filing its answer. It asserts that a short extension of the time for filing an answer would likely have been granted if requested prior to the due date, and that its attorney would have requested such an extension in advance of the due date if she had been aware of the need. The employer argues that taking the time

to prepare and file a specific answer is both preferable (as a matter of policy) and helpful to opposing counsel and the Examiner, although it could have filed a general denial. Finally, the employer argues that no issue of prejudice or surprise exists in this matter, as there was no hearing date established, nor had an Examiner been assigned, when it submitted its answer.

The union argues that the employer has not established good cause for its "extremely tardy" handling of this matter. It notes that even the employer agrees that its own internal filing error would not constitute good cause, and points out that the unavailability of employer officials in August could only have impacted the employer's filing of an answer if the employer had not misfiled the preliminary ruling letter. The union also notes that, even though the employer knew that its answer was overdue by August 23, 2001, it made no effort to secure the information that it claims to have needed until at least August 29, 2001, and no effort to file an answer until September 4, 2001. The union argues that the employer could have filed a general denial, and followed up later with a more detailed amended answer. The union's attorney disputes (and submitted documents to contest) certain claims by the employer's attorney regarding efforts to secure the union's concurrence to a continuance. The union also notes that, although the employer accompanied its answer with a letter indicating it would continue its efforts to contact the union, and would also file a motion with the Commission, it did not follow through on either of those promises until directed to do so by the Examiner. The union further argues that the late answer should not be considered as "filed" until the employer filed its explanation in response to the directive issued by the Examiner, and that such a lengthy extension would never have been granted by the Examiner. Finally, the union argues that the it has been prejudiced by employer actions that have delayed setting a hearing in this case.

APPLICABLE RULES

As last amended August 1, 2000, the Commission rules applicable to unfair labor practice cases include:

> WAC 391-08-010 APPEARANCE AND PRACTICE BEFORE AGENCY--WHO MAY APPEAR--NOTICE OF APPEARANCE. . . .
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> . . . .
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> (2) Except where the information is already listed in the agency's docket records for the particular case, a person appearing in a representative capacity shall file and serve a notice of appearance listing the representative's name, address, telephone number, fax number, and an e-mail address.
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> . . . .
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> WAC 391-08-180 CONTINUANCES. (1) Postponements, continuances, extensions of time, and adjournments may be ordered by the presiding officer on his or her own motion or *may be granted on timely request* of any party, with notice to all other parties, *if the party shows good cause*.
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> (2) . . . The party seeking the continuance shall notify all other parties of the request. The request for a continuance shall state whether or not all other parties agree to the continuance.
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> . . . .
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> WAC 391-45-210 ANSWER - CONTENTS - AMENDMENT - EFFECT OF FAILURE TO ANSWER. (1) *An answer filed by a respondent shall specifically admit, deny or explain each fact alleged* in the portions of a complaint found to state a cause of action under WAC 391-45-110. A statement by a respondent that it is without knowledge of an alleged fact shall operate as a denial. . . .
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> . . . .
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> (3) Motions to amend answers shall be acted upon by the examiner . . .
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> . . . .

> (b) Amendment may be allowed prior to the opening of an evidentiary hearing, subject to due process requirements.
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> (4) *If a respondent fails to file a timely answer* or fails to specifically deny or explain a fact alleged in the complaint, the *facts alleged in the complaint shall be deemed to be admitted as true, and the respondent shall be deemed to have waived its right to a hearing as to the facts so admitted. A motion for acceptance of an answer after its due date shall only be granted for good cause.*

(emphasis added.)

DISCUSSION

Over the years, Examiners in proceedings under Chapter 391-45 WAC have both accepted and denied late answers, depending upon the specific factual circumstances in each case. In at least *Intercity Transit*, Decision 2580 (PECB, 1986); *Battle Ground School District*, Decision 2429 (PECB, 1986); and *Kennewick General Hospital*, Decision 5389 (PECB, 1995), the Examiners accepted late answers where there was no showing that the complainant was or would be prejudiced. In at least *City of Benton City*, Decision 436 (PECB, 1978); *Toutle Lake School District*, Decision 2659 (PECB, 1987); and *Spokane Fire District 9*, Decisions 3773 and 3774 (PECB, 1991), Examiners rejected late answers in the absence of good cause for their tardiness.

The Commission has affirmed the "default" conclusions that have followed from rejection of late answers. *See City of Benton City*, Decision 436-A (PECB, 1978), and *Spokane Fire District 9*, Decision 3773-A (PECB, 1992). The Commission's decision in the *Benton City* case was then affirmed by the courts. WPERR CD-343 (Benton County Superior Court, 1979).

One thread that runs through the "default" cases is disregard for the processes of the Commission.

In *Benton City, supra*, the respondent employer did not answer as directed in a notice of hearing, and did not appear at the hearing. In a telephone call placed to the Examiner at the hearing site, the employer made an untimely request for a continuance and acknowledged that the notice of hearing had been overlooked or ignored. The Examiner delayed the start of the hearing for several hours, but the employer was still not prepared to file an answer or defend against the complaint.

