STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, UFCW LOCAL 365,	)	
Complainant,	)	CASE 18667-U-04-4744
vs.	)	DECISION 8773 - PSRA
WASHINGTON STATE PATROL,	)	
Respondent.	)	ORDER OF DISMISSAL

Leslie Liddle, Executive Director, for the union.

Christine O. Gregoire, Attorney General, *by Elizabeth Delay Brown*, Assistant Attorney General, for the employer.

On June 30, 2004, the Washington Public Employees Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union's complaint named the Washington State Patrol (employer) as respondent. Agency staff issued a preliminary ruling under WAC 391-45-110, finding a cause of action could exist as follows:

> Employer interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4), by breach of its good faith bargaining obligations through engaging in surface bargaining by being unprepared to meaningfully discuss union proposals, and failing to give reasons for its opposition to union proposals in collective bargaining negotiations for two property management division bargaining units.

The agency assigned Carlos R. Carrión-Crespo as Examiner.

The issue in this case is whether the union's complaint should be dismissed for insufficient service of process upon the employer's counsel of record. The union did not prove it served the complaint and made the requisite contemporaneous proof of service, which WAC 391-08-120 requires. The union's complaint is DISMISSED.

PROCEDURAL HISTORY

On June 30, 2004, the union filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the employer had interfered with employee rights, dominated or assisted a union, and refused to bargain.

On July 12, 2004, Assistant attorney general Elizabeth Delay Brown filed a Notice of Appearance as the employer's legal representative in this matter. On July 15, 2004, the Commission issued and served on all parties a Record of Appearance that included Brown as the employer's representative.

On August 5, 2004, the Commission issued a deficiency notice in this matter. The notice required the union to file and serve an amended complaint within 21 days following the date of the letter.

On August 26, 2004, the union filed an amended complaint in this matter. With the amended complaint, the union filed a proof of service, which indicated that it had sent a copy of the amended complaint to Eva Santos, Director of the Office of Financial Management Labor Relations Office, and to Juliet Wehr Jones, Labor and Risk Management, Washington State Patrol.

On September 24, 2004, the employer filed an answer to the amended complaint. The employer submitted the affirmative defense that "the union's complaint should be dismissed for insufficient service of process upon all counsel of record, as is required by WAC 391-08-120."

On October 1, 2004, the employer filed a motion to dismiss the amended complaint for insufficient service of process.

On October 5, 2004, the Examiner in this case requested the union to submit arguments that show cause why the motion to dismiss should not be granted.

On October 7, 2004, the union responded to the Examiner's request. The union admitted that it had not served a copy on the employer's counsel, but opposed the motion on grounds that the employer had not been prejudiced.

DISCUSSION

The Commission processes unfair labor practice cases as formal, adjudicatory proceedings under the state Administrative Procedure Act, Chapter 34.05 RCW. RCW 34.05.437 mandates that a party serve copies of all papers it files with an agency on all other parties, unless the agency specifies a different procedure. RCW 34.05.550(1) states that a party that does not apply for adjudicative proceedings within the time limits a statute or agency rule establish will lose its right to such a proceeding.

The Commission has established rules regarding unfair labor practice complaints. Under WAC 391-45-110(1), deficiency notices

in unfair labor practice cases must specify a due date in which the complainant must file and service an amended complaint. WAC 391-45-030, in turn, requires the party filing the unfair labor practice complaint to serve a copy on the party named as respondent in the manner that WAC 391-08-120(3) and (4) prescribe: that is, "upon all counsel and representatives of record . . ." and furnishing proof of service to the Commission. However, under WAC 391-08-003, the Commission and its agents retain the authority to waive requirements of rules when a party is not prejudiced by such action.

A respondent must raise the defense of insufficient service of process on either its notice of appearance or its answer to the complaint, but not six months after the complaint was filed. *City of Seattle*, Decision 8559 (PECB, 2004). Once the respondent has raised the issue, the complainant has the burden of proving that it served the complaint according to the rules. *City of Kalama*, Decision 6276 (PECB, 1998).

In *Washington State Patrol*, Decision 8709 (PSRA, September 8, 2004), a case with the same parties, the Examiner described the applicable precedent as follows:

> Historically, the Commission enforces the service requirements in its rules to further the legislative policy requiring unions and employers to communicate with each another. *Mason County*, Decision 3108-B (PECB, 1991). The Commission has routinely dismissed unfair labor practice complaints upon a record showing inadequate service. *Spokane School District*, Decision 5151-A (PECB, 1995). "It is important to document the proof contemporaneous to the service." *Spokane School District*; see also *City of Seattle*, Decision 5852-A (PECB, 1997).

The Examiner later summarized the public policy behind the rule, as follows:

> Proper service encourages effective communication between unions and employers and nurtures the orderly resolution of disputes inherent in the collective bargaining process. By enforcing timely and effective service of process, the Commission ensures that due process is afforded to all parties. In comparison to those substantial public policies, compliance with the service rule is a small imposition on parties. Equally important, compliance with the service rule avoids the need for hearings and decisions on "substantial compliance" claims. *City of Kalama*, Decision 6276.

In a footnote in *King County*, Decision 7221-A (PECB, 2001), the Commission commented on the applicable subsection, as follows:

> We need not consider, and do not base our decision on, the "who within the employer" issue raised in this case. The employer asserted the amended complaints should have been served on Lew, its representative of record as indicated on notices issued by the Commission staff. The union responded that its service of Cruz was sufficient, and appears to concede that it did not serve Lew. *We merely note that, under WAC 391-08-120(3), any papers submitted to the agency must be served on all counsel and representatives of record.*

(emphasis added). The Commission has waived its filing and service rules rarely. For example, in *City of Tukwila*, Decision 2434-A (PECB, 1987), the parties relied on erroneous advice from agency staff; in *Island County*, Decision 5147-C (PECB, 1996), a party substantially complied with a rule that was unclear on its face.

Motion to Dismiss

The employer's Motion to Dismiss the Complaint for Insufficient Service of Process relies upon the fact that the complaint was not

served on the assistant attorney general, who had filed an appearance before the Commission. The assistant attorney general has signed all the papers that the employer has filed in this matter.

The union admits that it did not serve the assistant attorney general, but requests that the Examiner schedule a hearing on this matter because the employer did not suffer prejudice. This allegation turns on three facts:

- The complainant served a copy of the amended complaint on the employer's other representative of record, as well as on the State's representative of record;
- The assistant attorney general received the complaint from the Commission staff, only six days late; and
- The assistant attorney general filed the answer to the complaint in time.

These facts do not constitute a reason to exempt the union from complying with the Commission's rules or the Administrative Procedure Act. The fact that the employer responded in time means only that the Commission could not assume as true any of the allegations contained in the amended complaint that the employer denied. However, the employer raised the issue as an affirmative defense within the answer to the complaint, which meant that the employer did not submit to the Commission's jurisdiction voluntarily by answering to the complaint.

The complainant has not satisfied the statutory and regulatory requirements to confer jurisdiction to the Commission over the employer. The fact remains that the union did not serve the counsel of record with a copy of the amended complaint, and cannot

rely on the Commission staff to do it. Under RCW 43.10.040, the Attorney General represents the state and all agencies of the state in administrative hearings. Washington's Attorney General applied this section in a 1984 opinion and concluded that the Washington State Patrol does not have statutory authority to employ an attorney to serve as its legal adviser, instead of obtaining legal advice and representation from the Office of the Attorney General. *Op. Atty. Gen.* 1984, No. 23. In this case, the assistant attorney general filed an appearance and signed all papers that the employer filed. The assistant attorney general inquired about the amended complaint only after it was apparent that it had not been filed during the prescribed period, because it had not received a copy. The results of such inquiry did not substitute the required service of process, and did not relieve the union from complying with the applicable regulations.

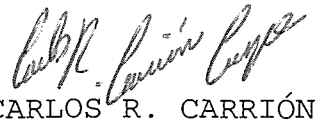
NOW, THEREFORE, it is

ORDERED

The Examiner DISMISSES the complaint filed by the Washington Public Employees Association in the above-captioned matter for insufficient service.

Issued at Olympia, Washington, the 12th day of November, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CARLOS R. CARRIÓN-CRESPO, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.