In *Spokane Fire District 9, supra*, the president of the respondent union did not return from an out-of-town trip in time to file an answer. He then prepared an answer, but did not serve it on the complainants until four days later, at the hearing.

The Sufficiency of Service of the Preliminary Ruling

In the case at hand, the employer makes no complaint about error on the part of the agency, nor does the Examiner find such error. The notice of case filing issued upon docketing of the case listed the mayor of Seattle and a senior employer official responsible for labor relations. The preliminary ruling was directed to and served upon the labor relations official. Responsibility for getting the papers to other individuals within the employer's organization then unknown to the Commission lay exclusively with the employer.

In her telephone message to the Director of Administration on August 23, 2001, and again in her declaration accompanying the employer's request to accept its late answer, the attorney who took over the task of representing the employer acknowledged to the Commission that she had not yet filed a notice of appearance in

this proceeding. By the time that notice of appearance was filed, on August 30, 2001, the employer's answer was already seven days overdue.

The "Filing Error" Explanation

The employer acknowledges that its own internal error was a central cause of its failure to file a timely answer. The attempt of this employer to evade the natural effects of an error committed by its city attorney or his staff was unanimously rejected by the Supreme Court of the State of Washington in *City of Seattle v. Public Employment Relations Commission,* 116 Wn.2d 923(1991). Moreover, the employer acknowledges that such an error would not normally constitute good cause excusing its tardiness.

The "Detailed Answer is Preferred" Argument

The employer asserts that detailed answers are favored, and that its delay to file a detailed answer was preferable to its filing of a general denial upon learning that its answer was overdue. Two responses are appropriate:

First, this line of argument ignores the clear language of WAC 391-45-210. A general denial would not have been sufficient under that rule.

Second, this argument distracts attention from the established fact that the employer's answer was already overdue when the employer's attorney first contacted the Director of Administration about a continuance. Strict reading of WAC 391-08-180 arguably makes the "good cause" continuance and the "agreed" continuance unavailable where they are not requested in a "timely" manner.

The "Employer Officials Were Unavailable" Argument

The employer contends that Janet May, who is identified as a legal advisor to the Seattle Police Department, was unavailable from August 10 through August 21, 2001. The employer also contends that Janice Corbin, who is identified as a former human resources director for the Seattle Police Department, was unavailable from August 1 through 8, and was unavailable again after August 16, 2001. The employer further contends that the attorney who filed its answer lacked familiarity with the matters at issue in this unfair labor practice proceeding, and needed to consult with May and Corbin before submitting a detailed answer. Even accepting those claims as true, reasons exist for their rejection:

First, a timely answer stating that counsel for the employer was "without sufficient knowledge" could have sufficiently acknowledged the Commission and its processes to avoid a "default" motion, but was not filed. WAC 391-45-210(3) could have permitted the filing of an answer once counsel obtained more detailed facts.

Second, and more important, any unavailability of May and Corbin prior to August 21 is irrelevant, because the filing error discussed above resulted in nobody actively looking at this case until the answer was overdue.

The Delayed Explanation

The employer's attorney made some contacts on August 23, but did not follow through with filing or serving any documents on that day. The "prior notice" feature of WAC 391-08-130 would not have prevented her from filing a request for a continuance, even if she did not receive concurrence from the union's attorney as a result of the contact she made that day. Under that rule, an alternative

to concurrence is the Examiner's holding of a pre-hearing conference.

Only a notice of appearance was filed on August 30, 2001. That fell short of what would have been needed to request (and provide good cause for) a continuance. Compounding the delay, the union's attorney claims to have received a message one day after the initial contact from the employer's attorney, telling him to disregard her initial message.

The answer filed by the employer on September 4 was accompanied by the above-quoted letter. The focus of that letter was far more concerned with the notice/concurrence requirements of WAC 391-08-130 than the "good cause" requirement of WAC 391-45-210(4).

As noted by the union, the employer even failed to address the "good cause" requirement of WAC 391-45-210(4) after the union protested the routine mention of scheduling of a hearing. The employer's reversion to silence is most comparable to the fact patterns that led to the default rulings in *City of Benton City*, *supra*, and *Spokane Fire District 9*, *supra*.

Even more troubling, the employer completely failed to follow through on its own promise to submit information supporting consideration of its late answer. It did so only after the Examiner directed it to do so.

The employer's ongoing lack of concern for (or compliance with) the Commission's regulations is troubling, and contributes to the Examiner's conclusion that the employer has not provided good cause to accept its late answer. The Examiner thus rules that the employer is in default. The Examiner will be in contact with the

parties shortly, to set a date for a hearing limited to the affirmative defenses asserted by the employer.

NOW, THEREFORE, it is

ORDERED

1. The motion of the City of Seattle for acceptance of its answer in this matter is DENIED.

2. The facts alleged in the complaint are deemed admitted as true, and the respondent has waived its right to a hearing as to those facts.

DATED at Olympia, Washington, this 16th day of April, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARTHA M. NICOLOFF, Examiner